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**HIGH COURT OF CHHATTISGARH, BILASPUR****Civil Revision No. 432 of 2002**

M/s Prem Prakash through its Partner Prem Prakash  
Wasan, Wasan Chawl, Korba, Tahsil & District Korba (C.G.)

**---- Applicant****Versus**

General Manager, M/s Bharat Aluminium Company Limited  
Balconagar, Tahsil & District Korba (Chhattisgarh)

**---- Non-applicant**


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For Applicant : Mr. Anand Mohan Tiwari, Advocate.

For Non-applicant: Mr. Sachin Singh Rajput, Advocate.

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**Hon'ble Shri Justice Sanjay K. Agrawal****Order On Board****28/09/2016**

(1) Impugning legality, validity and correctness of the order dated 02.04.2002 passed by the Additional District Judge, Korba in Civil Suit No.11-A/1998 rejecting the applicant's application under Section 8(1)(a) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996'), the applicant herein has filed this revision under Section 115 of the Code of Civil Procedure (henceforth 'CPC').

(2) In order to judge the correctness of the plea raised at the bar, it would be necessary to notice the following essential facts as under:-

(2.1) The applicant's tender was accepted by the non-applicant/Balco for construction of 104 Nos. Type-A Quarters of G.B.P.Paikmal; and the work order was issued on 1.5.1984 and the estimated value of the work awarded was Rs. 53,42,732.00 but the work could not be completed and some dispute arose between the parties, pursuant to which on 3.7.1996 vide Ex. D-30, the applicant made an application before the non-applicant for appointment of arbitrator to settle the dispute by arbitration.

(2.2) The non-applicant/Balco, by its letter dated 2.8.1996 vide Ex. D-39 rejected the same holding that contract is void under Section 20 of the Indian Contract Act, therefore, arbitration agreement has become inoperative.

(2.3) Thereafter, on 10.03.1998 the applicant filed an application for appointment of Arbitrator before the Additional District Judge, Korba under Section 8(1)(a) of the Act, 1996 claiming that Arbitrator be appointed as provided in the arbitration agreement to adjudicate the disputes arose between the applicant & non-applicant, which was opposed by the non-applicant/Balco by filing written statement.

(2.4) The Additional District Judge, Korba, by its impugned order dated 2.4.2002, rejected the application holding that original arbitration agreement has not been filed and the claim of the

applicant has become barred by limitation.

(3) Feeling aggrieved & dissatisfied with the order impugned dated 2.4.2002, instant revision under Section 115 of the CPC has been filed by the applicant challenging the order as unsustainable in law.

(4) Shri Anand Mohan Tiwari, learned counsel appearing for the applicant would submit that in-fact the application was filed under Section 8(1)(a) of the Arbitration Act, 1940 (henceforth 'Act, 1940') and it has wrongly been styled to have been filed under Section 8(1)(a) of the Act, 1996 as notice for arbitration was already given to the non-applicant on 3.7.1996, whereas the Arbitration and Conciliation Act, 1996 came into force with effect from 22-08-1996 and, therefore, application ought to have treated as application filed under Section 8(1)(a) of the Arbitration Act, 1940. He further submits that by virtue of provisions contained in Section 37(3) of the Act, 1940 arbitration proceedings shall commence only when one party to the arbitration agreement serves notice to the other party requiring appointment of an arbitrator and the question of limitation could not have been gone into by the trial Court while dealing with the application for appointment of an arbitrator, therefore, impugned order deserves to be set aside.

(5) On the other hand, Shri Sachin Singh Rajput, learned counsel appearing for the non-applicant/Balco would submit that

the Arbitration & Conciliation Act, 1996 had been made effective from 25.01.1996 and by virtue of Section 21 of the Act, 1996 unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute would commence on the date on which a request for that dispute to be referred to arbitration is received by the non-applicant. He would further submit that the application was in-fact filed under Section 8(1)(a) of the Act, 1996, which was not maintainable as Section 8(1)(a) of the Act, 1996 would be applicable in the proceedings pending before the Judicial Authority. He would further submit that for appointment of Arbitrator, Section 8(1)(a) of the Act, 1996 cannot be pressed into service independently unless an action is pending before the Judicial Authority and, therefore, learned Additional District Judge, Korba is absolutely justified in rejecting the application filed by the applicant. He placed reliance upon the judgments of the Supreme Court in the matters of **Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.**<sup>1</sup>, **Shetty's Construction Co. Pvt. Ltd. Vs. Konkan Railway Construction and another**<sup>2</sup> and **M/s. S.B.P. & Co. Vs. M/s. Patel Engineering Ltd. And Anr.**<sup>3</sup> in support of his submission.

(6) I have heard learned counsel appearing for the parties and considered their rival submissions made therein and perused the record of court below with utmost circumspection.

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1 (2001) 6 SCC 356

2 (1998) 5 SCC 599

3 AIR 2006 SC 450

(7) In order to decide the dispute between the parties, it would be appropriate to consider the few relevant facts. It is not in dispute that certain construction work was awarded to the applicant by the non-applicant/Balco and the dispute arose during the course of construction as the construction could not be completed on account of agitation made by local residents in relation to site where construction had to be made, pursuant to which, the applicant made a request to the non-applicant/Balco for settlement of dispute by way of arbitration on 3.7.1996, which was replied by the non-applicant/Balco on 2.8.1996 vide Ex.D-39.

(8) At this stage, the question for consideration would be the date on which the Arbitration & Conciliation Act, 1996 came into force.

(9) The Arbitration and Conciliation Act, 1996 ordinance was promulgated on 16-10-1996 and made effective on 25-1-1996 and second and third ordinance were promulgated thereafter and ultimately the Act of 1996 was brought into force with effect from 22-8-1996.

(10) The question as to the date of commencement of the Arbitration & Conciliation Act, 1996 came up for consideration before the Supreme Court in the matter of **Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.**<sup>4</sup> in which, Their Lordships of the Supreme Court after considering promulgation of the Arbitration

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4 (2001) 6 SCC 356

and Conciliation Ordinance, 1996 [first, second & third] came to the conclusion that Arbitration and Conciliation Act, 1996 has been made effective from 25.1.1996 when the first ordinance (A & C) came into force. Paragraphs 26 & 27 of the report state as under:-

“**26.** The Arbitration and Conciliation Ordinance, 1996 was originally promulgated by the President on 16-1-1996 and was made effective from 25-1-1996. The second Ordinance came in its place on 26-3-1996 which was again replaced by the third Ordinance on 26-6-1996. These Ordinances were issued, necessitated by the circumstances for continuing the operation of the new law. The new Act 26 of 1996 received the President's assent on 16-8-1996 and was published in the Gazette of India (Extra) Part II Section I dated 19-8-1996.

**27.** We have already expressed above that the Ordinance had the same force and effect as the Act. This Court in **Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.**<sup>5</sup> **Shetty's Constructions Co. (P.) Ltd. Vs. Konkan Rly. Construction**<sup>6</sup> and **National Aluminium Co. Ltd Vs. Metalimpex Ltd.**<sup>7</sup> appears to have taken the date of commencement of the Act as 25-1-1996 in the background of Ordinances and their continuance with same force effective from 25-1-1996. May be the Court was using the word “Act” interchangeable with the first Ordinance which came into force on 25-1-1996 which ultimately culminated into the Act. As already noticed above, the judgment of the Gujarat High Court in **Western Shipbreaking Corpn. v. Clare Haven Ltd.**

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5 (1999) 9 SCC 334

6 (1998) 5 SCC 599

7 (2001) 6 SCC 372

**U.K.**<sup>8</sup> was in appeal before this Court in *Thyssen* (supra) and in para 8 of the said Judgment, there is a specific mention that the use of the word “the Ordinance” shall mean the Act and vice versa. Even in *Thyssen* (supra) judgment itself in para 16, reference is made to *M.S.Shivananda v. Kannataka SRTC*<sup>9</sup>. In paras 12 & 13 of the said judgment, discussion is there as to the effect of expiration of a temporary Act and effect of repealing the Ordinance as to the rights and liabilities. As brought to our notice that some of the private publications mentioned that the Act came into force on 25-1-1996, this might have also contributed in mentioning the date of commencement of the Act as 25-1-1996. Be that as it may, in the light of the successive Ordinances and the provisions of the Ordinances and the Act being the same, the new law continued with the same effect and force from 25-1-1996. There is no alteration or change in the legal position and effect in relation to enforcement of the foreign award including the one made between the period 25-1-1996 and 22-8-1996, the date on which the Act came into force in terms of Section 1(3) read with the gazette notification inasmuch as the first Ordinance was operative with the same force and effect from 25-1-1996. In the present case with which we are concerned in this appeal, a foreign award was passed on 13-8-1996 and as such in terms of the conclusion arrived at in *Thyssen* (supra) the said award is to be enforced only under the Act. Even in the impugned judgment, it is stated that “it is an admitted position that the said Act has commenced from 26-1-1996”. This point that the date of the commencement of the Act is 22-8-1996 and not 25-1-1996 was neither raised nor contested. It may be added

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<sup>8</sup> (1988) 1 Raj 367, 404

<sup>9</sup> (1980) 1 SCC 149:1980 SCC (L&S) 131

that the High Court of Delhi did not have the benefit of Thyssen (supra) judgment as it was delivered subsequently on 7-10-1999 whereas the impugned judgment was passed on 27-9-1999. Section 1(3) of the Act reads thus:

“1. Short title, extent and commencement.-(1)-(2)\*\*\*

(3) It shall come into force on such date as the Central Government, may be notification in the official Gazette, appoint.”

(11) Thus, in view of the above-stated settled legal position, it is quite settled that the Arbitration & Conciliation Act, 1996 is effective from 25.1.1996 for all practical purposes.

(12) Now, the question for consideration would be when the arbitral proceedings is deemed to commence under the Act, 1996. For that purpose, it would be appropriate to notice Section 21 of the Act, 1996, which states as under:-

“21. **Commencement of arbitral proceedings.**- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

(13) According to Section 21 of the Act, 1961 arbitral proceedings in respect of a particular dispute would commence on the date on which a request for that dispute to be referred to the arbitration, is received by the otherside/respondent.

(14) In the case in hand, the non-applicant/Balco has received



the request for appointment of Arbitrator on 3.7.1996 vide Ex.D-30; on that day, The Arbitration and Conciliation Act, 1996 has already came into force, as said Act of 1996 was already effective from 25-1-1996.

(15) In the matter of **Shetty's Construction Co. Pvt. Ltd. Vs. Konkan Railway Construction and another**<sup>10</sup>, Their Lordships of the Supreme Court have applied the test to determine is whether request for referring the dispute for arbitration was moved for consideration after 26-1-1996 or prior thereto and it has been further held that if such request was made prior to that date, then the proceedings would be governed by the Old Act (i.e. The Arbitration Act, 1940) and if the request was made subsequent thereto the proceedings would be governed by the present Act. Paragraph 4 of the report states as under:-

“4. A mere look at sub-section 2(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 26-1-1996. The question therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received

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10 (1998) 5 SCC 599

by the respondents. Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26-1-1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the Old Act. As seen from the aforementioned factual matrix, it at once becomes obvious that the demand for referring the disputes for arbitration was made by the petitioners in all these cases months before 26-1-1996, in March and April 1995 and in fact thereafter all the four arbitration suits were filed on 24-8-1995. These suits were obviously filed prior to 26-1-1996 and hence they had to be decided under the old Act of 1940. This preliminary objection, therefore, is answered by holding that these four suits will be governed by the Arbitration Act, 1940 and that is how the High Court in the impugned judgments has impliedly treated them.”

(16) Thereafter, the Supreme Court in the matter of **U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and another**<sup>11</sup> held that where the arbitral proceedings were set in motion prior to the enforcement of the Act, 1996, the provisions of Act, 1940 would apply and held as under:-

“11. This Court in **Milkfood Ltd. v. GMC Ice Cream (P) Ltd.**<sup>12</sup> relying on or on the basis of **Shetty's Constructions Co. (P) Ltd. (supra)**, **Thyssen Stahlunion GMBH (supra)**, **Furesh Day Lawson Ltd. (supra)** and **State of W.B. Vs. Amritlal Chatterjee**<sup>13</sup> held

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11 (2004) 7 SCC 332

12 (2004) 7 SCC 288; JT (2004) 4 SC 393

13 (2003) 10 SCC 572; JT 2003 Supp (1) SC 308

that in respect of the arbitral proceedings commenced before coming into force of the 1996 Act, the provisions of the 1940 Act shall apply.”

(17) The principles of law laid down in U.P. State Sugar Corporation Ltd. (supra) was followed with approval by the Supreme Court in the matter of Neeraj Munal and others (III) Vs. Atul Grover and another<sup>14</sup>.

(18) If the facts of the case are examined in light of the afore-quoted judgments of the Supreme Court, it is quite vivid that in the present case request for appointment of Arbitrator was made on 3.7.1996 vide Ex. D-30, which was rejected by the non-applicant vide order dated 2.8.1996 (Ex. D-39) holding that contract is void under Section 20 of the Indian Contract Act and on that day, the Arbitration and Conciliation Act, 1996 has already came into force with effect from 25.01.1996, therefore, application filed by the applicant is held to have been filed under the provisions of the Arbitration & Conciliation Act, 1996. It is held accordingly.

(19) Now, the question is whether the application for appointment of Arbitrator under the Act, 1996 was maintainable before the Additional District Judge, Korba.

(20) In the matter of **M/s. S.B.P. & Co. Vs. M/s. Patel Engineering Ltd. and Anr.**<sup>15</sup>, Their Lordships of the Supreme

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14 (2005) 5 SCC 404

15 AIR 2006 SC 450

Court have held that the power exercised by the Chief Justice is a judicial power that could be delegated by the Chief Justice of High Court only to another judge of that court; further held that designation of a District Judge as the authority under Section 11(6) of the Act, 1996 by the Chief Justice of the High Court is not warranted on the scheme of the Act. Para 46 of the Report states as under:-

**“46.** We, therefore, sum up our conclusions as follows:

- 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.
- (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.
- (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 as 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.* [(2002) 2 SCC 388] 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 an dfrom 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. v. Rani Construction Pvt. Ltd.* [(2002) 2 SCC 388] is overruled.”

(21) In view of the above authoritative pronouncement, this Court is of the opinion that the District Judge was not competent to exercise the power conferred under Section 11(6) of the Act, 1996 for appointment of Arbitrator and no judicial proceedings was pending on that day, therefore, the learned Additional District Judge, Korba is absolutely justified in rejecting the application filed by the applicant under Section 8(1)(a) of the Act, 1961. However, rejection of that application will not bar the applicant to move an application under Section 11(6) of the Act, 1961 in accordance with law and any observation including limitation made in the impugned order will also not come in the way in

considering application under Section 11(6) of the Act, 1996, if any, filed by the applicant.

(22) As a fall out and consequence of the aforesaid discussion, the civil revision is dismissed subject to above-stated liberty to the applicant to move an application under Section 11(6) of the Act, 1996. No order as to costs.

(23) At this stage, learned counsel appearing for the applicant would submit that certified copy of impugned order, arbitration agreement and other relevant documents may be returned to him, to which, counsel for the non-applicant/Balco has no objection. The certified copy of the order impugned, arbitration agreement & other relevant documents be returned to the counsel for the applicant, after furnishing an attested photocopy thereof.

Sd/-  
(Sanjay K. Agrawal)  
Judge

D/-