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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 4220/2016 & C.M.Nos.17809-17810/2016**

NHPC LIMITED

..... Petitioner

Through **Mr. Kailash Vasdev, Senior Advocate
with Mr. Ajit Pudussery, Ms. Shruti
and Mr. Shreyans Singhvi,
Advocates.**

versus

**JV OF JAIPRAKASH ASSOCIATES LTD & NCC TUNNELLING
AS (INDIA)**

..... Respondent

Through **Mr.Gautam Narayan, ASC with
R.A.Iyer, Advocate for GNCTD.**

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Date of Decision: 11th May, 2016

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present writ petition has been filed challenging order dated 4th March, 2016 whereby the Arbitral Tribunal has rejected the application of the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 (for short "Act, 1996").
2. It is the petitioner's case that the Arbitral Tribunal erred in holding that the Joint Venture is not a corporate identity and it need not be a claimant.
3. Sections 16(5)&(6), Section 34(2)(a) and Section 37(2)(a) of the Act,

1996 are relevant to the present proceedings and are reproduced hereinbelow:-

"16. Competence of arbitral tribunal to rule on its jurisdiction—

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5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

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34. Application for setting aside arbitral award –

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(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

- (i) a party was under some incapacity, or*
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be

- set aside; or*
- (v) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;*

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37. Appealable orders.-

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- (2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.-
- (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or....."

(emphasis supplied)

4. From the aforesaid provisions, it is apparent that the impugned order can only be challenged under Section 34 of the Act and that too after the conclusion of the arbitral proceedings along with the final award.

5. At this stage, learned senior counsel for the petitioner states that it is open to the petitioner to invoke the jurisdiction of this Court under Articles 226 and 227 of the Constitution, as according to him the issue flagged in the present writ petition is a preliminary issue which goes to the root of the matter.

6. However, a Constitution Bench of seven Judges in ***SBP & Co. Vs. Patel Engineering Ltd. and Anr. (2005) 8 SCC 618*** has disapproved the approach of some of the High Courts that any order passed by an arbitral tribunal is capable of being corrected under Articles 226 or 227 of the

Constitution. The relevant portion ***SBP & Co. VS. Patel Engineering Ltd. and Another*** (supra) is reproduced hereinbelow:-

“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.

(emphasis supplied)

47. 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 designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.*
- (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 the 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 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) [Ed.: Paras 47(x) & (xii) corrected vide Official Corrigendum No. F.3/Ed.B.J./103/2005 dated 9-11-2005.] Since all were guided by the decision of this Court in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) 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 and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) [Ed.: Paras 47(x) & (xii) corrected vide Official Corrigendum No. F.3/Ed.B.J./103/2005 dated 9-11-2005.] The decision in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. [(2002) 2 SCC 388] is overruled.”

(emphasis supplied)

7. In view of the aforesaid, the present writ petition and the applications are dismissed as not maintainable.

MANMOHAN, J

MAY 11, 2016

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