

* **HIGH COURT OF DELHI : NEW DELHI**

ARB.P. No.113/2011

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Judgment pronounced on: 03.11.2011

M/S HRD CORPORATION Petitioner
Through Mr. Kailash Vasudev, Sr. Adv. with
Ms. Bindu Saxena, Mr. Shailendra
Swarup, Ms. Neha Khattar and
Mr. K.K.Patra, Advs.

Versus

GAIL(INDIA) LTD Respondent
Through Mr. Rajiv Bansal, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MANMOHAN SINGH, J.

1. The petitioner a Company registered under the laws of the
State of Texas, USA having its principal office at 1459, Minetta,
Houston, Texas 77035, has filed the present petition under Section 11(6)

of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”) for appointment of a substitute arbitrator as per Rule 11(12) read with Rule 10 of the ICADR rules in place of Late Mr. Justice N.N. Goswamy (Retd) in Arb. P. No.33/2007 - ICADR and Arb. P. No.38/2010- ICADR and also praying that the remaining members of the said Tribunal be allowed to continue in office.

2. The petitioner is engaged in refining and dealing amongst others in HDPE Wax, a byproduct of an HDPE/LLDPE plant in Petro Chemical Complex a downstream product of crude oil and higher fractions of Natural Gas, in USA and other parts of the world using its own technology.

3. Respondent is a Company registered under the Companies Act, 1956 and is engaged in the business of dealing with natural gas and downstream natural gas products (including HDPE/LLDPE) and has established its plant at its Petro Chemical Complex at Pata in the State of U.P.

4. It is averred in the petition, that on 01.04.1999 the petitioner and the respondent entered into an agreement (hereinafter referred to as the agreement) for sale and supply of entire quantity of HDPE Wax by

the respondent to the petitioner that shall be produced at the former's HDPE/LLDPE at its abovementioned Petro Chemical Complex at Pata. Article 14 of agreement contained the arbitration clause. Certain disputes have arisen between the parties on price fixation and are pending final resolution by arbitration. Further, it is stated that in the case being Arb. P. No.33 of 2007-ICADR for price fixation for the period of 13.07.2007 to 12.07.2010 the supplies of HDPE wax to the petitioner have been made at the interim prices determined by the arbitral tribunal. For fixing the price for the subsequent period of three years that is from 13.07.2010 to 12.07.2013, in the case being Arb. P. No.38 of 2010 the same arbitrators namely Mr. Justice Avadh Behari Rohatgi (Retd.) as the presiding arbitrator, Mr. Justice J.K. Mehra (Retd.) the arbitrator nominated by the petitioner and Mr. Justice N.N. Goswamy (Retd.) arbitrator nominated by the respondent, were constituted as a new tribunal under the ICADR Rules. Unfortunately, during the pendency of the arbitral proceedings of the said case, Mr. Justice N.N. Goswamy (Retd.) passed away, thereafter, by its letter dated 09.03.2011 the ICADR informed the petitioner that both the parties herein, that is the petitioner and the respondent are required to

appoint their respective arbitrators and the arbitrators so appointed would then appoint the presiding officer so as to constitute a new arbitral tribunal to adjudicate upon the disputes between the parties.

5. It is stated by the petitioner that the stand taken by the ICADR in its letter dated 09.03.2011 was contrary to the ICADR rules and thus the petitioner sent a letter dated 16.03.2011 to ICADR wherein the petitioner mentioned that neither did the presiding officer nor petitioner's nominee vacate their office. Therefore, in the present case, appointment of only the substituted arbitrator is warranted and not the appointment of the fresh tribunal.

6. In the letter dated 22.03.2011, ICADR refused to accept the submission of the petitioner asked for the appointment of a fresh Tribunal. Thereafter, the petitioner sent another letter to ICADR wherein it drew ICADR's attention to Rule 10. But ICADR on 01.04.2011 refuted the contentions of the petitioner again in its letter and subsequent to the said letter, the respondent nominated the name of Mr. Justice Anil Dev Singh, (Retd), A former Chief Justice of Rajasthan High Court as its nominee.

7. The petitioner is, thus, aggrieved by the adoption of the said procedure wherein the institution ICADR is failing to perform its function by not merely appointing the substitute arbitrator as per the rules but is appointing the tribunal afresh which may lead to delay, expense and other inconvenience to the petitioner. The petitioner has therefore approached this court for appointment of the substituted arbitrator.

8. In the reply to the present petition on behalf of the respondent, it is stated that the agreement dated 01.04.1999 was between the respondent herein and Marcus Oil Chemicals which is a division of HRD Corporation, incorporated under the laws of the State of Texas, USA having its principal office at 1459, Minetta, Houston, Texas 77035. Therefore, the arbitration between the parties herein is an International Commercial Arbitration and this court does not have the jurisdiction to entertain the present petition.

9. It is also stated that admittedly, the petitioner and the respondent have both appointed their respective nominee arbitrators and in terms of Section 11 (9) of the Act the two arbitrators have to appoint the third arbitrator further, the agreement between the parties provides

under the Article 14 thereof that in the event of any disputes between the parties, the arbitration shall be under aegis of International Centre of Alternative Dispute Resolution, New Delhi. Rule 5 of the ICADR Rules which provides for appointment of arbitrators is in *pari materia* with Section 11 (9) of the Act. Rule 5 of the ICADR Rules reads as follows:-

5. Appointment of arbitrators.—

- (1) Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator.
 - (1) Where the arbitration agreement provides that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the presiding arbitrator, and—
 - (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party;
 - (b) the appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the ICADR.
- (2) In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the ICADR.

- (3) A decision by the ICADR on a matter entrusted to it by sub-rule (2) or sub rule (3) will be final and binding on the parties.
- (4) Upon receipt of a request under sub-rule (2) or sub-rule (3), the ICADR will—
 - (a) make the appointment as promptly as possible,
 - (b) follow the procedure specified in rule 35,
 - (c) have regard to —
 - (i) any qualifications required of the arbitrator by the agreement of the parties;
 - (ii) such considerations as are likely to secure the appointment of an independent and impartial arbitrator; and
 - (iii) in the case of appointment of a sole or presiding arbitrator in an international commercial arbitration, the advisability of appointing a person of a nationality other than the nationalities of the parties.
- (5) A substitute arbitrator will be appointed in the same manner in which his predecessor had been appointed.
- (6) The ICADR, before appointing a person as arbitrator or the presiding arbitrator, will obtain confirmation from such person that—
 - (i) no circumstances exist that give rise to justifiable doubts as to his independence or impartiality, and

- (ii) where any qualifications are required of an arbitrator by the agreement of the parties, he possesses those qualifications.

10. According to the respondent, the present petition is premature as there is nothing to suggest that there is any disagreement between the appointed Arbitrators over the third arbitrator. Further, it is stated that as the respondent does not wish to continue with tribunal constituted with effect from 13.07.2010, therefore, a fresh arbitral tribunal would have to be constituted although it would be open to the petitioner to reappoint Mr. Justice J.K. Mehra (Retd.) as its nominee arbitrator and the two nominee arbitrators would then appoint the Presiding Arbitrator.

11. In terms of the liberty granted to the respondent vide order dated 30.05.2011 the respondent has also filed an interim reply wherein, it has challenged the maintainability of the instant arbitration application in view of the provision contained in Section 11 of the Act. The submission of the respondent reads as under:

“The agreement dated 01.01.1999 between Gas Authority of India Limited and Marcus Oil and Chemical division of HRD Corporation, which contains the Arbitration clause, is an agreement between a body corporate incorporated in USA. The is evident from the recitals contained in the agreement dated 01.04.1999 between Petitioner and the

Respondent.”

“The Arbitration between the Petitioner and the Respondent is an international commercial Arbitration. Therefore, this court would not have the jurisdiction to entertain the present Application and the same is liable to be dismissed as such.”

12. Further, it is stated by the respondent that there is nothing in the agreement that would suggest that the term of the tribunal is interlinked or dependent upon clause 6.4 of the said agreement which reads as under:

“6.4. After the expiry of every three years the SELLER and the BUYER will review the price determination Mechanism. In case during the preceding three years large fluctuations in the prices of Ethylene have occurred it will be open to the parties to mutually agree upon any other product to which the price is to be indexed or if any other publication indicative in the price of ethylene are available agree upon such publication to be used for reference.”

13. As per the respondent, the tribunal constituted with effect from 13.07.2010 was to continue only with the mutual consent of the parties, and that as the respondent does not consent to the continuance of the said tribunal a new Arbitral Tribunal is to be reconstituted with Justice Anil Dev Singh (Retd.), as the nominee Arbitrator of the respondent.

14. When the matter came up for hearing learned Senior counsel Mr. Kailash Vasudeva, appearing on behalf of the petitioner made his submissions which can be outlined in the following manner:

- a) Firstly, learned Senior counsel stated that there was an arbitration clause wherein the appointment of the arbitrators were to be effected by the institution namely ICADR and under its rules thereof. The said appointment has been made duly as per rules. Learned Senior counsel read the rule pertaining to the termination of the mandate of arbitrator, which reads as under:

“11. Termination of mandate and substitution of arbitrator –

- (1) In addition to the circumstances referred to in rule 9 or rule 10, the mandate of an arbitrator shall terminate –
 - (a) Where he withdraws from office for any reason; or
 - (b) By or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed in the same manner in which his predecessor had been appointed.
- (3) Where an arbitrator is replaced under sub-rule (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) An order of ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely

because there has been a change in the composition of the arbitral tribunal.”

Placing reliance upon the said Rule, it is contended that the death of the arbitrator shall be considered to be a circumstance warranting the substitution of the arbitrator and therefore, the new arbitrator has to be substituted as per the rule of the appointment.

b) Learned senior counsel has made a fine distinction between the substitution of the arbitrator in the event of the death of one the arbitrator and the reconstitution or appointment of new tribunal by replacing all the arbitrators. It is argued that it is only the arbitrator who has died must be replaced with new arbitrator and the institution of a fresh Tribunal is not required and that the ICAI is failing to perform its function vested in it as per the rules which has lead to the petitioner approaching this court.

c) Learned senior counsel submitted that the case of the petitioner falls within the Section 11(6) in view of the fact that the agreed procedure of the appointment and substitution or termination of the mandate of the arbitrator is in consonance with Section 14 and 15 of the Act of 1996. Therefore, the case of the petitioner will fall within the purview of Section 11 (6) where this court has the

power to appoint the arbitrator in the event the institution fails to perform its function in accordance with the law.

15. In order to substantiate his submissions, learned senior counsel for the petitioner relied upon the judgment passed by the Apex Court in the case of **National Highways Authority of India & Anr vs. Bumhiway DDB Ltd.** (JV), (2006) 10 SCC 763 wherein the court observed:

“27. It was submitted that the resignation and death of an arbitrator mandates application of Section 15(1) and 15(2) of the Arbitration Act. Section 15(1) and 15(2) are complete and wholesome and contra distinct to Section 11(6). Mr. Justice Y. Bhaskar Rao's resignation brought the matter back from vestiges of Section 11(6) though in the first place in law there were none and brought the matter squarely within Section 15(2). Any decision given under Section 11(6) is wholly miscarriage in law and would tantamount to putting the Act upside down. It was also submitted that the matter on Section 15(2) is no longer res integra as per the dictum in Yashwith Construction.”

16. By placing reliance on the aforementioned para of National Highways (Supra), it was urged by the learned senior counsel that the death or the resignation would be covered within the ambit of termination of the mandate of the arbitrator as the same would lead to arbitrator withdrawing the office. Therefore, this court can intervene

under Section 11 (6) of the Act.

17. Likewise the Judgment passed by the Apex Court in *Yashwith Constructions (P) Ltd. vs. Simplex Concrete Piles India Ltd.,* (2006) 6 SCC 204 was relied upon wherein the apex court observed as under:

“In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section 15 of the Act. When the arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorized originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorizing the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the

part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.”

18. Thus, the learned senior counsel stated that this court can appoint the arbitrator by exercising its jurisdiction under 11(6) as the mandate of the arbitrator Shri N.N. Goswamy has been terminated on account of his death and the institution is not following the procedure as per the rules.

19. Learned Senior counsel thus concluded that the ICADR has failed to perform its function as per the agreed procedure and the petitioner wrote to the ICADR to perform its function by replacing only Late Shri N.N. Goswamy (Retd. Judge of this Court) on the occasion of his demise but the ICADR is pressing for the reconstitution of the

tribunal which will procrastinate the matter and will lead to an expense besides starting the matter afresh. All this will prejudicially affect the parties and more so the petitioner.

20. Per contra Mr. Rajiv Bansal, learned counsel appearing on behalf of the respondent has raised the preliminary objection as to maintainability of the present petition before this court.

21. Learned counsel argued that this court cannot entertain the present petition in view of the fact that the present arbitration relates to international commercial arbitration which is governed by a separate process for the appointment.

22. Learned counsel has placed reliance on Sections 2(1)(f), 11(6), 11(11), 11(12), 14 and 15 of the Act.

23. By placing the reliance on the provisions of the Act, it has been argued that the present case no doubt relates to the international commercial arbitration. In the case of the international commercial arbitration, the appropriate court for the purposes of the appointment of the arbitrator is Supreme Court of India in view of the fact that the Chief Justice of India or his designate is empowered to appoint such arbitrator. Therefore, this court cannot entertain the present petition as the same

has been filed before the incompetent court having no jurisdiction in the matter.

24. In rejoinder, learned Senior counsel for the petitioner replied that this court can entertain the present petition seeking the substitution of the arbitrator in view of the fact that the language of the Section 11 only enables Supreme Court to appoint the arbitrator at the first instance. It cannot be a legislative intent to knock the doors of the Supreme Court time and again for the replacement of the arbitrators or substitution of the same which this court can conveniently do. Therefore, no such prohibition exists in exercise of jurisdiction by this court.

25. Let me now examine the objection of the respondent on the maintainability. For the purposes of the convenience, the relevant Sections 2 (1)(f), 11 (6), 11(11), 11(12), 14 and 15 of the Act are reproduced hereinafter:

“Section 2(1) (f)

(f) " international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is-

(i) an individual who is a national of, or habitually

resident in, any country other than India; or

- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) a company or firm association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country;

Section 11(6)

(6) Where, under an appointment procedure agreed upon by the parties,-

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11(11)

11. Where more than one request has been made under sub-section (4) or subsection (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

Section 11(12)

(a) Where the matters referred to in sub- sections (4), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to " Chief Justice" in those subsections shall be construed as a reference to the " Chief Justice of India."

(b) Where the matters referred to in sub- sections (4), (5), (7), (8), and (10) arise in any other arbitration, the reference to " Chief Justice" in those sub- sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub- section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief justice of that High Court.

Section 14 : Failure or impossibility to act-

(1) The mandate of an arbitrator shall terminate if—

- (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
- (b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.”

Section 15 : Termination of mandate and substitution of arbitrator-

- (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
 - (a) where he withdraws from office for any reason; or
 - (b) by or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
- (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

26. A conjoint reading of the aforementioned provisions especially the interplay between Section 2(f) read with Section 11(6) and Section 11(12) makes it abundantly clear that the legislature has intentionally carved out a fine distinction between a matters relating to the “any other arbitration” and “international commercial arbitration” when it comes to the process of the appointment of the arbitrator.

27. Section 11(12) clarifies all the doubts in explicit terms by

stating that when it comes to the matters referred to in sub section (4), (5) and (6) arising in an international commercial arbitration, the reference to the term Chief Justice shall be construed as reference to the Chief Justice of India.

28. This leaves no room for doubt that Section 11(6) is the enabling provision which empowers the High Court, in the present case this court as well as Supreme Court for appointment of the arbitrator. However, the designated court changes depending upon the nature of arbitration. In the case of international commercial arbitration, the Supreme Court will exercise powers vested under Section 11(6) by virtue of the clear terms of Section 11(12) sub clause (a) read with Section 11(6), on the other hand in the case of any other arbitration, the same powers vested in it shall be exercised by the “High Court” in view of the operation of Section 11(6) read with Section 11(12)(b) of the Act.

29. A further reading of Sections 14 and 15 would reveal that upon termination of the mandate of the arbitrator, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. This is made clear in terms of Section 15(2).

30. Therefore, for the purposes of appointment of substitute arbitrator, one has to immediately revert back to the rules of the appointment and therefore, the court in such circumstances is also no different for the purposes of appointment. This question is no longer res integra that while appointing the substitute arbitrator, the court appoints the same under the provisions of Section 11 (6) by exercising its powers of appointment read with Section 15 (2).

31. No doubt that the Supreme Court's observations in the case Yashwith Constructions (P) (Supra) are instructive of the fact that the court's jurisdiction under Section 11(6) for the purposes of appointment of the substitute arbitrator shall attract only when the parties or the institution fails to perform the agreed procedure or the rules prescribed by the institution. The Supreme Court only states that the court's jurisdiction under Section 11(6) is attracted in that event. However, the same shall be attracted keeping in mind the express legislative measures under Section 11(12) which demarcates "any other arbitration proceedings" and "international commercial arbitration" wherein High Court and Supreme Court have been given powers in the respective cases to exercise such jurisdiction under the same Section.

32. The powers vested in the respective courts shall be exercised in terms of the Section 11(6) depending upon the nature of proceedings in view of the express legislative mandate. Thus, if the matter pertains to “any other arbitration” the substitution powers shall be exercised by the High Court as the wordings shall be “Chief Justice” and the original court for the purposes of appointment at the first instance shall be High Court. On the other hand, if the matter relates to the international commercial arbitration, the same powers shall be exercised by the Supreme Court in view of the unequivocal terms of Section 11(12) as the wording then has to be read and construed as “Chief Justice of India” and the original court for the purposes of appointment shall be the Supreme Court of India.

33. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom

cannot be replaced by the Judge's views. As observed by the Apex Court that when a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser. (See : **Shri Mandir Sita Ramji vs. Lt. Governor of Delhi** - (1975) 4 SCC 298).

34. It is further trite that the court cannot re legislate or add words into the statute. This has been followed in **Association for Development vs. Union of India & Others**, 2010 (115) DRJ 277 wherein this court approved the literal rule and observed that —it is not the duty of the court to enlarge the scope of the legislation when the language of the provision is plain and unambiguous. The court cannot recast or reframe the legislation for the very reason it has no power to legislate. The court cannot add words to a statute or read words into it which are not there.

35. It also needs to be emphasized that the when the statute says that things are to be performed in the manner prescribed, then they are to be performed that manner to the exclusion of the others. (Kindly See **State of UP Vs. Singhara Singh**, (1964) SCR 485 wherein the Supreme

Court approving the principle of *Taylor vs. Taylor*, (1875) 1 Ch. D. 426

observes as under:

“In Nazir Ahmed's case(2) the Judicial Committee observed that the principle applied in *Taylor v. Taylor*(3) to a Court, namely, **that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record under s. 164 and, therefore, held that magistrate could not give oral evidence of the confession made to him which he had purported to record under s. 164 of the Code**”(Emphasis Supplied).)

36. Therefore, in view of the above discussion, it becomes amply clear that there can be no departure from the express legislative mandate which is unequivocal and clear in explicit terms that for the purposes of the appointment of the arbitrator, the appropriate court or the designated court shall be Supreme Court under Section 11(6) read with Section 11(12) of the Act. If for the purposes of an appointment, the appropriate court shall be Supreme Court at the first instance, then by operation of the Section 15(2), if the mandate of the arbitrator terminates, for the purposes of the appointment of substitute arbitrator, the appropriate court which has the powers of appointment as per the rules of the appointment, shall be Supreme Court as it will be exercising its powers under Section 11(6) of the Act. This is due to the reason that the powers

of the court for the purposes of appointment of the arbitrator is mutatis mutandis applicable to the appointment of substitute arbitrator. There are no separate powers which are prescribed under the Act of 1996 which empowers this court to take departure from the powers under Section 11(6) except the powers vested under the agreed procedure. The petitioner itself filed the present petition under Section 11(6) which means that the petitioner itself admits that the court can exercise the powers only under Section 11(6). If that is so, then by operation of Section 11(12) read with Section 2(f) of the Act, the present dispute being an international commercial arbitration, the designated court for the purposes of appointment of the substitute arbitrator shall be the Supreme Court of India.

37. In this context, it would be wise to refer to the decision of five bench of the Apex Court in **S.B.P. & Co Vs. Patel Engineering Ltd., (2005) 8 SCC 618** wherein the Supreme Court has culled out the following conclusions:

- “i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

- ii) **The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court. (Emphasis Supplied)**
- (iii) **In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute. (Emphasis Supplied)**
- (iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.
- (v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.
- (vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.
- (vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under

Article 136 of the Constitution of India to the Supreme Court.

- (viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.
- (ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.
- (x) Since all were guided by the decision of this Court in *Konkan Railway Corpn. Ltd. & anr. Vs. Rani Construction Pvt. Ltd.* [(2000) 8 SCC 159] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.
- (xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.
- (xii) The decision in *Konkan Railway Corpn. Ltd. & anr. Vs. Rani Construction Pvt. Ltd.* [(2000) 8 SCC 159] is overruled.”

38. The individual appeals will be posted before the appropriate bench for being disposed of in the light of the principles settled by this decision.

39. From a bare reading of the above observations and conclusions drawn at point (ii) and (iii) by the Supreme Court in SBP & Co. (Supra), it becomes amply clear that the power vested in the Chief Justice and Chief Justice of India is statutory and the same is vested by the statute. The said power can be delegated by the respective Chief Justice of the High Court to another judge of that High Court only and Chief Justice of Supreme Court to another Judge of Supreme Court only. Thus, being purely statutory power vested in the appropriate cases by the statute. This court cannot supplement or supplant the said power by assuming jurisdiction on the subject which falls within the domain of Chief Justice of India as per the provisions of Section 11 (6) read with Section 11(12). Rather, this court would be going against the judgment of five Judge Bench in the case of SBP & Co. (supra) which still holds the field by assuming such jurisdiction as being the designated court and also the designated judge in this case. Thus, the present petition has to fail.

40. Further, it is not unconventional for the Supreme Court to exercise the powers of appointment of the substitute arbitrator in the event the mandate of the arbitrator fails under the provisions of the Section 15 of the act by exercising the powers under Section 11(6) of the Act in the matters of international commercial arbitration. The Supreme Court in the case of *San-A Tradubg Co. Ltd vs I.C. Textiles Ltd.* decided on 28.04.2006 in the arbitration petition No.8/2005 has held speaking through Hon'ble P. Naolekar, J. in the following terms:

“In the present case, the named arbitrator under the contract, viz., Mr. Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, Japan vide his letter dated 29th June, 2003 expressed his inability to discharge his role as arbitrator.

41. Section 15 of the Act provides for termination of mandate and substitution of arbitrator, reads as under:

"15. Termination of mandate and substitution of arbitrator.-
(1) In addition to the circumstances referred to in section 13 and section 14, the mandate of an arbitrator shall terminate -

(a) where he withdraws from office for any reason; or (b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the

rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

Under clause (a) of Section 15(1), when the arbitrator withdraws from office for any reason, a substitute arbitrator can be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

The procedure for filling the vacancy arising out of the arbitrator's withdrawal from office is provided under Section 15. It says that in addition to the grounds covered by Sections 13 and 14, the mandate of an arbitrator shall terminate when he withdraws from his office for any reason or under an agreement of the parties. **The Section provides that the substitute arbitrator is to be appointed according to the same rules which were applicable to the appointment of the arbitrator who is to be replaced. Sub-section (2) of Section 15 contemplates appointment of the substitute arbitrator in place of the arbitrator who refuses to act as an arbitrator, as per the rules applicable to the appointment of the arbitrator. Sub-section (2) of Section 11 of the Act provides that in the absence of any agreed procedure for appointment of the arbitrator or arbitrators, sub-section (6) of Section 11 would apply whereunder a party may request the Chief Justice or any person or institution designated by him to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. By virtue of sub-section (12) of Section 11, in**

international commercial arbitration, the reference to Chief Justice in sub-section (6) shall be construed as a reference to the Chief Justice of India. (Emphasis Supplied)

“.....It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the Court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act”

(Emphasis Supplied)

“In the present case, I do not find any such stipulation in the contract entered into between the parties whereunder the parties have specifically debarred appointment of a fresh arbitrator if the named arbitrator refuses to act and perform his function as arbitrator. In the absence of any specific condition debarring appointment of a fresh arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named arbitrator's refusal to perform his function.”

After the observing the above quoted, the Supreme Court assumed the jurisdiction and proceeded to appoint the same arbitrator as named in the clause as during the currency of proceedings before Supreme Court, the arbitrator filed an affidavit before the Supreme Court that he is ready and willing to conduct proceedings. The Supreme Court thus observed:

“Mr. Manabu Nonoguchi was appointed as an arbitrator by the parties. Normally, the parties are the best judge for deciding as to who will be the person capable and competent to adjudicate the disputes raised considering his experience, knowledge and competence in a particular trade or business to which the disputes relate and taking these factors into account the parties have appointed Mr. Manabu Nonoguchi as an Arbitrator, in case a

dispute arises between the parties. Unfortunately, for some reason, the named arbitrator refused to act as an arbitrator. However, during the pendency of these arbitration applications, I.A. supported by affidavit has been filed stating that the named arbitrator is ready and willing to take up the arbitration. Considering this fact, it would be appropriate if Mr. Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, Osaka 541-0041, Japan is appointed as an Arbitrator to adjudicate upon the disputes arising between the parties. I, accordingly, appoint him as Arbitrator. He shall take up the steps in accordance with law and shall make all possible endeavour to decide the disputes expeditiously. Arbitration Application Nos. 8 and 9 of 2005 stand disposed of.”

42. From the reading of the above said observations, few things become clear, first that the Supreme Court does assume jurisdiction in the cases of failure of the mandate of the arbitrator by taking necessary measures under Section 11 (6). Secondly, the Supreme Court in the above quoted case assumed jurisdiction on the basis of same interplay between Section 11(6), Section (11) (12) which speaks in unequivocal terms.

43. Therefore, it is only under Section 11 (6) that supreme court assumes jurisdiction which means that the appointment powers are exercised in the cases of substitution and there no departure or leniency in the cases of substitution as against the appointment. Thus, it cannot be said that the Supreme Court may not entertain the petition in such

cases. Rather, it is the only designated court or designated judge as laid down under Section 11(6) read with Section 11(12).

44. I do not find any substance in the submission of Mr. Kailash Vasudeva, learned Senior counsel that this court should appoint the substitute arbitrator as the legislative intent could not be to knock the doors of the Supreme Court for the purposes of substitution. I think the answer to this is that when the legislative provision itself is clear and unambiguous in express terms and it is so plain that no other meaning can be ascribed to the same, then it would be futile to speculate the legislative intent. Rather, I find that the intent as emerging from the clear terms of the Section is that international commercial arbitration is put on the higher pedestal wherein the Chief Justice of India or his designate is the appointing authority and will continue to monitor the said disputes as the same being a commercial dispute wherein the commercial matters or monies of international parties are at stake and which may require more circumspection, expertise and expeditious disposal of the arbitration leading to Supreme Court to appoint such arbitrators in its wisdom.

45. I am not examining the other submissions of the petitioner as

I have already arrived at the finding that this court is not competent court to entertain the present petition seeking appointment of substitute arbitrator in the case of international commercial arbitration.

46. Accordingly, the objection raised by the respondent is sustainable and is accepted. The petition is rejected being not maintainable.

47. No costs.

MANMOHAN SINGH, J.

NOVEMBER 03, 2011
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