Banwari Lal Kotiya vs P.C. Aggarwal on 8 May, 1985

Equivalent citations: 1985 AIR 1003, 1985 SCR SUPL. (1) 567, AIR 1985 SUPREME COURT 1003, (1985) 3 APLJ 2, (1985) 28 DLT 428, (1985) 98 MAD LW 58, 1985 (3) SCC 255, (1985) 2 CURCC 413

Author: V.D. Tulzapurkar

Bench: V.D. Tulzapurkar, Misra Rangnath

PETITIONER:
BANWARI LAL KOTIYA

Vs.

RESPONDENT:
P.C. AGGARWAL

DATE OF JUDGMENT08/05/1985

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
MISRA RANGNATH

CITATION:
1985 AIR 1003 1985 SCR Supl. (1) 567
1985 SCC (3) 255

ACT:
Arbitration Act, 1940, sections 2(a) and (e) and 20, scope of-Need for Fresh assent of both the parties for the actual reference when arises-Actual reference when becomes consensual and not unilateral, explained-Interpretation of Bye-laws 247 of the Delhi Stock Exchange.

HEADNOTE:
The appellant is a share broker and a member of the Delhi Stock Exchange-an exchange recognised by the Central Government under the Securities Contract Regulations) Act, 1956. The respondent, a non member had dealings in shares and securities with the appellant as principal to principal between 14th July to 27th September, 1960, in respect whereof Contract Notes (ex. P. 1 to P. 31) in the prescribed form where issued by the appellant and were signed by the respondent. Each one of the Contracts contained an

arbitration clause couched in very wide terms requiring the parties thereto to refer all their disputes or claims to arbitration as provided in the Rules, Regulations and Bye-laws of the Exchange.

Under these transactions a sum of Rs. 5923 became due and payable by the respondent to the appellant but since the respondent raised a dispute denying the claim, the said dispute was referred to the arbitration of two arbitrators Mr. Prem Chand and Mr. P.S. Khambete (both members of the Exchange) the former being the nominee of the appellant and the latter being the appointee of the Exchange on the respondent's failure to nominate his arbitrator when called upon to do so. The arbitrators held their proceedings in which the respondent participated though he inter alia raised a contention that he was not a party to the reference and would not be bound by the Award that might be made on the basis of such unilateral reference. The Arbitrators made their Award on 18th April, 1961, allowing the claim of the appellant with costs against the respondent. In response to the notice of filing the Award in the Court, the respondent filed objections to the Award on several grounds such as denial of the existence of the agreement of reference, that he was not a member of the Exchange, that the Contract Notes had not been signed by him, that the arbitrators had mis-conducted themselves and the proceedings, that the Award had been improperly procured etc. Negativing all the objections, the Sub-Judge Delhi recorded the findings that the Contract Notes bore the signatures of the respondent and as such under the arbitration clause contained in each one of them read with the relevant Bye-laws there was a valid Agreement for Reference to arbitration made the Award a rule of the Court and passed a decree in favour of the appellant on 7.9.1962.

568

In the first appeal preferred to the High Court, a learned Single Judge of the Delhi High Court entertained a doubt as to whether the respondent could be said to be a party to the actual Reference to arbitration even though each of the Contract Notes containing the arbitration clause was signed by the respondent, since the respondent had not joined in nominating his arbitrator despite service of notice asking him to do so, and whether on that account the Reference could be said to be unilateral, referred the same to a larger Bench on 5.1.1971. The Full Bench answered the question in favour of the respondent, relying on certain observations made by the Supreme Court in Seth Thawardas Pherumal v. Union of India reported in (1955) 2 SCR P. 48 and took the view that notwithstanding the fact that respondent had signed the Contract Notes and had thereby become consenting party to the arbitration agreement tho actual reference to arbitration of the two arbitrators required the assent of both the parties and since to such reference the respondent had not given his consent it was a

unilateral reference to arbitration and as such the resultant Award would not be binding on the respondent. Hence the appeal by special leave.

Allowing the appeal, the Court

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HELD: 1.1 The question whether fresh assent of both the parties for the actual reference is necessary or not must depend upon whether arbitration agreement is a bare agreement or it is an arbitration agreement as defined in section 2(a) of the Act. If it is the latter, then, clearly the actual reference to arbitration would be consensual and not unilateral and no fresh assent of the parties would be necessary nor will resort to section 20 be necessary. Instead the party desirous of going to arbitration can resort to remedies available to him under Chapter II of the Arbitration Act, 1940; and in a case like the instant one he can, as the appellant, did, proceed under the relevant Bye-laws. [582 C-E]

1.2 It is true that the Arbitration Act, 1940 defines the two expressions "arbitration agreement" and "reference" separately. Section 2(a) defines an "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'` while section 2(e) defines a "reference" to mean "a reference to arbitration". The latter expression obviously refers to an actual reference made jointly by the parties after disputes have arisen between them referring the said disputes for adjudication to a named arbitrator or arbitrators, while the former expression is wider as it combines within itself two concepts, (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. If that be so, it stands to reason that only 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 concensual reference resort to section 20 of the Arbitration Act will be essential but where the arbitration agreement conforms to the definition given in section 2(a), the party desiring arbitration can straightaway approach the arbitrator or arbitrators and resort to section 20 of Arbitration Act is unnecessary because

569

consent to such actual reference to arbitration shall be deemed to be there as the second concept is included in the agreement signed by the parties, and the aspect that differences or disputes actually arose subsequently would be inconsequential because the arbitration agreement as defined in section 2(a) covers not merely present but future differences also In other words, in such a case there will be no question of there being any unilateral reference. In

every case the question will have to be considered as to whether the arbitration agreement is a bare agreement of the type indicated earlier or an arbitration agreement as defined in section 2(a) of the Act. [574 D-A; 575 A-C]

2.1 On a plain reading of the arbitration clause contained in the Contract Notes read with relevant Bye-laws it is abundantly clear that the arbitration agreement herein is not a bare arbitration agreement but is clearly an arbitration agreement as defined in section 2(a) of the Arbitration Act of 1940. In other words, the assent of the parties to actual reference is already there in the agreement; in addition there is a statutory reference. Therefore, the reference being consensual (and also statutory) the resultant award would be valid and binding on the parties to the transactions. This case was not a case of unilateral reference. Resort to section 20 of the Arbitration Act on the part of the appellant before approaching the arbitrators for adjudication was unnecessary and the Award was and is binding on the respondent. [577 H; 578 A-C]

2.2 The arbitration clause contained in the Contract Notes read with relevant Bye-laws make two or three things very clear. In the first place the arbitration clause is couched in a very wide language inasmuch as it makes arbitrable not merely the claims or disputes arising out of the transactions specified in the Contract Note but also "all claims differences and disputes in respect of any dealings, transactions and contracts of a date prior or subsequent to the date of this Contract (including any question whether such dealings, transactions or contracts have been entered into or not)". Secondly the arbitration clause incorporates a provision that all such claims, differences and disputes shall be submitted to and decided by arbitration" in Delhi as provided in the Rules, Regulations and Bye-laws of the Exchange; this is a pointer to consensual submission in the clause. Thirdly, Bye-laws 247(a) which governs these transactions in terms constitutes the actual reference to arbitration and under Bye-laws 248(a) and 249(1) the reference is to two arbitrators who would be the nominees of each one of the parties to the disputes and provision is made empowering the Board of Directors or President to appoint arbitrator in case a party fails to nominate his own; in other words once a contract is made subject to Rules, Regulations and Bye-laws (framed under the rule making power) there comes into existence a statutory submission or reference to arbitration. [577 D-H]

3.1 The true scope and effect of the observations of the Court in Seth Thawardas Pherumal's case must be read in the proper perspective and not in a truncated manner or divorced from the context of specific issue which arose for determination before the Court in that case. It will be clear that these were neither intended to apply generally to all references nor to lay down the wide proposition that

there can be no reference to arbitration except through the
570
Court under section 20 unless both parties join in it. The observations were made in the context of the specific issue that arose before this Court and were not and are not intended to apply generally to all references. The statement that 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' makes it clear that the observations were confined to the references of specific questions of law. Ordinarily the Court has jurisdiction to set aside an award if an illegality or an error of law appears on the face of it and it is only when a specific question of law has been referred to the arbitrator for adjudication that his decision thereon falls within his exclusive jurisdiction and cannot be interfered with by the Court howsoever erroneous it might be. The true effect of these observations is that even in the case of an arbitration agreement which squarely falls within the definition of that expression as given in section 2 and which is not a bare arbitration agreement there would be included in it a consensual actual reference by the parties of all their disputes including questions of law that may arise later but the arbitrator's award on such questions of law would not be within his exclusive jurisdiction since specific question or questions of law cannot be said to have been referred to him as required by the law of arbitration but though the reference would be valid the award and his decisions on questions of law is erroneous on the face of it would be liable to be set aside by the Court. This is for from laying down the wide proposition that there can be no reference to arbitration except through the Court under section 20 unless both the parties join afresh in the actual reference. [579 A-C; 581 F-H; 582 A-C]

Seth Thawardas Pherumal v. Union of India [1955] 2 SCR P. 48 discussed and explained.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 272 of 1972.

From the Judgment and Order dated 18.7.1972 of the Delhi High Court in F.A.O. No. 139-D of 1962.

S.S. Ray and Rameshwar Nath for the Appellant. Anoop Singh, C.L. Itorara and H.M. Singh for the Respondent.

The Judgment of the Court was delivered by TULZAPURKAR, J. This appeal by special leave is directed against the judgment and decree passed by the learned Single Judge of the Delhi High

Court on 18th July, 1972 in F.A.O. No 139-D of 1962 whereby a decree in terms of the Award passed by the Trial Court was set aside. Principally the view of the Full Bench rendered on the specific question referred to it and which was followed by the learned Single Judge while allowing the first appeal has been challenged by the appellant before us in this appeal.

Facts, admitted and/or found by the lower courts are these: The appellant is a share-broker and a member of the Delhi Stock Exchange-an Exchange recognised by the Central Government under the Securities Contracts (Regulations) Act, 1956. The respondent, a non-member, had dealings in shares and securities with the appellant as principal to principal between 14th July and 27th September, 1960 in respect whereof printed Contract Notes (Ex. P. 1 to P. 31) in the prescribed form were issued by the appellant and were signed by the respondent. These transactions were subject to the Rules, Regulations and Bye-laws of the Exchange which covered transactions between a member and a non-member. Each one of the Contracts contained an arbitration clause couched in very wile terms requiring the parties thereto to refer all their disputes of claims to arbitration as provided in the Rules, Regulations and Bye-laws of the Exchange and Bye- law 244(a) incorporated a "Reference to Arbitration" in respect of such disputes or claims (whether admitted or not) between a member and a non-member arising out of or in relation to such transactions to two arbitrators to be appointed under the Rules, Regulations and Bye-laws of the Exchange.

It appears that under these transactions a sum of Rs. 5923 became due and payable by the respondent to the appellant but since the respondent raised a dispute and did not pay the claim the said dispute was referred to the arbitration of two arbitrators Mr. Prem Chand and Mr. P.S. Khambete (both members of the Exchange) after following the procedure prescribed under the Rules, Regulations and Bye- laws of the Exchange, the former being the nominee of the appellant and the latter being the appointee of the Exchange on the respondent's failure to nominate his arbitrator when called upon to do so. The arbitrators held their proceedings in which the respondent participated though he inter alia raised a contention that he was not a party to the reference and would not be bound by the Award that might be made on the basis of such unilateral reference. After considering the entire evidence oral and documentary produced before them and after hearing the parties the arbitrators made their Award on 18th April, 1961 whereby they allowed the claim of the appellant with costs against the respondent. The Award was filed in Court and after notices of filing the Award were served, the respondent filed objections to the Award on several grounds such as denial of the existence of the agreement of reference, that he was not a member of the Exchange, that the Contract Notes had not been signed by him, that the arbitrators had mis- conducted themselves and the proceedings, that the Award had been improperly procured etc. The learned Sub Judge Ist Class, Delhi who heard the matter negatived all the objections raised for setting aside the Award; in particular he recorded the findings that the Contract Notes bore the signatures of the respondent and as such under the arbitration clause contained in each one of them read with the relevant Bye-laws there was a valid Agreement for Reference to arbitration. Consequently, he made the Award a rule of the Court and passed a decree in favour of the appellant on 7.9.1962.

The respondent preferred an appeal being F.A.O. No. 139-D of 1962 to the High Court of Delhi. The learned Single Judge who heard the appeal confirmed the trial court's findings on all the issues arising in the case except on the question of validity of the reference. Undoubtedly, he in agreement

with the trial court held that the Contract Notes Exbs. P. 1 to P. 31 which contained the arbitration clause, were signed by the respondent but even so, since the respondent had not joined in nominating his arbitrator despite service of notice asking him to do so, he entertained a doubt as to whether the respondent could be said to be a party to the actual Reference to arbitration and whether on that account the Reference to the two arbitrators could be said to be unilateral and therefore, in view of the importance of the question involved, he referred the same to a larger Bench keeping the appeal on his file pending receipt of the decision of the larger Bench on the point. This reference order was made on 5th January, 1971 in consequence whereof the question came to be referred to a Full Bench.

The Full Bench answered the question in favour of the respondent. It took the view that notwithstanding the fact that respondent had signed the Contract Notes and had thereby become consenting party to the arbitration agreement the actual reference to arbitration of the two arbitrators Prem Chand and P.C. Khambete required the assent of both the parties and since to such reference the respondent had not given his consent it was a unilateral reference to arbitration and as such the resultant Award would not be binding on the respondent. In taking the view that the actual reference also required fresh assent of both the parties the Full Bench relied upon some observations made by this Court in its decision in Seth Thawardas Pherumal v. Union of India. The Full Bench rejected the submission made before it on behalf of the appellant that the relevant observations of this Court on which it sought to rely for taking such view should be confined to and must be regarded as having been made in the context of the specific question which actually arose for decision-before this Court in that case. The Full Bench expressed its final conclusion in these words:

> "In cases where a contract between the parties contains what may be called an arbitration clause to refer future disputes to arbitration, the agreement is merely an agreement to submit future differences to arbitration within the meaning of section 2(a) of the Arbitration Act. If disputes arise in the future, a reference has to be made to arbitration within the meaning of section 2(e) of the Arbitration Act and at this stage there should be a consent of both the parties. If the consent exists it would not be necessary to proceed under Chapter III by making an application under section 20 of the Arbitration Act and the parties or one of the parties can proceed under Chapter II of the said Act."

Presumably the Full Bench held that since there was no such consent at such later stage for the actual reference on the part of the respondent herein an application under s. 20 was necessary to be taken out by the appellant and in the absence of such step having been taken the actual Reference was unilateral and consequently the Award made on such reference was not binding on the respondent. When the matter went back to the learned Single Judge he naturally following the view of the Full Bench allowed the appeal of the respondent and set aside the decree passed in terms of the Award. It is this view of the Full Bench that is under challenge in this appeal.

It is obvious that two questions really arise for our determination in this appeal. First, whether in the facts and circumstances of the case there was a unilateral reference to arbitration of the two

arbitrators Mr. Prem Chand and Mr. P.S. Khambete or having regard to the terms and conditions of the Contract Notes which included an arbitration clause in very wide terms to which the respondent had become a party by signing the Contract Notes and the relevant Rules Regulations and Bye-laws of the Exchange the respondent could be said to have accorded his consent to the actual Reference to arbitration of the two arbitrators? In other words whether a fresh assent on his part was necessary at the stage when the reference came to be made to the two arbitrators in accordance with the relevant Bye-laws of the Exchange? And the second, whether the Full Bench has properly appreciated the true scope and effect of the relevant observations made by this Court in Seth Thawardas Pherumal's case (supra)?

It is true that the Arbitration Act, 1940 defines the two expressions "arbitration agreement" and "reference" separately. Section 2(a) defines an "arbitration agreement"

> to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not" while s 2(e) defines a "reference" to mean "a reference to arbitration". The latter expression obviously refers to an actual reference made jointly by the parties after disputes have arisen between them referring the` said disputes for adjudication to a named arbitrator or arbitrators, while the former expression is wider as it combines within itself two concepts, (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. This will be clear form the manner in which the expression "submission" was defined in the earlier Indian Arbitration Act, 1899 because, following the English Arbitration Act, 1889, the Indian Arbitration Act 1899 defined the expression "submission" in the same words now used to define "arbitration agreement" in the 1940 Act and in Russell on Arbitration (20th Edn.) at page 44 it has been stated that this term (arbitration agreement as defined) covers both the concepts (a) and (b) mentioned above within it. If that be so, it stands to reason that only 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 concensual reference resort to s. 20 of the Arbitration Act will be essential but where the arbitration agreement conforms to the definition given in s. 2 (a), the party desiring arbitration can straightaway approach the arbitrator or arbitrators and resort to s. 20 of Arbitration Act is unnecessary because consent to such actual reference to arbitration shall be deemed to be there as the second concept is included in the agreement signed by the parties, and the aspect that differences or disputes actually arose subsequently would be inconsequential because the arbitration agreement as defined in s. 2(a) covers not merely present but future differences also. In other words, in such a case there will be no question of there being any unilateral reference. Such being the true position in law it is difficult to agree with the view of the Full Bench that "where a contract between the parties contains what may be called an arbitration clause to refer future disputes to arbitration the agreement is merely an agreement to submit future differences to arbitration within the meaning

of s. 2(a) of the Arbitration Act and that if disputes arise in future a reference has to be made to arbitration within the meaning of s. 2(e) of the agreement and at this stage there should be a consent of both the parties." In every case the question will have to be considered as to whether the arbitration agreement is a bare agreement of the type indicated earlier or an arbitration agreement as defined in s. 2(a) of the Act and we proceed to examine this question in regard to the arbitration agreement in the instant case.

It has not been disputed before us that the Contract Notes Exbts. P. 1 to P. 31 issued by the appellant and signed by the respondent contain printed terms and conditions on the basis of which the transactions were put through by the parties and that such terms and conditions include an arbitration clause. There is also no dispute that these dealings were subject to or governed by the Rules, Regulations and Bye-laws and the usages of the Exchange. The arbitration clause printed in each one of the Contract Notes runs thus:

"In the event of any claim (whether admitted or not), difference or dispute arising between you and me/us out of these transactions the matters shall be referred to arbitration in Delhi as provided in the Rules, Bye-laws and Regulations of Delhi Stock Exchange Association Ltd; Delhi.

This contract constitutes and shall be deemed to constitute as provided overleaf an agreement between you and me/us that all claims (whether admitted or not) differences and disputes in respect of any dealings transactions and contracts of a date prior or subsequent to the date of this contract (including any question whether such dealings, transactions or contracts have been entered into or not) shall be submitted to and decided by arbitration in Delhi as provided in Rules, Bye-laws and Regulations of the Delhi Stock Exchange Association Ltd; Delhi. The provisions printed overleaf form a part of the contract."

On the reverse of the Contract Notes are printed verbatim, Bye-laws Nos. 247 to 249 and 273 and 274 of the Exchange contained in the Chapter of the Bye-laws dealing with "arbitration other than between the members." Bye-law 247 appears under the heading "Reference to Arbitration" and clause (a) thereof is relevant which runs thus:

"247 (a) All claims (whether admitted or not) differences and disputes between a member and a non- member or non-members (the terms "non-member" and "non members" shall include a remisier, authorised clerk or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to Rules, Bye laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or relating to the rights, obligations and liabilities of remisiers, authorised clerks, employees or any other person with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided

in the Rules, Bye- laws and Regulations of the Exchange".

Bye-law 248 deals with "Appointment of Arbitrators" and clause (a) thereof is material which runs thus:

> "248(a) All claims, differences, and disputes required to be referred to arbitration under these Bye- laws and Regulations shall be referred to the arbitration of two members of the Exchange one to be appointed by each party."

Bye-law 249 deals with "Appointment of Arbitrators by the Board of Directors or President" and cl.(1) thereof which is material runs thus:

> "249. On payment in advance of the minimum fees of arbitrators prescribed under these Bye-laws and Regulations by any party to a claim, difference or dispute the Board of Directors or the President shall appoint an arbitrator.
>
> (i) if after one party has appointed an arbitrator ready and willing to act and there is failure, neglect or refusal on the part of the other party or parties to appoint an arbitrator (ready and willing to act) within seven days after service of written notice of that appointment or within such extended time as the Board of Directors or the President may on the application of the other party or parties allow".

The aforesaid arbitration clause contained in the Contract Notes read with relevant Bye-laws make two or three things very clear. In the first place the arbitration clause is couched in a very wide language inasmuch as it makes arbitrable not merely the claims or disputes arising out of the transactions specified in the Contract Note but also "all claims differences and disputes in respect of any dealings, transactions and contracts of a date prior or subsequent to the date of this Contract (including any question whether such dealings, transactions or contracts have been entered into or not)" Secondly, the arbitration clause incorporates a provision that all such claims, differences and disputes "shall be submitted to and decided by arbitration" in Delhi as provided in the Rules, Regulations and Bye-laws of the Exchange; this is a pointer to consensual submission in the clause. Thirdly, Bye-law 247(a) which governs these transactions in terms constitutes the actual reference to arbitration and under Bye-laws 248(a) and 249 (1) the reference is to two arbitrators who would be the nominees of each one of the parties to the disputes and provision is made empowering the Board of Directors or President to appoint arbitrator in case a party fails to nominate his own; in other words once a contract is made subject to Rules, Regulations and Bye-laws (framed under the rule making powers) there comes into existence a statutory submission or reference to arbitration. On a plain reading of the arbitration clause contained in the Contract Notes read with relevant Bye-laws it is abundantly clear that the arbitration agreement herein is not a bare arbitration agreement but is clearly an arbitration agreement as defined in s. 2(a) of the Arbitration Act of 1940. In other words, the assent of the parties to actual reference is already there in the agreement; in addition there is a statutory reference. Therefore the reference being consensual (and also statutory) the resultant award would be valid and binding on the parties to the transactions. That being so it is difficult to accept the Full Bench view that this was a case of unilateral reference requiring fresh

assent of the respondent at the stage when the reference came to be made to two arbitrators. In our view resort to s. 20 of the Arbitration Act on the part of the appellant before approaching the arbitrators for adjudication was unnecessary and the Award was and is binding on the respondent.

For taking the view that it was a case of unilateral reference requiring fresh assent of the respondent at the stage when the reference came to be made to Messrs Prem Chand and Khambete and that in the absence of such fresh assent from the respondent it was necessary for the appellant to approach the Court with an application under s. 20 of the Arbitration Act the Full Bench relied upon the following observations made by this Court in Thawardas Pherumal case (supra):

> "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."

The Full Bench has taken the view that the above observations are applicable generally to all references and are not restricted to references of specific questions of law arising in given set off acts and circumstances and lay down the wide proposition that there can be no reference to arbitration except through the Court under s. 20 unless both the parties join in the actual reference. That is why the Full Bench has expressed its final conclusion in the manner and language quoted earlier.

With great respect, we would like to observe that the Full Bench has failed to appreciate the true scope and effect of the aforementioned observations of this Court. These observations must be read in the proper perspective and not in a truncated manner or divorced from the context of specific issue which arose for determination before the Court in that case. So considered it will be clear that these were neither intended to apply generally to all references nor to lay down the wide proposition that there can be no reference to arbitration except through the Court under s. 20 unless both parties join in it.

Briefly stated the facts in Thawardas Pherumal's case (supra) were these: Seth Thawardas, a contractor, entered into a contract with the Government for supply of two and half crores of pucca bricks to be delivered in instalments according to a fixed time schedule. A clause in the contract required "all disputes arising out of or relating to the contract to be referred to arbitration" of the Superintending Engineer of the Circle for the time being- Disputes arose about a number of matters between the parties at the same were duly referred to the arbitrator. One of the claims (the 5th head of the claim) preferred by the contractor was a loss of Rs. 75,900 being the value of 88 lacs of katcha bricks that were destroyed by rain. The contractor's case in regard to this claim was that there was default on the part of the C.P.W.D. in not removing the fully baked bricks which were ready for delivery, that due to delay in removal of baked bricks unburnt katcha bricks got accumulated which could be not be fed into his kilns and in the meanwhile rains set in with the result that 88 lacs of katcha bricks were destroyed by the rains and hence he was entitled to claim the value thereof as

loss. Government's reply was two fold. First, it urged that the katcha bricks formed no part of the contract and even if it was at fault in not taking delivery of the pucca bricks in time all that it will be liable for would be for the breach of that contract but the loss that was occasioned by damage caused to the katcha bricks which formed no part of the contract was too remote. Secondly, compensation for this loss could in no event be claimed because this kind of situation was envisaged by the parties when the contract was made and it was expressly stipulated that Government would not be responsible and in that behalf reliance as placed on clause (6) of the agreement which in terms stated: "the department will not entertain any claim for damage to unburnt bricks due to any cause whatsoever." The arbitrator held that the said clause was not meant "to absolve the department from carrying out their part of Contract and so he awarded the contractor Rs, 64075 under this head. This part of the award was challenged on the ground that it disclosed an illegality and an error of law on the fact of it. This Court took the view that the arbitrator had clearly gone wrong in law, his construction of the terms of the contract being faulty and the award was liable to be set aside. Even so a contention was raised on behalf of the contractor that the Court could not interfere with or set aside the award inasmuch as the question of law had been specifically referred to the Arbitrator for his adjudication and therefore, he had exclusive jurisdiction to decide it rightly or wrongly and the court could not interfere with that decision, however, erroneous in law it might be. Therefore, the real issue that arose for determination before the Court in that case was whether the question of law arising between the parties had been specifically referred to the arbitrator or not and on the facts of the case the court expressed the view that such a specific question of law could not be expected to be referred to arbitration by reason of the arbitration clause contained in the original contract inasmuch as the question could not be known to the parties unless and until the dispute actually arose and that such a question could be specifically formulated and referred only after the dispute arose. Since the question could not be and was not contained in the original arbitration clause it was required to be referred to arbitration by both the parties after disputes arose and since this was not done the Court held that the question of law had not been specifically referred to the arbitrator and therefore, the arbitrator had no exclusive jurisdiction to decide the same and there being an error of law apparent on the face of the award the Court could interfere with the decision and set aside the award. It was in this context that the Court considered the necessity of either making such a reference by both the parties afresh or a Court's order under s. 20(4) so as to give exclusive jurisdiction to the arbitrator to decide the question of law rightly or wrongly and the aforementioned observations on which the Full Bench has relied were not meant for applying generally to all references.

This would also be clear if the relevant observations are read in their entirety and in proper perspective. The relevant observations appearing at page 58 of the Report run thus:

> "We are of the opinion that this is not the kind of specific reference on a point of law that the law of arbitration requires. In the first place, what was shown to us is no reference at all. It is only an incidental matter introduced by the Dominion Government to repel the claim made by the contractor in general terms under claim No.5. In the next place, this was the submission of the contractor alone. 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. Therefore, when a question of law is the point at issue, unless 'both sides' specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Court to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceedings is not enough".

On reading the aforesaid observations in proper perspective it is clear that these were made in the context of the specific issue that arose before this Court and were not and are not intended to apply generally to all references. The statement that in the absence of either, agreement by both sides about the terms of reference, or an order of the Court under s.20(4) compelling a reference, the arbitrator is not vested with 'the necessary exclusive jurisdiction' makes it clear that the observations were confined to the references of specific questions of law. Ordinarily the Court has jurisdiction to set aside an award if an illegality or an error of law appears on the face of it and it is only when a specific question of law has been referred to the arbitrator for adjudication that his decision thereon falls within his exclusive jurisdiction and cannot be interfered with by the Court howsoever erroneous it might be. The true effect of these observations is that even in the case of an arbitration agreement which squarely falls within the definition of that expression as given in s.2(a) (and which is not a bare arbitration agreement) there would be included in it a consensual actual reference by the parties of all their disputes including questions of law that may arise later but the arbitrator's award on such questions of law would not be within his exclusive jurisdiction since specific question or questions of law cannot be said to have been referred to him as required by the law of arbitration but though the reference would be valid the award and his decisions on questions of law if erroneous on the face of it would be liable to be set aside by the Court. This is far from laying down the wide proposition that there can be no reference to arbitration except through the Court under s.20 unless both the parties join afresh in the actual reference.

As we have said above the question whether fresh assent of both the parties for the actual reference is necessary or not must depend upon whether arbitration agreement is a bare agreement of the type indicated earlier or it is an arbitration agreement as defined in s.2(a) of the Act. If it is the latter then clearly the actual reference to arbitration would be consensual and not unilateral and no fresh assent of the parties would be necessary nor will resort to s.20 be necessary. Instead the party desirous of going to arbitration can resort to remedies available to him under Chapter II of the Arbitration Act, 1940; and in a case like the instant one he can, as the appellant did, proceed under the relevant Bye-laws.

Having regard to the above discussion the appeal is allowed, the judgment and decree of the learned Single Judge passed in F.A.O. 139-D of 1962 following the view of the Full Bench is set aside and the decree in terms of the Award which was passed by the learned trial Judge is restored. The respondent will pay the costs of the appeal to the appellant.

S.R. Appeal Allowed.