Bombay High Court Skanska Cementation India Ltd. vs Bajranglal Agarwal And Ors. on 13 December, 2002 Equivalent citations: 2004 (2) ARBLR 67 Bom Author: F Rebello Bench: F Rebello JUDGMENT F.I. Rebello, J. 1. Both the petitions are being disposed of by a common order as there are common challenges in both the petitions. The common challenges may be set out as under : (1) There was no agreement for Arbitration in writing between the parties. Consequently the Award of the Arbitral Tribunal is without jurisdiction. (2) The Arbitral Tribunal conducted the proceedings in Hindi, though a request was made to conduct them in English. Minutes of the order of the Arbitral Tribunal were made available to the petitioners as requested but were made available to the respondents as demonstrated by the respondents producing the minutes before this Court. It is further contended that though the proceedings were to be in Hindi, nevertheless an Award is passed in English. In these circumstances the petitioners were denied opportunity, of presenting their case. The Award is, therefore, liable to be set aside on that count. The petitioners were also denied the opportunity of opposing through Advocates even though an opportunity was sought. This was more so considering that the procedure was to be in the Hindi language. There was discretion in the Arbitral Tribunal. Yet the opportunity was denied. Considering the material available it is clear that the respondent Nos. 2 and 3 were not conversant with the English language yet the final Award has been pronounced in English. This would disclose non-application of mind by the Arbitrators. It was, therefore, contended that the petitioners were denied sufficient opportunity and as such were unable to present their case. (3) It is contended that the Arbitral Tribunal has awarded interest on interest which it could not have done. This would be again against the substantive law of India and consequently would be against public policy and as such the Award is liable to be set aside. In addition, in so far as Arbitration Petition No. 186 of 2002, the additional challenge is : (a) The costs awarded are without jurisdiction as the costs are not in respect of the subject matter of the Arbitral proceedings, but other litigation between the parties. That was not the subject matter of submission nor could have arisen from the Arbitral clause. In these circumstances the Award to that extent is liable to be set aside. 2. A few facts may be now noted to enable this Court to dispose of the present petitions. Admittedly the petitioners in both the petitions had placed purchase orders on the respondents. The dispute is regarding the balance unpaid amounts and the interest on the unpaid amounts. The petitioners in support of their contentions that there was no Arbitral clause relied on the purchase order and more specifically Clauses 1, 10 and 11 which may be reproduced as under : "(1) The execution of this order shall be deemed to be an acceptance of the conditions stated herein. The contract shall be deemed to have been made in Bombay, and shall be subject to jurisdiction of Courts in Bombay. (10) In case of any dispute the decision of the company shall be final and binding on the suppliers. (11) In acknowledging the order the supplier is required to draw attention of the company specifically to any conditions contained in the order which he finds unacceptable and in the absence of such notification, the conditions contained herein shall exclusively govern this order." It is, therefore,

the contention of the petitioners that when the respondents supplied the goods it amounted to a contract which had come into force and it was governed by the provisions of the terms and conditions of the purchase order. The terms and conditions specifically provided that in case of any dispute, decision of the company shall be final and binding on the supplier. It is further contended that merely because the petitioners have signed some documents before the Arbitral Tribunal would not mean that they have submitted to jurisdiction. All throughout their contention is that the Arbitral Tribunal had no jurisdiction and considering Section 16 of the Arbitration and Conciliation Act, 1996 and considering the judgment of the Apex Court in the very dispute amongst the parties in which it was observed that the dispute regarding jurisdiction would be resolved and decided by the Arbitrator the issue was open for consideration and decision and merely because they participated and raised objections to the jurisdiction of the Arbitral Tribunal would not amount to acquiescence on their part in submitting to the jurisdiction of the tribunal. On the other hand on behalf of the respondents, it is contended that the issue of jurisdiction was an issue before the Arbitral Tribunal. Considering the terms, the Arbitral Tribunal has come to a finding that there is an Arbitral clause. Once that be the case, it is contended, considering that there was a, contract between the parties and the Arbitral Tribunal had decided the dispute this Court should not interfere with the said finding on the issue of jurisdiction. It is then contended that even assuming Clause 11 of the terms and conditions of the purchase order, the respondents had dispatched the goods under the delivery challan. The delivery challan contains clauses of which those relevant for discussion read as under : "Subject to Mumbai jurisdiction and/or if any dispute arises regarding the goods sold under this challan the same have to be referred for decision to Bharat Merchants Chamber or Arbitration under the Rules of the said Chamber Membership No. 600." Additionally Clause 4 reads as under : "That acceptance of this bill/invoice overrules conditions of the purchase order wherever it clashes with the purchase order." It is contended that the goods were received by the petitioners under this challan without protest. Moneys for the goods received have been paid from time to time without protest. Apart from that subsequently bills were raised on the petitioners. Clause 5 of the printed conditions reads as under : "If any dispute arises regarding the goods sold under this bill the same shall have to be referred for decision to Bharat Merchants Chamber." It is, therefore, contended that both in terms of the delivery challan and the bill the Arbitral Tribunal would have jurisdiction. The petitioners if aggrieved by the terms ought to have protested and/or refused to accept delivery when the delivery challan contained specific provision. Having not done so it would not be open to the petitioners to raise the dispute before the Arbitral Tribunal of jurisdiction of the Arbitral Tribunal after having paid the large amounts of moneys under the various delivery challans and bills. 3. Considering this background the issue will have to be considered. The purchase order which bars the remedy of party of having recourse to Court of law by leaving the matter for decision of the company would normally if an issue was raised would have been held to be void considering Section 28 of the Indian Contract Act.

This issue, however, was not raised nor answered before the Arbitral Tribunal. It may also not be necessary to advert to Section 28 of the Contract Act in the discussion considering the contentions and other material on record. The main contention as raised on behalf of the petitioners is based on Clauses 1, 10 and 11 of the purchase order. The purchase order by itself would not be a contract between the parties. It is only on accepting the terms of the purchase order would a contract come into being. Clause 1 of the purchase order does provide that execution of this order shall be deemed to be acceptance of the conditions stated hereinabove. Clause 11 of the purchase order provided that the respondents could draw attention of the company to conditions which they find unacceptable. By the terms contained in the delivery challan the petitioner-company is deemed to have been informed that the condition that their decision was final was not acceptable and that the dispute if any should be referred to Arbitration of the Bharat Chamber of Commerce. As such even though the purchase order was received, the respondents did not accept the purchase order and drew the attention of the company that the term of resolving the dispute was not acceptable by sending the goods under delivery challan which contained Clauses 4 and 7. Clause 4 made it clear, that it is in the nature of counter offer by the respondents to the petitioners for accepting the goods. In other words the respondents had not agreed to Clause 10 of the purchase order. Even otherwise considering Clause 11 the respondent had specifically informed the petitioners that they were sending the goods under the delivery challan with a different condition. The petitioners accepted the goods under the challan without protest. As such pursuant to the counter offer or counter proposal the terms of the delivery stood amended even considering Clause 11 of the purchase order and accordingly the contract apart from the terms and conditions of the purchase order which were agreed by the parties would contain additional terms under which the goods were dispatched and accepted by the petitioners. The petitioners also sent invoices. Under the invoices again there was an Arbitral clause. The invoices were accepted, money paid under the invoices without protest. To my mind, therefore, the contract between the parties clearly contemplated a provision for Arbitration, The order dated 1st August, 2001 of the Arbitral Tribunal has taken into account these terms in the delivery challan. To my mind, therefore, the issue having been in issue before the Arbitral Tribunal and the tribunal having taken decision, which it was capable of taking considering the construction of the terms the said view cannot be said to be a view impossible of being taken. It was no doubt pointed out that the agreement signed on 12th October, 2001 could not amount to an Arbitral agreement. The Arbitral Tribunal has not proceeded on that agreement as the decision on the preliminary jurisdiction was much earlier. If the subsequent agreement is correctly read, all that the agreement sets out is that the Arbitral Tribunal as constituted will decide the disputes as per the Arbitration Rules of the Chamber. In other words the procedure to be followed by the Arbitral Tribunal as constituted would be the procedure of the Chamber. This could have been agreed upon considering Section 19 of the Act of 1996. That leaves us with the judgment relied upon by the learned counsel for the petitioners in

the case of Divya Shivlaks Impex v. Shantilal Jamnadas Textiles (P) Ltd., (DB). In that case there was no provision in the contract for Arbitration. The Arbitral clause was sought to be invoked based on the printed term in the invoice which read as under : "This sale is subject to the sale, Disputes and Arbitration Rules of Mumbai Piece Goods Merchants Mahajan." It is this Rule which was being construed by the Division Bench to hold that the said clause was unintelligible and that a mere term in the printed invoice would not be construed as a term for Arbitration. As pointed out earlier on the facts of the present case the delivery challan contained a counter offer. The goods were accepted with the said counter offer. Hence, the judgment in M/s. Divya Shivlaks Impex (supra), is clearly distinguishable. On behalf of the respondents their learned counsel relied on the judgment of the Apex Court in Waverly Jute Mills Co. Ltd. v. Raymon & Co., . The judgment in that case would really not be attracted to the facts of this case. In that case the admitted position was that there was no provision in the contract for Arbitration, yet the matter proceeded. In the course of the proceedings consent terms were filed by which jurisdiction was conferred. This was the issue before the Apex Court. On a construction of the said consent terms the Apex Court observed that considering the language of the Act of 1940 the proceedings before the tribunal without an Arbitration clause could not be proceeded with by the appearance of the parties, but pursuant to the consent terms the parties could proceed for fresh Arbitration. With the above the first contention is rejected. 4. We now come to the second issue as to whether the petitioners were denied an opportunity. The dispute raised by the petitioners was as to the jurisdiction of the Arbitral Tribunal. The letter adverted to and the agreement dated 12th October, 2001 shows that the parties clearly accepted that the procedure followed by the Tribunal would be the procedure of the Arbitration Rules of the Chamber. This has nothing to do with the assumption of jurisdiction, but the procedure to be followed by the Tribunal. The Tribunal could follow its own procedure or that of the Chamber. In the instant case parties agreed that the Arbitral Tribunal would follow the procedure of the Chamber. Therefore, conducting the proceedings in Hindi cannot be said to have deprived the petitioners of an opportunity. The fact that the respondents have produced minutes of the proceedings would not disclose any bias or support the contention that the Award was procured. The minutes are minutes of the tribunal. Assuming that the minutes of the tribunal were given to the respondents and not to the petitioners that by itself at any rate cannot result in this Court drawing an inference that the Arbitral Award was procured. In addition it was sought to be pointed out that at the last meeting of the Arbitral Tribunal the parties were given an opportunity to file their written arguments. This would be reflected in the recorded proceedings of 12th October, 2001. The contention of the petitioners is that even before the expiry of the period of 10 days the Award was made by the Arbitral Tribunal on 16th October, 2001 and the said Award was communicated to the petitioners by letter dated 14th January, 2002. It is the contention of the petitioners that they had filed their reply after the given time. However, it is sought to be pointed out that the two things emerge from that, firstly the Award in fact was not made on 16th

October, 2001 and was made subsequently by which time the arguments of the petitioners in writing were available to the tribunal and it was not considered. Alternatively the tribunal proceeded to answer the reference without waiting for the written arguments of the petitioners. On the other hand on behalf of the respondents their learned counsel contends that the tribunal must have fixed the date on 16th October, 2001 as the date of the Award and that even though the Award is made subsequently, it would relate back to the date when it was fixed for orders. It is really not necessary for me to go into those aspects of the matter. The Award is dated 16th October, 2001 and in the absence of any other explanation it can be presumed that the Award was passed on that day, but was communicated to the petitioners by letter of 14th January, 2002. The record of the minutes maintained by the tribunal of 12th October, 2001 record as under : "Shri Arun Bapat, representative of the defendant put up their case in writing, of which a copy is given to the plaintiff. Both the parties are directed to submit in writing, within 10 days, the oral submissions made by the plaintiff and defendant in today's meeting." In other words it is clear that the petitioners herein had already put their case in writing. What the parties were called upon was to file written submissions of the oral arguments. It was sought to be contended that with the written submissions the petitioners had filed documents. That was not the purpose for which the matter was adjourned. The matter was adjourned for filing submission of oral arguments by putting their arguments in the form of written submissions. Nothing is pointed out that any statement or oral submission made has not been considered. To my mind, therefore, it cannot be said that the petitioners did not have sufficient opportunity of contesting the proceedings. That contention must be rejected. 5. The next contention was that the petitioner has sought services of an advocate. That was rejected. The tribunal has dealt with the said application and considering the Rules and the discretion in the tribunal has chosen to reject the application of both the petitioners and the respondents for engaging a lawyer. The exercise of discretion surely cannot be a matter for interference by the Courts under Section 34 by contending that the petitioners were denied an opportunity. The decision to permit engagement of lawyer was within the discretion of the tribunal. Both the parties had sought the opportunity of engaging lawyers. Both have been dealt with equally. The petitioners if they were not conversant with the language could have deputed any person conversant with Hindi to enable them to proceed before the Arbitral Tribunal. It was within the competence of the petitioners to do so. Having not done so and once the tribunal has followed the procedure of the Chamber agreed to by the parties, it cannot be said that the Award atleast on the count should be set aside. There has been no failure to give an opportunity to the petitioners to present their case. The petitioners were in fact represented and had submitted their written say. 6. It is pointed out that the proceedings were in Hindi, The petitioners have raised a substantial challenge that the respondent Nos. 2 and 3 did not know English and in the absence of any reply from respondent Nos. 2 and 3 it is impossible to understand as to how the Award could be made in English. There is nothing before this Court to hold that the 3rd Arbitrator was not aware of English language. There is

also nothing on record to hold and contend that the Arbitrators did not discuss amongst themselves the final decision before the final Award was transcribed in English by the Arbitrator against whom there is no challenge that he had no knowledge of English language. Merely because an objection is raised before this Court does not mean that the members of the Arbitral Tribunal must come to this Court and answer such contentions. It is not possible for this Court hearing Arbitration matters specially under the Arbitration and Conciliation Act, 1996 to entertain such objections which will only lead to further delay and frustrate the object of expeditious disposal of the Arbitral proceedings. What the Court must examine is whether the Award as passed discloses reasons, is intelligible and capable of being understood by the parties. In the instant case the Award satisfies all the requirements and merely because the respondents 2 and 3 have not come before this Court to contest the case raised by the petitioners does not mean that the petitioners have proved their case and this Court must set aside the Award on that count. The petitioner had filed their written say. 7. The next contention is in so far as the interests component is concerned. I have gone through the claim statement of the respondent and the Award passed by the tribunal. The claim statement would show that what the respondents had claimed a sum of Rs. 1,28,807 towards unpaid bill dated 13th January, 1998 and interest of Rs. 64,790 from 30th June, 1999 at 36% per annum on the said unpaid bill, Rs. 11,878 as short payment under three bills and lastly a sum of Rs. 3,99,780 as overdue interest for delayed payment of other bills. The contract contained a provision for interest. The tribunal, however, while awarding interest had reduced it to 21% per annum. Therefore, the claim of the respondents for interest at 36% has been rejected and interest has been reduced to 21% per annum. Further interest has been made payable at the rate of 1.75% per month from 3rd October, 2001 till the date of making of the payment. All this was within jurisdiction considering Section 31(7) of the Act of 1996. In so far as interest component is concerned, that would be an amount due on the date of the cause of action and from that date interest could have been awarded in terms of Section 31(7). The interest is awarded from 3rd October, 2001. The Award can be partly amended and the interest on the said amount can be said to be payable from 16th October, 2001, the date of the Award. When the parties chose a forum to get their disputes adjudicated Courts should be slow in setting aside the Awards on technicalities when there is a ground available under Section 34(2). Whenever the Award is sustainable the said Award can be amended without directing the parties to resorting to a course under Section 33. In the instant case; as pointed out above, considering Section 34 of the C.P.C. and Section 31(7) of the Act of 1996 interest could have been awarded as on the date of the reference. However, 3rd October, 2001 is not the date of the Award. To avoid further delay, the Award to that extent is being slightly modified in so far as Arbitration Petition Nos. 185 of 2002 and 186 of 2002. It was also contended that compound interest has been awarded by the Arbitral Tribunal. As noted earlier the respondents had not claimed compound interest nor has the tribunal awarded compound interest. The tribunal as on the date of the claim has ascertained the claim and on that claim has granted interest.

This is permissible both under Section 34 of the C.P.C., and Section 31(7) of the Act of 1996. That contention, therefore, must be rejected. It was further contended that principal amounts were accepted without claiming the delayed interest and in these circumstances the interest could not have been awarded. The claim for interest was a matter of submission before the Arbitral Tribunal. The mere fact that various amounts were accepted without the respondents reserving the right to claim interest for the delayed period, by itself cannot tantamount in the absence of any express communication between the parties, that they have waived the right to claim interest. No documentary evidence was produced before the tribunal to show that by accepting the principal amount the respondents have waived their right to interest. That contention has, therefore, to be rejected. 8. It was also contended that the tribunal erred in awarding the amounts considering the material on record. Under the Act of 1996 challenge to an Award can only be under Section 34 of the Act. Mere erroneous finding by itself cannot be the subject matter to interfere with the Award passed. To that extent the learned counsel was not heard as this Court cannot reappreciate the evidence before the tribunal unless on the face of the Award the findings are perverse. There is no such material. 9. It is lastly contended that dealing with the additional challenge in Arbitration Petition No. 186 of 2002, that the awarding of costs in a sum of Rs. 1,03,464 was not the matter for submission to the tribunal. The costs incurred are in respect of proceedings not before the tribunal, but the Civil Court. These costs do not form part of the agreement or arise from the agreement. They were also not part of submission to the Arbitral Tribunal. In these circumstances the costs awarded could not have been awarded and consequently that part of the Award is liable to be set aside. There is clearly merit in the submission. The Arbitral Tribunal could not have awarded costs incurred in respect of those other proceedings. Costs incurred by the respondents in respect of other proceedings which do not arise out of the terms of the agreement or which were not matter of submission to the Arbitral Tribunal could not have been awarded. To that extent the Award in a sum of Rs. 1,03,464 would have to be set aside. The amount of the Award accordingly stands reduced to Rs. 1,42,061 with interest thereon as directed by the Arbitral Tribunal, but from 16th October, 2001. In the light of that the following order : (1) The challenge in so far as Arbitration Petition No. 185 of 2002 is rejected. The Award stands modified in so far as the interest is concerned. The awarded amount will bear interest from 16th October, 2001. (2) In so far as Arbitration Petition No. 186 of 2002 is concerned, the petition is partly allowed in as much as that part of the Award granting a sum of Rs. 1,03,464 towards the cost of litigation incurred by the plaintiff is set aside. In the light of that the Award stands reduced by a sum of Rs. 1,42,061 with interest thereon from 16th October, 2001 as directed by the Arbitral Tribunal. (3) Learned counsel for the petitioner seeks stay of execution. Considering the facts and circumstances this is not a proper case considering the amounts involved to stay the execution. Application for stay rejected. Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Personal Secretary of this Court.