

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.11.2015

+ **W.P.(C) 3013/2013**

STEEL AUTHORITY OF INDIA LIMITED

..... Petitioner

versus

INDIAN COUNCIL OF ARBITRATION & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner :Mr A.K. Ganguli, Senior Advocate with
Mr Sunil K. Jain, Mr Madhur Jain, Ms Reeta
Chaudhary and Mr Shantanu Jain.

For the Respondents :Mr A. Majumdar, Mr Arvind Kumar Gupta and
Mr Abhishek Goyal.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. This petition, under Article 226 of the Constitution of India, has been filed by Steel Authority of India Limited (hereafter 'SAIL'), *inter alia*, praying as under:-

- “(a) Issue a writ of certiorari or any other writ, direction or order quashing the appointment of Sole Arbitrator by Respondent no.1 that was not supplied to us.
- (b) Issue a writ of certiorari or any other writ, direction or order quashing the proceedings carried out by the learned Sole Arbitrator pursuant to the appointment by Respondent no.1”

2. The controversy involved in the present petition relates to the arbitration proceedings commenced by the Respondent No.2, Great Eastern Shipping Ltd. (hereafter GE Shipping) in relations to a Charter Party dated 19th December, 2007 entered into between the SAIL and GE Shipping whereby GE Shipping had agreed to carry a cargo of bulk coking coal from 1/2 safe berth(s) Haypoint, Australia to 1/2 safe berth(s), Visakhapatnam/Paradip/Haldia, India. Disputes arose between SAIL and GE Shipping in relation to the aforesaid Charter Party and that led GE Shipping to invoke the alternate dispute resolution mechanism of arbitration in terms of the Charter Party. GE Shipping made claims for freight, demurrage and interest amounting to an aggregate sum of Rs.2,33,11,846.22 as on 30.06.2012, which were rejected by the Arbitral Tribunal. Aggrieved by the same, GE Shipping filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act') before this court. GE Shipping prevailed in the said petition and the arbitration award rejecting the claims made by GE Shipping was set aside. In the circumstances, GE Shipping has once again initiated arbitration proceedings. According to SAIL the Arbitration proceedings are not

maintainable in view of the disputes having been subject matter of the earlier arbitration proceedings that culminated in an arbitration award. SAIL also assails the appointment of Arbitrator by respondent no. 1, Indian Council of Arbitration (hereafter 'ICA'), which SAIL contends as being contrary to the provisions of Section 11 of the Act.

3. In the aforesaid circumstances, the principal questions to be addressed in the present petition are:-

- (1) whether in the facts and circumstances any interference with the arbitration proceedings pending between GE Shipping and SAIL is warranted by this court in proceedings under Article 226 of the Constitution of India;
- (2) whether the arbitration proceedings initiated by GE Shipping are maintainable, given that the proceedings are in respect of disputes that have been the subject matter of an earlier arbitration award, which was set aside under Section 34 of the Act; and
- (3) whether the appointment of Arbitrators to the Arbitral Tribunal by ICA is illegal and contrary to the provisions of Section 11 of the Act.

4. The controversy involved in the present petition arises in the backdrop of the following facts:-

5. GE Shipping is, *inter alia*, engaged in the business of operating vessels, which are let out for carriage of goods by sea. At the relevant time, GE Shipping was the owner of a vessel, M.V. Jag Riddhi, and it entered into a Charter Party with SAIL on 19th December, 2007 whereby GE Shipping undertook to transport 47000 MTs of (5% more or less at the option of GE Shipping) of coking coal in M.V. Jag Riddhi from Haypoint Australia to 1/2 safe Berth(s) Visakhapatnam/Paradip/Haldia. M.V. Jag Riddhi was loaded with a cargo of 47,102 MTs at Haypoint on 18th January, 2008. The vessel arrived at Visakhapatnam and discharged 24,938 MTs of its cargo and, thereafter, proceeded to the Port of Haldia where the balance cargo was discharged. The discharge was completed on 20.02.2008.

6. GE Shipping had issued a Notice of Readiness (hereafter the 'NOR') at 9.30 hours on 05.02.2008 for discharge of cargo at Vizag. SAIL disputed the validity of the said NOR as, according to SAIL, all four hooks were not ready in every respect when the NOR was issued. SAIL claimed that the cargo in hatch-I and hatch-II was not accessible to SAIL at the port of

discharge at the material time and the NOR could only be accepted at 14.30 hours on 12.02.2008.

7. In view of the disputes between the parties, GE Shipping invoked the arbitration clause. GE Shipping nominated Captain S. N. Berry as an Arbitrator and SAIL nominated Shri R. S. Saran as an Arbitrator. The said Arbitrators nominated by the said parties jointly nominated Shri H. N. Singh as the 3rd Arbitrator. The Arbitral Tribunal so constituted considered GE's claim which included a claim of Rs.1,23,28,252.20 as disport demurrage and a sum of Rs.1,04,87,542.91 as balance freight. The Tribunal made an award dated 07.05.2010, *inter alia*, holding that the vessel M.V. Jag Riddhi was not absolutely ready when the NOR was served by GE Shipping and, therefore, the NOR was invalid; the Tribunal concluded that GE Shipping's claim for demurrage and balance freight did not survive.

8. Aggrieved by the rejection of its claim, GE Shipping petitioned this Court under Section 34 of the Act being OMP No.582/2010. The said petition was allowed and this Court, by a judgment dated 09.05.2012, *inter alia*, held that the Tribunal had erred in concluding that the NOR was not

valid. This Court, further held that the Tribunal's conclusion that when the NOR was issued the vessel was not ready in all respects, was not based on any evidence but on a conjecture and, therefore, suffered from a patent illegality. In view of the aforesaid, this Court further held that the Tribunal's rejection of GE's claim for demurrage and balance freight could not be sustained in law. Accordingly, the Arbitral award dated 7.10.2015 was set aside. SAIL was also imposed with costs of Rs.20,000/-.

9. Thereafter, GE Shipping sent a communication dated 20th July, 2012 (through its Advocates) to the Secretary of ICA, *inter alia*, stating that disputes had arisen between GE Shipping and SAIL and invoking the arbitration as contemplated under clause 8 of the Maritime Arbitration Rules of ICA. GE Shipping also referred to Clause 57 of the Charter party, which expressly provided that disputes between the contracting parties would be settled under the provisions of the Act and under the Maritime Arbitration Rules of ICA. In terms of the Maritime Arbitration Rules of ICA, GE Shipping enclosed its statement of claims and also intimated the name of one Mr V.K. Gupta as an Arbitrator.

10. Pursuant to the relevant Rules, ICA sent a communication dated 16th August, 2012, *inter alia*, calling upon SAIL to name its nominee or arbitrator from the Maritime Panel of Arbitrators within a period of 30 days, i.e., up to 16th September, 2012, failing which SAIL's nominee arbitrator would be appointed by Maritime Arbitration Committee under Rule 10(3)(b) of the Maritime Arbitration Rules of ICA. SAIL was also called upon to file a response to the claims made by GE Shipping and pay the requisite cost.

11. In response to the aforesaid communication dated 16th August, 2012, SAIL addressed a letter dated 5th September, 2012 seeking extension of time till 29th September, 2012 for submission of their "*Defence Statement, claim, name of the arbitrator and arbitration fee*". However, SAIL neither named its nominee arbitrator nor paid the requisite costs; instead, SAIL sent a communication on 20th September, 2012 via e-mail, *inter alia*, contending that since ICA had entertained GE Shipping's applications for an arbitration in the first instance, it had exhausted "*its forum and procedure as per Rules in respect of the same dispute arising out of same contract and, therefore has become functious officio*". SAIL asserted that *de novo* arbitration was not permissible and further requested ICA not to entertain GE's application.

12. A number of communications were exchanged between GE Shipping, ICA and SAIL and it is not necessary to advert to the same. Suffice it to say that ICA repeatedly called upon SAIL to pay its cost for arbitration, however, SAIL continued to canvas its view that the arbitration procedure with respect to the disputes raised by GE Shipping stood exhausted since and steadfastly declined to participate in the procedure. On 12th November, 2012 SAIL sent a communication once again reiterating that the role of ICA had come to an end and SAIL was not in a position to participate in any such arbitration procedure or to pay the cost demanded. ICA, on the other hand, expressed its view that the controversy being raised could not be decided by ICA and the same would have to be considered by the Arbitral Tribunal and repeatedly called upon SAIL to co-operate in resolution of the disputes through arbitration.

13. On 20th August, 2012, ICA sent a communication granting SAIL a last and final opportunity for compliance with their directions by 7th January, 2012, failing which ICA would have no other option but to proceed with the matter without any further reference to SAIL.

14. It appears that in a telephonic conversation on 20th January, 2013, one Mr S.B. Mathur of SAIL requested ICA to grant further one weeks' time to clear the arbitral costs and to nominate its arbitrator. Referring to the said conversation, ICA sent an email on 29th January, 2013 mentioning that SAIL had been granted extension on at least six occasions to comply with the directions to deposit arbitral cost and select its nominee arbitrator but had failed to do so; nonetheless, ICA was granting further one weeks' time till 6th February, 2013 for payment of a sum of Rs.1,79,776/- towards its share of arbitration costs and expenses as well as time till 11th February, 2013 for forwarding the name of SAIL's nominee arbitrator.

15. SAIL failed to avail of the opportunities granted by ICA and neither paid the cost as required nor named its nominee arbitrator. GE Shipping, on the other hand, requested ICA to exercise its discretion for appointing a sole arbitrator. However, the said request was not exceeded to.

16. By a communication dated 9th April, 2013, ICA informed SAIL as to the constitution of the arbitral tribunal. ICA had appointed one Mr. Gajendra Singh Sahni as an arbitrator on behalf of SAIL and subsequently the arbitrators had appointed Sh. Ashok Sharma as a presiding arbitrator. It

is in the aforesaid background that SAIL has approached this Court by filing the present petition.

Submissions

17. At the outset, the petitioner was called upon to make submissions regarding the maintainability of the present petition. It was pointed out that the scope of interference in arbitration proceedings was limited in view of the provisions of Section 5 of the Act. Further, it appeared that ICA was not acting in the realm of public law as it was not performing any public functions while appointing an arbitrator in terms of the agreement entered into between the parties.

18. Mr A.K. Ganguli, learned senior counsel appearing for the petitioner earnestly submitted that the present petition was maintainable. He contended that ICA was performing a quasi judicial function and, therefore, was subject to supervisory jurisdiction of the High Court under Article 226 read with Article 227 of the Constitution of India. He submitted that the ICA had usurped the judicial powers conferred on the Chief Justice and/or his nominees under Section 11(6) of the Act, which he contended was patently illegal and, thus, ICA's actions were amenable to jurisdiction

under Article 226 read with Article 227 of the Constitution of India. He referred to the decisions of the Supreme Court in ***U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey***: (1999) 1 SCC 741, ***Jai Singh v. MCD***: (2010) 9 SCC 385 and ***T.C.Basappa v. T. Nagappa***: (1955) 1 SCR 250 in support of his contention that powers conferred under Article 32 and Article 226 of the Constitution of India were very wide and according to Mr Ganguli, the same would extend to judicial review of the powers sought to be exercised by ICA.

19. Mr Ganguli submitted that the ICA's action of appointing an arbitrator was wholly without jurisdiction and amounted to usurpation of powers conferred on the Chief Justice under Section 11(6) of the Act. He submitted that ICA had construed the inaction on the part of SAIL 'to act as required' under the appointing procedure and in this eventuality the only recourse open to GE Shipping was to approach the Court under Section 11(6) of the Act. He referred to the decision of the Supreme Court in ***SBP. & Company v. Patel Engineering Ltd. &Anr***: (2005) 8 SCC 618 and contended that power exercised by the Chief Justice of High Court or the Chief Justice of India, under Section 11(6) of the Act was not an administrative power but a judicial power. He argued that in view of this

settled law, such power could not be exercised by ICA. He further contended that power under Section 11(6) of the Act, being a judicial power could only be delegated to a Judge of the concerned Court and could not be exercised by any other institution that did not exercise the judicial powers of the State.

20. Mr Ganguli next contended that the Act does not contemplate a *de novo* arbitration with respect to the same dispute. He submitted that the arbitration agreement insofar as it relates to the claims being agitated by GE Shipping, stood exhausted as an Arbitral Tribunal had already considered the said disputes. He submitted that a *de novo* arbitration with respect to the same disputes was not contemplated under the Act and, therefore, the arbitration proceedings initiated by the respondents was illegal and outside the provisions of the Act.

21. Mr Ganguli, thereafter, submitted that the principle of *res judicata* would apply to arbitration proceedings. He referred to the decision of the Supreme Court in **K.V. George, Secy. To Govt., Water and Power Deptt.:** (1989) 4 SCC 595 in support of his contention that the principle of *res*

judicata would also apply to the arbitration proceedings and submitted that the claims made by GE Shipping were barred by principle of *res judicata*.

22. Mr Ganguli next contended that Section 34 of the Act also contemplated an order whereby the Court would remand the disputes to the Arbitral Tribunal. He submitted that in the present case although GE Shipping had succeeded in its petition under Section 34 of the Act, the Court had merely set aside the arbitral award and not remanded the matter. He submitted that since this decision had become final, therefore, it was not open for GE Shipping to re-agitate the said issue. He referred to the decision of a Division Bench of this Court in **National Highways Authority of India v. ITD Cementation India Ltd.**: 2007(4) Arb. LR 555 (Delhi) whereby a Division Bench of this Court had remitted the disputes to the arbitrator on the issue of quantification of the amount and further directed that the parties would be afforded an opportunity to adduce evidence on the question of quantification of the amount before making a fresh award. Mr Ganguli also drew attention of this Court to another decision of a Division Bench of this Court in **BSNL v. Canara Bank**: 169 (2010) DLT 253 (DB) wherein this Court had referred to the decision in **Vindhya Tele Links Ltd. v. Bharat Sanchar Nigam Ltd.**: FAO(OS) 433/2006 whereby this Court

had rejected the contention that the power to remit the disputes to the arbitrator was foreign to the Act. Mr Ganguli contended that once it was established that this Court had the power to remit the disputes to the arbitrator under Section 34 of the Act and as the same has not been done, the disputes could not be re-agitated before the Arbitral Tribunal.

23. The learned counsel appearing for GE Shipping submitted that the present petition was not maintainable as ICA was not 'State' within the meaning of Article 12 of the Constitution of India. He submitted that the Board of Members of ICA are private bodies and persons and do not perform any judicial or quasi judicial function. He further submitted that ICA acts only subject to the agreement between the parties and does not determine any question which affects the rights of the parties. He submitted that the present petition was not maintainable as the action of ICA in appointing an arbitrator in terms of the agreement between the parties was not amenable to judicial review under Article 226 of the Constitution of India. He also contended that SAIL had an alternative remedy under Section 16 of the Act.

24. The learned counsel further drew the attention of this Court to a letter dated 05.09.2012 whereby SAIL had sought further time to appoint its nominee arbitrator. He submitted that this clearly indicated that initially SAIL had not objected to the arbitration initiated by GE Shipping but had accepted the same. The objections raised by SAIL subsequently, were an afterthought and had been raised only with a view to delay the proceedings.

25. The learned counsel also referred to the decision of the Supreme Court in **SBP & Company v. Patel Engineering Ltd. & Anr.:** (2005) 8 SCC 618 and contended that a writ petition challenging procedural orders issued in arbitration proceedings was not maintainable.

26. The learned counsel for the petitioner also countered the submissions made on behalf of SAIL regarding merits of the case. He submitted that in terms of clause 57 of the Charter Party, SAIL and GE Shipping had agreed for resolution of disputes by arbitration governed by the procedure of ICA. He submitted that Rule 10 of Maritime Rules of ICA provided for the procedure for appointment of an Arbitral Tribunal and the same was in accordance with Section 11(2) read with Section 11(6) of the Act. He referred to the decision of the Supreme Court in **Iron and Steel Company**

Ltd. v. M/s Tiwari Road Lines: AIR 2007 SC 2064 and *Standard Corrosion Controls Pvt. Ltd. v. Sarku Engineering Services SDN BHD*: (2009) 1 SCC 303 in support of his contention that an arbitrator has to be appointed in accordance with the procedure as agreed between the parties.

27. The learned counsel further contended that the principles of *res judicata* were not applicable as the award rejecting the claims made by GE Shipping had been set aside and, thus, the disputes between the parties had not been finally adjudicated. The learned counsel also joined issues on whether the Court had the power to remit an award under Section 34 of the Act. He submitted that once the Court has decided to set aside the award under Section 34 of the Act, it would have no power to pass further directions to remand the matter to the Arbitral Tribunal. He submitted that the decisions in the case of *IVRCL Infrastructures & Projects Ltd (supra)* and *Videsh Sanchar Nigam Ltd (supra)* could not be considered as authorities for the proposition that once an award had been set aside, the arbitration agreement would stand exhausted in respect of the disputes, which were subject matter of the award. He submitted that the same would be contrary to the decision of the Supreme Court in *Mcdermott*

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Reasons and Conclusion

28. At the outset, it is relevant to refer to the arbitration clause in the Charter Party - clause 57, which reads as under:-

“57. Arbitration Clause:

All disputes arising under this Charter Party shall be settled in India in accordance with the provisions of the Arbitration & Conciliation Act, 1996, (No. 26 of 1996) or any further amendments thereof and under the Maritime Arbitration Rules of the Indian Council of Arbitration. The Arbitrators to be appointed from out of the Maritime Panel of Arbitrators of the Indian Council of Arbitration. The Arbitrators shall be commercial men.”

29. It is not disputed that SAIL and GE Shipping had agreed that all disputes arising under the Charter Party would be settled in accordance with the provisions of the Act and under the Maritime Arbitration Rules of ICA. Rule 10 of the Maritime Arbitration Rules provides for the nomination/appointment of arbitrators. Sub Rule 3 of Rule 10 is relevant and reads as under:-

"3) The number of arbitrators to hear dispute under these rules shall be either one or three where the parties fail to agree on a sole Arbitrator, then the three Arbitrators shall be determined as under:

- a) Each party shall appoint one Arbitrator.
- b) The party invoking the arbitration agreement for settlement of the dispute shall appoint an arbitrator from out of ICA maritime Panel of Arbitrators and give intimation and notice of the appointment to the other party, under intimation to the Secretary of the Council, calling upon the other party to appoint the second Arbitrator within 30 days from the receipt of the request to do so. If the other party fails to appoint the second Arbitrator within 30 days or within the extended time agreed between the parties, the second Arbitrator will be appointed by the Maritime Arbitration Committee of the ICA.
- c) The two Arbitrators, as appointed aforesaid shall appoint within a period of 30 days, the third Arbitrator who shall act as the Presiding Arbitrator. If the two Arbitrators, appointed by the parties, fail to agree on the third Arbitrator, the third Presiding Arbitrator shall be appointed by the Maritime Arbitration Committee of ICA."

30. Section 11(2) of the Act expressly provides that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Admittedly, in the present case, the parties had agreed on the procedure as per Maritime Rules of ICA. In terms of Rule 10 of the said Rules, a party invoking the arbitration is required to appoint an arbitrator out of the ICA Maritime Panel of Arbitrators and give intimation and notice of such

appointment to the other party calling upon the other party to appoint the second arbitrator within a period of 30 days. It is also provided that if the other party fails to appoint second arbitrator within a period of 30 days, the Maritime Arbitration Committee of ICA will appoint the second arbitrator. Admittedly, in the present case, GE Shipping had complied with the said procedure and had called upon SAIL to appoint the second arbitrator. It also cannot be disputed that SAIL had been given repeated opportunities to appoint its nominee arbitrator but as it had failed to do so. Thus, in terms of the clause 57 of the Charter Party read with the Maritime Rules of ICA, the Maritime Arbitration Committee of ICA had appointed the second arbitrator in terms of the procedure agreed to between the parties. In the circumstances it cannot be disputed that the Arbitral Tribunal had been constituted in terms of the procedure agreed to between the parties.

31. The contention that ICA had usurped the powers of the Chief Justice under Section 11(6) of the Act is bereft of any merit and contrary to the plain language of Section 11(6) of the Act. Section 11(6) of the Act reads as under:-

"11. Appointment of arbitrators.-

(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 to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

32. A plain reading of Section 11(6) of the Act indicates that a request for appointment of an arbitrator may be made where an Arbitral Tribunal has not been constituted on account of failure on the part of the concerned party/person to act in terms of the appointment procedure as agreed to by the parties. Clause (c) expressly contemplates a situation where a person fails to perform any function entrusted under the appointment procedure agreed to between the parties.

33. In the present case, the procedure for appointment of an Arbitral Tribunal as agreed to between SAIL and GE Shipping, contemplated the Maritime Arbitration Committee of ICA to appoint the second arbitrator. Accordingly, ICA appointed the second arbitrator. Therefore, there was no occasion for GE Shipping to approach the Court under Section 11(6) of the Act. Clause (a), (b) & (c) of Section 11(6) of the Act contemplates

situations where Arbitral Tribunal cannot be constituted on account of failure on the part of a party/ person to act in accordance with the appointing procedure. Section 11(6) of the Act would have no application where an Arbitral Tribunal has been constituted under a procedure agreed to between the parties.

34. The petitioner's contention that ICA has usurped a judicial function, which is required to be interfered with under Article 227 or 226 of the Constitution, is unmerited. Appointment of an arbitrator in terms of the agreed procedure is not a judicial function. ICA had merely acted in terms of the contract between parties and did not perform any adjudicatory function. As explained hereinabove, request under Section 11(6) of the Act could be made by a party only in cases where the Arbitral Tribunal has not been constituted for the reasons as stated in clauses (a), (b) and (c) of Section 11(6) of the Act. In the present case, the occasion for GE Shipping to make a request under section 11(6) of the Act did not arise as the Arbitral Tribunal had been constituted in terms of the procedure agreed by SAIL and GE Shipping.

35. The Contention that ICA exercises quasi judicial powers which are subject to supervisory jurisdiction of this Court under Article 226/227 of the Constitution of India is also wholly unfounded and without any merit. The functions performed by ICA are in terms of agreement between the parties and such functions are in the realm of contract between the parties and cannot be termed as judicial or quasi judicial function. ICA has acted in terms of the agreement between SAIL and GE Shipping and its decision to appoint the second arbitrator does not determine the rights of either parties; such decision does not have any trappings of a judicial function.

36. The action of ICA is not in the realm of public law; the action of appointment of an arbitrator by ICA was not in discharge of public duties or any public function. Such action is purely in terms of the contractual agreement between the parties and no interference under Article 226/227 of the Constitution is called for.

37. The decisions of the Supreme Court in ***U.P. State Coop. Land Development Bank Ltd. (supra)***, ***Jai Singh v. MCD (supra)*** and ***T.C. Basappa (supra)*** are inapplicable to the facts of the present case. In ***Jai Singh v. MCD (supra)***, the Supreme Court considered a challenge to the

exercise of jurisdiction by the High Court in upsetting concurrent findings of the Additional Rent Controller and the Additional Rent Control Tribunal. In the facts of that case the Supreme Court held that the High Court's exercise was not proper. Clearly, the *ratio decidendi* of the said case has no application in the facts of the present case. In ***T.C.Basappa*** (*supra*), the Constitution bench was concerned with a challenge to the decision of a Division bench of High Court of Mysore, whereby the order of Election Tribunal, Shimoga was quashed. Indisputably, the election tribunal exercised judicial functions and it is in that context that the Supreme Court held that the High Court would have the power of review. But, in the facts of that case held that the decision of the High Court was erroneous. In the present case, the premise that ICA exercised judicial functions is fundamentally flawed and the petitioner can draw no assistance from the decision in ***T.C. Basappa*** (*supra*)

38. In ***U.P. State Coop. Land Development Bank Ltd.*** (*supra*), the controversy involved related to disciplinary proceedings initiated by the appellant therein against its employee, who was working as a Branch Accountant. The Allahabad High Court held the appellant to be an "Authority" and an instrumentality of the State and held that the appellant

was amenable to writ jurisdiction and set aside the dismissal orders passed against the employee. Although the Supreme Court allowed the appeals and set aside the judgment of the Allahabad High Court holding that the dismissal of the respondents therein was not illegal, it upheld the view that the appellant therein was an authority controlled by the State Government and disciplinary proceedings against the employees was statutory in nature and, therefore, a writ petition was maintainable against the appellant. The Supreme Court held that the control of the State Government on the appellant was all pervasive and its employees had a statutory protection. In the present case, the petitioner has not produced any material, which could persuade this Court to conclude that ICA is 'State' within the meaning of Article 12 of the Constitution of India.

39. It is also important to note that ICA's action that is impugned in the present petition - appointment of an arbitrator - is not in performance of a public function or a statutory duty but under a procedure as contractually agreed to between the parties. Thus, even if it was assumed that ICA was a State its actions in the private law domain could not be subject to judicial review unless it was shown that such actions offend any of the constitutional guarantees. The petitioner has made out no such case.

40. More importantly, the statutory scheme of the Act also does not permit any interference in arbitration proceedings. Section 5 of the Act expressly provides that no judicial authority would intervene except as provided that “notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part”

41. The object of the Act was to provide an alternative dispute resolution mechanism for expeditious resolution of disputes and, thus, the Act does not permit recourse to Courts at multiple stages. The Supreme Court in **SBP. & Company** (*supra*) had held that approach of the High Courts to intervene in the orders passed by the Tribunal under Article 226 or 227 of the Constitution was not warranted as an aggrieved party would have an avenue to ventilate its grievance against any award that may be passed. The relevant extract from the said decision is quoted below:-

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including

any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

42. Although aforesaid decision referred to orders passed by an Arbitral Tribunal, the principles enunciated by the Court would be equally applicable to any action with regard to the appointment of Arbitrators/Constitution of the Arbitral Tribunal. In the event that a party seeks to

challenge the constitution of the Arbitral Tribunal – such as in this case – it would be open for the party to raise this dispute before the Arbitral Tribunal under Section 16 of the Act.

43. Thus, in my view, the present petition is not maintainable and is liable to be rejected.

44. In view of the aforesaid decision, it is not necessary to consider the other issues that were raised on behalf of the SAIL. However, since the same were pressed by Mr Ganguli with some earnestness, I deem it appropriate to briefly consider the same.

45. In my view, the contention that the arbitration proceedings initiated by GE Shipping are barred by principles of *res judicata* is also flawed. Admittedly, the award declining the claims of GE Shipping was set aside by this Court under Section 34 of the Act. The finding of the Arbitral Tribunal that lay time did not commence till 12th February, 2008 - which was the basis for rejecting GE Shipping's claims for demurrages and balance freight - was held by this Court as unsustainable in law. This Court had also held that the award passed by the Tribunal was passed on misreading of documents and, therefore, rejection of GE Shipping's claim

could not be sustained in law. This Court also found that the Tribunal's finding that vessel in question was not ready in all respects at the time when the NOR was issued, was not based on any evidence but on a conjecture and, thus, suffered from a patent irregularity. In view of the aforesaid findings, GE Shipping's claims still survived and could not be stated to have been finally decided. In the circumstances, it is difficult to understand as to how principles of *res judicata* could possibly apply.

46. The petitioner's contention that since the disputes had been subject matter of an arbitration award, the arbitration agreement stood exhausted also cannot be accepted. An arbitration agreement merely provides for an alternative forum for resolution of disputes. Thus, all disputes that the parties agree to resolve by arbitration are to be resolved by arbitration. Thus, as long as the disputes that are covered under the arbitration agreement remain unresolved, the parties would be free to take recourse to arbitration for resolution of the said disputes and the other party would be contractually bound to submit the disputes to arbitration. Plainly, the claims made by GE Shipping arise under the Charter party and thus are covered under clause 57 of the Charter party, that is, the arbitration agreement.

47. It was also earnestly argued that since this Court had not remanded the disputes to arbitration while setting aside the arbitration award under Section 34 of the Act, *de novo* arbitration was not permissible. This contention is also not sustainable in law. The question whether the Court has the power to remand the disputes to arbitration under Section 34 of the Act has been subject matter of several decisions by this Court. There is apparently, a conflict in the views expressed in *National Highways Authority of India* (*supra*) and *Vindhya Tele Links Ltd.* (*supra*) and in the later decisions of this court. However, a Division Bench of this Court *Puri Construction Pvt. Ltd. & Ors. V. Larsen & Toubro Ltd. & Anr.* : **FAO(OS) 23/2009** had noticed several conflicting decisions with regard to the aforesaid issue and following the principle laid down by the Supreme Court in *Mcdermott International Inc.* (*supra*) held that “*the power to modify, vary or remit the award does not exist under Section 34 of the Act*”. Thus, it is now no longer open for the petitioner to contend that since this Court did not remit the award under Section 34 of the Act, the disputes therein could not be referred to a *de novo* arbitration.

48. Notwithstanding the issue whether a Court has the power to remit the award under Section 34 of the Act, the fact is that this Court had by a

judgment dated 9th May, 2012 set aside the award rejecting GE Shipping's claim but had not remitted the matter. Thus the claims of GE Shipping remained to be finally adjudicated. Admittedly, the parties had agreed to resolve the disputes arising out of the Charter Party by arbitration. Thus, it would not be open for SAIL to avoid resolution of such disputes through arbitration. At this stage, it is necessary to refer to the following observations of the Supreme Court in *Mcdermott International Inc.* (*supra*) whereby the Supreme Court had held as under:-

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

49. A plain reading of the aforesaid passage also clearly indicates that once an award has been set aside, the parties would be free to begin the arbitration once again. Thus, in my view, the contention that GE Shipping could not initiate the arbitration after the decision of this Court under

Section 34 of the Act, cannot be accepted. Mr Ganguli sought to suggest that the observation made by Supreme Court in *Mcdermott International Inc.* (*supra*) was a “stray observation” and was not determinative of the issue at hand. This contention is also unacceptable. First and foremost, the observations of the Supreme Court are relevant to the decision rendered by it; secondly, in *Puri Construction Pvt. Ltd.* (*supra*) a division bench of this Court followed the principles laid down by the Supreme Court in *Mcdermott International Inc.* (*supra*) while interpreting the provisions of section 34 of the Act.

50. Before concluding, it is necessary to observe that there is considerable merit in the respondent’s contention that the present proceedings were initiated only to obstruct and delay the final resolution of the petitioner’s claims. Although SAIL had initially sought time to appoint an arbitrator but it has subsequently endeavored to obstruct the proceedings. In my view, the conduct of SAIL has been less than fair; it has sought to delay the adjudication of the claims made by GE Shipping and resile from its contractual agreement for resolution of disputes through arbitration. In my view, the present proceedings are an abuse of process of this court.

51. Accordingly, the petition is dismissed with the cost of Rs.75,000/-.

SAIL shall pay this cost to GE Shipping within four weeks from date.

VIBHU BAKHRU, J

NOVEMBER 16, 2015

MK/RK

