

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

OP(C).No. 2333 of 2015 (O)

ARBITRATION CASE NO.1/2014 OF ARBITRAL TRIBUNAL

PETITIONER(S) :

1. T.P.DAISON, AGED 46 YEARS,
S/O. THATTIL UMBAVO POULOSE, NEAR SHEEBA THEATRE,
OLARIKKARA DESOM, ARANATTUKARA VILLAGE, THRISSUR TALUK,
P.O.PULLAZHI, THRISSUR-680 012.
2. JENCY DAISON, AGED 39 YEARS,
W/O.T.P.DAISON, NEAR SHEEBA THEATRE,
OLARIKKARA DESOM, ARANATTUKARA VILLAGE, THRISSUR TALUK,
P.O.PULLAZHI, THRISSUR-680 012.

BY SRI.T.KRISHNANUNNI (SENIOR ADVOCATE)
ADV. SRI.R.RAMADAS

RESPONDENT(S) :

1. VARGHESE JOSE T., AGED 47 YEARS,
S/O. T.V.JOSE, THANIKKAL CHALISSERY HOUSE, KARAMUKKU,
KANDASANKADAVU P.O., THRISSUR DISTRICT, PIN-680 613.
2. ROSE VARGHESE, AGED 44 YEARS,
W/O. VARGHESE JOSE T., THANIKKAL CHALISSERY HOUSE,
KARAMUKKU, KANDASANKADAVU P.O., THRISSUR DISTRICT,
PIN-680 613.
3. T.A.THOMACHAN,
CHARTERED ACCOUNTANT, SOUTHERN COMPLEX, VELIYANNOOR,
THRISSUR, PIN-680 021.

R1 TO R2 BY ADVS. SRI.N.M.MADHU
SMT.C.S.RAJANI
R3 BY ADV. SRI.BABU PAUL

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 17-11-2015,
THE COURT ON 07-12-2015 DELIVERED THE FOLLOWING:

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1: TRUE COPY OF THE AGREEMENT DATED 27/12/2012 ENTERED INTO BETWEEN PETITIONERS AND RESPONDENT 1 AND 2.**
- P2: THE TRUE COPY OF THE COMMUNICATION SENT BY THE 1ST PETITIONER TO THE 3RD RESPONDENT DATED 06/06/2014.**
- P3: TRUE COPY OF THE REMINDER SENT BY THE 1ST PETITIONER TO THE 3RD RESPONDENT ON 16/06/2014.**
- P4: TRUE COPY OF THE NOTICE TO PETITIONERS DATED 17/06/2014.**
- P5: A TRUE COPY OF FORM NO.ADT-I ISSUED BY THE NEW TRICHUR COMPANY PVT LTD, KANDASSANKADAVU, THRISSUR.**
- P6: TRUE COPY OF THE COMMUNICATION TO THE 3RD RESPONDENT DATED 14/08/2014.**
- P7: TRUE COPY OF THE COMMUNICATION DATED 11/02/2015.**
- P8: TRUE COPY OF THE ORDER OF THIS HON'BLE COURT IN W.P.(C).NO.9081/2015 DATED 17/09/2015.**
- P9: TRUE COPY OF THE ORDER PASSED BY THE 3RD RESPONDENT DATED 24/02/2015.**

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

K.ABRAHAM MATHEW J.

O.P(C).No.2333 of 2015

Dated this the 7th day of December, 2015

JUDGMENT

Petitioners are husband and wife. Respondents 1 and 2 also are husband and wife. All of them are partners of three firms. Disputes arose between the petitioners on the one side, and the respondents 1 and 2 on the other. The 3rd respondent Chartered Accountant, who was auditor of both parties, attempted to settle the disputes. It resulted in their executing Ext P1 agreement dated 27.12.2012, by which they appointed the third respondent their arbitrator to decide disputes that might arise between the parties as to the implementation of the agreement. There was an understanding that the third respondent would not continue to work as the auditor of both parties. Later, a dispute arose between the two parties. On 6.6.2014 the first petitioner sent Ext P2 letter to the third respondent requesting him to enter on arbitration. On 16.6.2014 the former sent Ext P3 reminder to him. By Ext P4 notice he informed both parties that the arbitration proceedings would be conducted on 19.7.2014. Thereafter, the petitioners learnt that the third respondent continued to work as the auditor of respondents 1 and 2. At the instance of the third respondent the other respondents filed O.S.No.172 of 2014 in Sub Court, Thrissur and O.S.No.4379 of 2014 in Munsiff Court, Thrissur, the subject matter of which was the dispute between the parties. The third respondent

is not impartial. He did not complete the arbitration proceedings in order to help the other respondents. So the petitioners sent him Ext P6 'written statement' on 14.8.2014 challenging his impartiality as provided in Section 13(2) of the Arbitration and Conciliation Act. There was no response. On the other hand, he issued a notice to the petitioners informing them that the arbitral proceedings would be held on 13.2.2015. The petitioners sent Ext P7 communication to him requesting him to take a decision on the 'statement' filed by them challenging him. As no decision was taken on the 'statement', the petitioners did not participate in the arbitration proceedings. But the third respondent proceeded with the arbitration. The petitioners filed WP(C) No.9081 of 2015 in this court in which the respondents raised a contention that the third respondent had already taken a decision on the written statement sent by the petitioners challenging his impartiality. The court directed the third respondent to issue a copy to the petitioners if such an order was passed. Thereafter, on 19.9.2015 the third respondent issued them Ext P9, which is said to be a copy of the order passed on 24.2.2015 to the effect that the third respondent refused to withdraw from the office of the arbitrator. The petitioners were not heard before the order was passed. In this Original Petition their prayer is to quash Ext P9 order and to issue a direction to the third respondent to consider and dispose of Ext P6 'written statement' filed by them challenging

him as arbitrator after giving them an opportunity to be heard.

2. Sri.N.M.Madhu, learned counsel for respondents 1 and 2 submits that the third respondent is only a private judge and he is not a tribunal within the meaning Article 227 of the Constitution of India and the Original Petition is not maintainable. On the other hand, Sri.T.Krishnanunni, learned senior counsel appearing for the petitioner submits that an arbitrator who is bound to act in accordance with the provisions of the Arbitration and Conciliation Act is a tribunal coming under the purview of Article 227.

3. The preliminary point arising for consideration is whether an arbitrator appointed by private parties is amenable to the supervisory jurisdiction of the High Court.

4. I shall first consider the decisions relied on by the learned counsel for respondents 1 and 2. In **Ace Pipeline Contracts Private Limited v. Bharat Petroleum Corporation Limited (AIR 2007 SC 1764)** the Supreme Court has made the following observation:

“Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent-BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under S.34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.”

In this case, the court did not consider whether an arbitrator appointed by parties to a dispute like the third respondent is a tribunal coming under the purview of Article 227. The question was an entirely different one. This judgment is of no assistance to take a decision in this case.

5. Another decision relied on by the learned counsel for respondents 1 and 2 is **V.V.S.Constructions, Engineering Contractors, Visakhapatnam v. IVRCL Infrastructure and Projects Ltd Hyderabad (AIR 2011 AP 136)**. That was a case in which one of the parties to the agreement invoked Section 11(6) of the Act to remove the sole arbitrator. He made a request to appoint a former High Court Judge to assume the office of the arbitrator. The learned Judge has observed :

“Thus it is clear that the challenge, if any, as to the competency of the arbitrator has to be decided by the arbitrator himself and if such challenge is not successful, the arbitral proceedings shall be continued before the same arbitrator and an award shall be passed and only thereafter the party challenging the arbitrator has to make an application for setting aside such an arbitral award in accordance with S.34.”

Here also the applicability of Article 227 of the constitution did not come up for consideration.

6. The last decision cited by the learned counsel is **State of Madhya Pradesh v. Vayam Technologies Ltd (AIR 2014 MP 88)**. This is only a case in which the High Court has just reiterated

the observation referred to above of the Supreme Court in **Ace Pipeline Contracts Private Limited (supra)**. Thus none of the above three decisions help to resolve the controversy in this case.

7. The first of the two decisions pressed into service by the petitioners' learned counsel is **In re Annamalai Mudaliar (AIR 1953 Madras 362)**. The award involved in that case was one passed by a deputy registrar of Co-operative Societies. "Article 227 covers only cases of tribunals discharging the same or analogous functions as are being discharged by courts" was one of the arguments raised in that case. The court held that it got "revisional jurisdiction under Article 227 by way of superintendence over the judicial work of a duly constituted tribunal like the deputy registrar under the Co-operative Societies Act". It appears that the arbitrator under the said Act was a statutory arbitrator. There is no dispute that a statutory arbitrator is amenable to the supervisory jurisdiction of the High Court.

8. The decision in **Unik Accurates Pvt Ltd v. Sumedha Fiscal Services Ltd (2000 (Suppl) Arb.LR 220 (Calcutta))** is the other decision relied on by the learned senior counsel. The question the High Court was called upon to answer was the same as the one in the case before this court. The learned Judge held that an arbitrator appointed by the parties and governed by the provisions of the Arbitration and Conciliation Act 1996 is a tribunal within the

meaning of Article 227 of the Constitution.

9. In **Bharat Bank Ltd.v. Employees of Bharat Bank (AIR 1950 SC 188)** a 5 judge bench of the apex court held that the condition precedent for bringing a tribunal within the ambit of Article 136 is that it should be constituted by the state. This was adopted by another 5 judge bench in **Durga Shankar Mehta v. Raghuraj Singh (AIR 1954 SC 520)** and followed by another 5 Judge bench in **Harinagar Sugar Mills Ltd V.Shyam Sunder Jhunjunwala (AIR 1961 SC 1669)**. The question was again considered by another 5 judge bench of the Supreme Court in **Jaswanth Sugar Mills Ltd, Meerut v. Lakshmi Chand & others(1963 SC 677)**. The court observed that the conciliation officer acting under clause 29 of the Order promulgated in 1954 under the UP Industrial Disputes Act 1947 had to act judicially in granting or refusing permission to alter the terms of employment of workmen at the instance of the employer, but even so he was not a tribunal because he was not invested with the judicial power of the state.

10. The question was again considered in detail by a 5 Judge bench in **Engineering Mazdoor Sabha and another v. Hind Cycles Ltd (AIR 1963 SC 874)**. The question the Supreme Court was called upon to answer in this case was whether an arbitrator to whom an industrial dispute is voluntarily referred under Section 10A of the Industrial Disputes Act, 1947 is a tribunal within the meaning

of Article 136(1) of the Constitution of India. The said provision ran as follows:

10A (1) Where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred under S.10 to a Labour Court or Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration and the reference shall be to such person or persons (including the presiding officer of a Labour Court or Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified in the arbitration agreement.

(2) An arbitration agreement referred to in sub section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

(3) A copy of the arbitration agreement shall be forwarded to the appropriate government and the conciliation officer and the appropriate Government shall, within fourteen days, from the date of the receipt of such copy, publish the same in the official Gazette.

(4) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

(5) Nothing in the Arbitration Act, 1940 shall apply to arbitrations under this section."

11. The apex court took notice of the decisions in **Bharath Bank Ltd., Delhi v. Employees of the Bharath Bank Ltd, Delhi (AIR 1950 SC 188)**, **Durga Shankar Mehta v. Raghuraj Singh (AIR 1954 SC 520)** and **Harinagar Sugar Mills Ltd V.Shyam Sunder Jhunjhunwala (AIR 1961 SC 1669)** and gave its seal of approval to the following test evolved by those decisions in these

words:

"The expression "tribunal" as used in Art.136 does not mean the same thing, as "court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the state and invested with judicial as distinguished from purely administrative or executive functions. Thus, there can be no doubt that the test which has to be applied in determining the character of an adjudicating body is whether the said body has been invested by the state with its inherent judicial power. This test implies that the adjudicating body should be constituted by the State and should be invested with the State's judicial power which it is authorised to exercise."

The court held:

"....apart from the importance of the trappings of a court, the basic and essential condition which makes an authority or a body a tribunal under Art.136 is that it should be constituted by the state and should be invested with the State's inherent judicial power."(emphasis supplied)

12. The meaning of the expression "trappings of a court" is given in Bharat Bank's case as follows:

"The procedural rules which regulate the proceedings before the tribunals and the powers conferred on them in dealing with matters brought before them.....".

13. The five judge bench has pointed out some of the attributes of a tribunal :

"They can compel witnesses to appear, they can administer oath, they are required to follow certain rules of procedure; the proceedings before them are required to comply with rules of natural justice, they may not be bound by the strict and technical rules of evidence but, nevertheless, they

must decide on evidence adduced before them; they may not be bound by other technical rules of law, but their decisions must, nevertheless, be consistent with the general principles of law”.

14. In the above case the Supreme Court examined the difference between a statutory arbitrator and a private arbitrator. In the case of the former the parties to the dispute are compelled to go to the person named as such by the statute. The court took the view that the arbitrator appointed under Section 10A of the Industrial Disputes Act is neither a statutory arbitrator because he is not appointed under the provisions of the Act, nor a private arbitrator because he is clothed with certain powers, his procedure is regulated by certain rules and the award pronounced by him is given by the statutory provisions a certain validity and binding character for a specified period; he may be said to be higher than that of a private arbitrator and lower than that of a tribunal. Thus according to the apex court there are classes of arbitrators viz statutory arbitrators, private arbitrators, and arbitrators whose status is higher than that of private arbitrators but lower than that of statutory arbitrators.

15. The five Judge bench held that the arbitrator appointed under Section 10A of the Industrial Disputes Act is not a tribunal within the meaning of Article 136 because he lacks the basic, the essential and the fundamental requisite in that behalf because he is not invested with the state's inherent judicial power, the reason for

which is that he is appointed by the parties and the power to decide the dispute between the parties who appoint him is derived by him from the agreement of the parties and from no other source.

The court added:

“The fact that his appointment once made by the parties is recognised by S.10A and after his appointment he is clothed with certain powers and has thus, no doubt, some of the trappings of a court, does not mean that the power of adjudication which he is exercising is derived from the state and so, the main test which this court has evolved in determining the question about the character of an adjudicating body is not satisfied. He is not a tribunal because the state has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties”.

16. In **A.C.Companies v. P.N.Sharma (AIR 1965 SC 1595)** the Supreme Court observed: “ The consideration about the presence of or some of the trappings of a court is not really decisive. Presence of some of the trappings may assist the determination of the question as to whether the power exercised by the authority which possessed the said trappings, is the judicial power of the state or not. The main and the basic test however is whether the adjudicating power which a particular authority is empowered to exercise has been conferred on it by a statute can be described as part of the state's inherent power exercising in discharging its judicial function”.

17. The conclusion one may reach on the basis of the test

evolved by the 5 Judge of the Supreme Court in **Bharat Bank's** case (supra), which was followed by another 5 Judge bench in **Durga Shankar Mehta's** case (supra) and approved by yet another 5 Judge bench in **Harinagar Sugar Mills Ltd** case (supra) and reiterated in **Indo China Steam Navigation Company's** case (supra) and **A.C.companies'** case (supra) is this:

An authority is a tribunal within the meaning of Article 136 of the Constitution only if

1) it has trappings of a court, and

2) it has been constituted by the state and invested with the state's judicial power.

These two are positive propositions.

An authority is not a tribunal

1) if its power to decide the dispute is derived from the agreement of the parties and not from the state

2) for the mere reason that its procedure is regulated by certain rules,

3) for the mere reason that the award pronounced by it has been given validity and binding character by statutory provisions.

These three are negative propositions.

18. In **Indo China Steam Navigation Company Ltd v. Jasjit Singh, Additional Collector of Customs, Calcutta & others (AIR 1964 SC 1140)** the Supreme Court-again a 5 Judge

bench - held that the presence of some of the trappings of a court may assist to determine whether the proceedings before authority in question are judicial or not, but the basic test is whether the authority in question has been constituted by the state and has been given a part of the state's inherent judicial powers.

19. Now the question is whether the above test laid down by the Supreme Court in deciding whether an authority is a tribunal within the meaning of Article 136 of Constitution is applicable to Article 227 of the Constitution. There cannot be any doubt about it. The Supreme Court in **Engineering Mazdoor Sabha's** case (supra) has observed:

“Like Article 136, Article 227 also refers to courts and tribunals and what we have stated about the character of the arbitrator appointed under Section 10A by reference to the requirement of Section 136 may prima facie applied to the requirements of Article 227”.

This has been reiterated in **A.C.Companies v. P.N.Sharma (AIR 1965 SC 1595)**, wherein it stated that the word tribunal carries the same meaning in both articles.

20. In **M/s.Unik Accurates Pvt Ltd.(supra)** the High Court of Calcutta took note of certain observations of his Lordship Justice Bachawat who wrote a separate judgement concurring with the view of the other four judges in **A.C.Companies'** case (supra). In his separate judgment the learned Judge expressed the opinion that an authority other than a court might be invested by a statute with

judicial power in widely different circumstances, which it would be impossible and indeed inadvisable to attempt to define exhaustively. "The proper thing is to examine each case as it arises and to ascertain whether the power vested in the authority can be truly described as judicial function or judicial power of the State". His lordship further observed that any outside authority empowered by state to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them satisfies the test of an authority vested with the judicial power of the state and may be regarded as tribunal and that the aforesaid test of a tribunal was not meant to be exhaustive and it might be that other bodies not satisfying those tests might also be tribunal within that Article. It cannot be denied that the decision in a case depend upon its own facts. But there cannot be any change in the principles evolved by a 5 Judge bench and approved and explained by several subsequent five Judge benches of the Supreme Court including **A.C.Companies'** case in which the above observation has been made. In **All Party Hill Leaders' Conference, Shillong v. W.A.Sangma and others (AIR 1977 SC 2155)** the Supreme court has said:

The basic principle laid down in the **Bharat Bank(AIR 1950 SC 188)** (supra) has not been departed from by this Court and has been reiterated in several later decisions (see **J.K.Iron and Steel Co.Ltd., Kanpur v. The Iron and Steel Mazdoor Union, Kanpur, (1955) 2 SCR**

1315: (AIR 1956 SC 231); M/s.Harinagar Sugar Mills Ltd v. Shyam Sundar Jhunjhunwala, (1962) 2 SCR 339:(AIR 1961 SC 1669); Jaswant Sugar Mills Ltd. Meerut v. Lakshmichand, 1963 Supp(1) SCR 242: (AIR) 1963 SC 677). The Engineering Mazdoor Sabha v. The Hind Cycles Ltd, Bombay, 1963 Supp(1) SCR 625; (AIR 1963 SC 874) and Associated Cement Companies Ltd., v. P.N.Sharma, (1965)2 SCR 366: (AIR 1965 SC 1595)).

From a conspectus of the above decisions it will be seen that several tests have been laid down by this court to determine whether a particular body or authority is a tribunal within the ambit of Art.136. The tests are not exhaustive in all cases. It is also well settled that all the tests laid down may not be present in a given case. While some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit of Art.136(1) as tribunal must be constituted by the state and invested with some function of judicial power of the state. This particular test is an unfailing one while some of the other tests may or may not be present at the same time."

The primary test is whether the tribunal was constituted by the state and vested with the powers of the state. The observation of Justice Bachawat in **A.C.Companies** case cannot be made basis to hold that the test evolved by the various decisions of the apex court referred to above is not applicable.

21. The learned Judge of the Calcutta High Court relied on the provisions in Sections 17, 36 and 37 of the Arbitration and Conciliation Act to hold that the arbitrator appointed under the Act is a tribunal within the meaning of Article 227 of the Constitution. Sections 17 and 37 (2)(b) are quoted below:

17. Interim measures ordered by arbitral tribunal-

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).

37(2) An appeal shall also lie to a court from an order of the tribunal

(a) xxxx xxxx xxxx

(b) granting or refusing to grant an interim measure under section 17.

22. Where an authority is not constituted by the state the other features of it which are similar to those of an authority constituted by the state and invested with its powers shall not lead to the conclusion that it is a tribunal within the ambit of the said Article. This has been explicitly stated by the Supreme Court in

Engineering Mazdoor Sabha's case:

xxxx xxxx xxxx xxxx

"There is no doubt that the appropriate Government plays some part in these arbitration proceedings-it publishes the agreement; it requires the arbitration award to be submitted to it; then it publishes the award; and in that sense, some of the features which characterise the proceedings before the Industrial Tribunal before an award is pronounced and which characterise the subsequent steps to be taken in respect of such an award, are common to the proceedings before the arbitrator and the award that he may make. But the similarity of these features cannot disguise the fact that the initial and the inherent power to adjudicate upon the dispute is derived by the arbitrator from the parties' agreement, whereas it is derived by the

Industrial Tribunal from the statutory provisions themselves”.

What the court has held is that steps to be taken subsequent to the constitution of the authority are not of significance if the authority is not constituted by the state.

23. In **A.C.Companies'** case (supra) His lordship Justice Bachawat who wrote the separate judgment and relied on by the Calcutta High Court has said in unequivocal terms:

“ In order to be a tribunal, it is essential that the power of adjudication is derived from a statute or a statutory rule. An authority or body deriving its power of adjudication from an agreement of the parties, such as a private arbitrator.....does not satisfy the test of a tribunal within Article 136”.

24. Section 17 does not confer any power of adjudication on the arbitrator; it only empowers the arbitrator to pass some orders after he has commenced his proceedings. It has nothing to do with the appointment of the arbitrator or his initial authority. Section 17 gives the arbitrator power to issue some orders and Section 37 gives the aggrieved party the right to challenge the order passed under Section 17. Both these sections have nothing to do with the appointment or initial authority of the arbitrator, but they deal with steps subsequent to his appointment, which according to the Supreme Court is irrelevant in deciding whether the authority is a tribunal within the meaning of Article 136 of the Constitution.

25. The learned Judge of the Calcutta High Court observed that the true nature of right of appeal is one of entering a superior tribunal and invoking its aid and interposition to redress the error of the tribunal below. The learned judge added: "Thus, once it is established that an arbitral tribunal is subject to the supervision of a principal civil court of original jurisdiction in a district or a High Court in exercise of ordinary original jurisdiction it will be preposterous to contend that such tribunal does not come within the preview of Article 227 of the Constitution". In none of the judgments referred to above, the Supreme Court has held that right of appeal is a test to determine whether an arbitrator is a tribunal within the meaning of Article 227 of the Constitution. Right of appeal has nothing to do with empowering of the arbitrator to adjudicate upon the dispute. Right of appeal before a civil court against the order of the arbitrator is not a step in the test evolved by the Supreme Court.

26. The test evolved by the Supreme Court may be applied to the case under consideration. Has the arbitral tribunal constituted under the Arbitration and Conciliation Act 1996 the trappings of a court. The Act contains no provision empowering the tribunal to compel witnesses to appear before it. If it wants to compel appearance of witnesses, it has to take the assistance of a court as provided in Section 27 of the Act. The tribunal is not empowered to

administer oath to witnesses. The Act does not require it to follow any rules of procedure. There is no provision to implement the orders passed under Section 17. Section 19 of the Act declares that the tribunal is not bound by the Code of Civil Procedure and that subject to Chapter 5 of the Act the parties are free to agree on the procedure to be followed by the tribunal in conducting its proceedings and in the absence of an agreement between the parties the tribunal may conduct the proceedings in the manner it considers appropriate. Without any hesitation it can be held that the arbitral tribunal constituted under the Arbitration and Conciliation Act 1996 has no attributes of a tribunal and hence has no trappings of a court.

27. It has already been seen that merely because the award pronounced by an arbitral tribunal has been given validity and binding character by statutory provisions it cannot be said to be a tribunal within the meaning of Article 227. So Section 36 of the Act which gives power to the district court to execute the award of arbitrator in the same manner as if it were a decree of the court is no ground to hold that the arbitrator is a tribunal within the meaning of Article 227.

28. What is the source from which the arbitral tribunal under the Arbitration and Conciliation Act 1996 gets authority to decide the dispute between the parties. No arbitral proceedings can be

initiated under the Act unless there is an agreement between the parties, which is clear from Section 7 of the Act. But, then, what is the effect of the power given to the Chief Justice or a person or an institution designated by him to appoint an arbitrator under the Act. Though under the circumstances mentioned in Section 11 the Chief Justice or any person or institution designated by him has been given the authority to appoint an arbitrator, it is only a procedure for appointment of arbitrator as seen from Section 11(2). The question relevant for the purpose is not what is the procedure to appoint an arbitrator, but what is the source of the power to appoint the arbitrator. It is nothing but the agreement between the parties. Chief Justice or the person or the institution designated by him cannot appoint an arbitrator in the absence of an arbitration agreement between the parties. The necessary conclusion is that an arbitral tribunal under the Arbitration and Conciliation Act 1996 is not one constituted by the state and has not been invested with its judicial power.

29. The following observation of the Supreme Court in **Indian Oil Corporation and others v. M/s.Raja Transport (P) Ltd (AIR 2009 SC (Supp)2145(2)** is of much significance in this context. "Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties".

I cannot help disagreeing with the conclusion reached by the

learned Judge of the High Court of Calcutta in **Unik Accurates Pvt Ltd v. Sumedha Fiscal Services Ltd** (supra). I hold that the arbitral tribunal constituted by the agreement of parties to a dispute and whose procedure and orders are governed by the provisions of the Arbitration and Conciliation Act 1996 is not a tribunal within the meaning of Article 227 of the Constitution of India. This petition is not maintainable.

In the result, this Original Petition is dismissed.

K.ABRAHAM MATHEW
JUDGE

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