CASE NO.:
Appeal (civil) 149 of 2007

PETITIONER:
Krishna Bhagya Jala Nigam Ltd

RESPONDENT:
G. Harischandra Reddy and Anr

DATE OF JUDGMENT: 10/01/2007

BENCH:
Dr. Arijit Pasayat & S. H. Kapadia

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C)No.10418 of 2005)

KAPADIA, J.

Leave granted.

Two issues arise for determination in this civil appeal filed by Krishna Bhagya Jala Nigam Ltd. (for short, 'Jala Nigam') against the decision of the Division Bench of the Karnataka High Court dated 28.1.2005 in Miscellaneous First Appeal No.1785 of 2002 dismissing the said appeal preferred by Jala Nigam under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act').

The first issue is : whether Jala Nigam could be allowed to raise the contention, on the facts and circumstances of this case, that Clause 29 of the Contract(Agreement) is not an arbitration clause and due to want of jurisdiction of the arbitral tribunal to adjudicate upon the claims made by the contractor (respondent no.1), Award dated 25.6.2000 published on 14.11.2000 was a nullity.

The second issue is regarding the merits of the claims made by the contractor.

The facts giving rise to the above civil appeal are as follows.

On 27.11.93 Agreement bearing No.41/93 was entered into between Jala Nigam and the claimant (respondent no.1) concerning construction of Mulawad Lift Irrigation Scheme. The contract was for 36 months. It was to be completed by 26.11.96. In the course of execution of the contract, Jala Nigam entrusted to the contractor, certain extra work vide two supplementary agreements dated 11.6.96 and 7.11.98. The contract was extended up to 31.12.2003. The claimant (contractor) raised disputes, said to have arisen out of the works entrusted under the contract. By letter dated 23.3.98 the contractor called upon the Chief Engineer to act as an arbitrator under Clause 29 of the Contract which is reproduced hereinbelow:

"Clause 29 - (a) If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the contractor regarding the following matters namely.

(i) The meaning of the specifications designs, drawings and instructions herein before mentioned,
(ii) The quality of workmanship or materials used

on the work and
(iii) Any other question, claim, right, matter thing whatsoever, in any way arising out of or relating to the contract, designs, or those conditions or failure to execute the same whether arising during the progress of the work or after the completion, termination or abandonment thereof the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the Contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the Contractor to do so, give written Notice of his decision to the Contractor.

(b) Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor. The said decision shall forthwith be given effect to the Contractor shall proceed with the execution of the work with all due diligence.

(c) In case the decision of the Chief Engineer is not acceptable to the Contractor, he may approach the Law Courts at\005.(*) for settlement of dispute after giving due written Notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of this Written Notice of the decision of the Chief Engineer.

(d) If the Chief Engineer has given written Notice of his decision to the Contractor and no written Notice to approach the Law Court has been communicated to him by the Contractor within a period of Ninety days from receipt of such notice, the decision shall be final and binding upon the Contractor."

By letter dated 26.3.98 the Chief Engineer refused to act as an arbitrator on the ground that the contract did not provide for arbitration. This led the contractor to file C.M.P. No.26/99 under Section 11 of the Arbitration Act. By order dated 10.9.99 the High Court directed the Chief Engineer to act as an arbitrator. By the said order the High Court directed both the parties to file their respective claims and counter claims before the arbitrator. By letter dated 12.11.99 the Arbitrator entered upon the reference. He fixed the date of appearance of the parties. The Arbitrator gave necessary directions to both sides to file statements and counter statements. The contractor placed before the Arbitrator 11 claims in all. Jala Nigam filed its counter statement. Ultimately, on the basis of the evidence produced by the parties, the Arbitrator gave his Award on 25.6.2000 and the same was published on 14.11.2000.

Aggrieved by the Award, Jala Nigam filed a petition under Section 34(2)(v) of the Arbitration Act before the Principal Civil Judge (Senior Division) Bijapur vide Arbitration Case No.1 of 2001. The Award was confirmed by the said civil court vide

Judgment dated 15.12.2001. Aggrieved by the said decision, Jala Nigam carried the matter in first appeal filed under Section 37(1)(b) of the Arbitration Act to the High Court. Vide impugned judgment dated 28.1.2005 the appeal stood dismissed. Hence this civil appeal.

Mr. C.S. Vaidyanathan, learned senior counsel for Jala Nigam, contended that the above-quoted Clause 29 of the Contract was not an arbitration clause and, therefore, the proceedings before the Arbitrator stood vitiated for lack of jurisdiction. He contended that the proceedings before the Arbitrator were without jurisdiction for want of arbitration agreement which cannot be cured by appearance of the parties, even if there was no protest or even if there was a consent of Jala Nigam, since consent cannot confer jurisdiction and, therefore, the impugned Award was null and void. Learned counsel submitted that though the plea of "no arbitration clause" was not raised in the counter statement before the Arbitrator, such a plea was taken by Jala Nigam in C.M.P. No.26/99 filed by the contractor and, therefore, Jala Nigam was entitled to raise the plea of "no arbitration clause". Learned counsel submitted that under the circumstances the courts below had erred in holding that Jala Nigam had waived its right to object to the Award on the aforementioned grounds.

We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jala Nigam before the Arbitrator. The said plea was not advanced before the civil court in Arbitration Case No.1 of 2001. On the contrary, both the courts below on facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the Arbitrator. It gave consent to the appointment of the Chief Engineer as an Arbitrator. It filed its written statements to the additional claims made by the contractor. The executive engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the arbitral tribunal. He did not call upon the arbitral tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the arbitral tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10.9.99 passed in C.M.P. No.26/99. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now allowed to contend that Clause 29 of the Contract did not constitute an arbitration agreement.

Before concluding on this issue, one clarification needs to be mentioned. On 26.7.2005 a three-Judge Bench of this Court has referred the question involving interpretation of Clause 29 of the Contract to the Constitution Bench in the case of M/s. P. Dasaratharama Reddy Complex v. Government of Karnataka and Another \026 Civil Appeal No.1586 of 2004. Placing reliance on the said order, learned counsel for Jala Nigam submitted that the hearing of this civil appeal be postponed pending disposal of the above reference by the Constitution Bench. We do not find any merit in this argument. As stated above, the plea that Clause 29 of the Contract was not an arbitration clause, was raised in the present case for the first time only in Miscellaneous First Appeal No.1785 of 2002 filed under Section 37(1)(b) of the Arbitration Act before the High Court. As stated above, Jala

Nigam, on the contrary, had consented to the Chief Engineer, acting as an Arbitrator. For the aforestated reasons and particularly in view of the fact that there has been considerable delay in the litigation no useful purpose would be served by keeping the matter pending in this Court awaiting the decision of the Constitution Bench. Therefore, on the facts and circumstances of this case and in view of the conduct of the parties, we hold that Jala Nigam cannot be allowed to urge that Clause 29 of the Contract is not an arbitration clause.

On the merits of the claims made by the contractor we find from the impugned Award dated 25.6.2000 that it contains several Heads. The Arbitrator has meticulously examined the claims of the contractor under each separate Heads. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the Award. Here also we may add that we do not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.

As far as idling charges are concerned, the Arbitrator has awarded Rs.42,000/- per day for the period 1.2.94 to 17.12.94 and from 1.6.95 to 31.12.95 excluding the period 18.12.94 to 31.5.95 and from 1.1.96 to 12.11.96. On this basis the idling charges awarded by the Arbitrator was arrived at Rs.1.47 crores. It is contended that the contractor has not led any evidence to show the existence of the machinery at site and, therefore, he was not entitled to idling charges. We are of the view that the Award of the Arbitrator is fair and equitable. He has excluded certain periods from calculations, as indicated above. We have examined the records. The delay took place on account of non-supply of Drawings and Designs and in the meantime the establishment of the contractor stood standstill. We suggested to the learned counsel for the respondent (contractor) for reduction of the awarded amount under this Head from Rs.1.47 crores to Rs.1 crore. Learned counsel for the respondent fairly accepted our suggestion. We suggested the aforestated figure keeping in mind the longstanding dispute between the parties. Therefore, the amount awarded under this Head shall stand reduced from Rs.1.47 crores to Rs.1 crore.

Accordingly the civil appeal stands allowed to the extent indicated above with no order as to costs.