

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

+ FAO (OS)(COMM) 19/2017

Reserved on: 18.05.2017

Date of decision: 30.05.2017

IN THE MATTER OF:

M/S HINDUSTAN STEELWORKS CONSTRUCTION LIMITED

..... Appellant

Through: Mr. Paramjit S. Patwalia, ASG with
Mr. G. Umapathy, Mr. Leo D. Rozario and
Mr. Aditya Singh, Advocates
versus

M/S NTPC LTD. KAHALGAON SUPER THERMAL POWER STATION

..... Respondent

Through: Mr. I.S. Alag, Sr. Advocate with Mr.
J.S. Lamba, Advocates with Mr. P. Vishvanathan,
DGM, Law for NTPC Kahalgaon.

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HON'BLE MS.JUSTICE SANGITA DHINGRA SEHGAL

HIMA KOHLI, J.

1. The appellant/Hindustan Steelworks Constructions Limited (in short, **‘the appellant/HSCL’**), a Public Sector Company, has filed the present appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (in short, **‘the A&C Act’**) against the judgment and order dated 7.2.2016 passed by the learned Single Judge in OMP (COMM) No.411/2016,

dismissing its petition under Section 34 of the A&C Act, praying *inter alia* for setting aside an order dated 11.2.2015 passed by the Appellate Authority in an appeal preferred by the respondent/NTPC against Awards dated 10.4.2012 and 10.5.2012 made by the learned Arbitrator appointed under the Permanent Machinery for Arbitration (in short ‘**the PMA**’), an alternate dispute redressal mechanism devised by the Government.

2. Several rounds of litigations have taken place between the parties before the impugned order came to be passed. For gaining a proper perspective on the issues raised by learned counsels for the parties, it is considered necessary to briefly narrate the relevant facts. In the years 2003-2004, two contracts in connection with the construction of the Kahalgaon Super Thermal Power Project situated in District Bhagalpur, Bihar were awarded by the respondent/NTPC to the appellant/HSCL under two separate Letters of Award, one dated 31.7.2003 and the other dated 3.2.2004 (in short ‘**the LOA**’). The first LOA provided for settlement of disputes between the parties in para 22.1.0, as below :

“22.0.0 **SETTLEMENT OF DISPUTES -**

22.1.0 It is specifically agreed that all differences and disputes between the parties arising out of the contract shall be settled by the process of settlement and arbitration as specified in clause 56.0 of General Conditions of Contract for Civil Works. The provisions of Arbitration & Conciliation Act, 1996 shall apply to the arbitration proceedings.”

3. The second LOA dated 3.2.2004 provided for settlement of disputes in the following manner :

“22.0.0SETTLEMENT OF DISPUTES

22.1.0 It is specifically agreed that all disputes or differences whatsoever arising out of this Contract between the parties whether during the progress of the work or after its completion, shall be settled in accordance with the stipulations of Memorandum No. 3/5/93-PMA dated 30/06/93 of Govt. of India, Ministry of Industry, Deptt. of Public Enterprises.”

4. In the course of undertaking the construction work, disputes and differences arose between the parties and the respondent/NTPC cancelled the contract awarded to the appellant/HSCL in part on seven occasions and finally on 24.11.2010, on the ground that it had failed to complete the work within the contractual period. The said disputes were referred to the Joint Secretary, Government of India appointed as an Arbitrator under the PMA, who pronounced two Awards dated 10.4.2012 and 10.5.2012, partly allowing the claims raised by the appellant/HSCL and dismissing the counter claims of the respondent/NTPC in entirety.

5. During the pendency of the arbitration proceedings, the respondent/NTPC invoked the bank guarantee furnished by the appellant/HSCL. Aggrieved by the said invocation, the appellant/HSCL filed a petition on the original side of this Court under Section 9 of the A&C Act for restraining the respondent from encashing the bank guarantee (OMP 567/2010). Vide order dated 28.09.2010, an *ex parte ad interim*

injunction was granted in favour of the appellant, restraining the respondent from encashing the bank guarantees in respect of the LOA's dated 31.07.2003 and 03.02.2004. But, on the very next date, i.e., on 19.10.2010, a counsel had appeared on behalf of the respondent/NTPC and stated that even before the interim order came to be passed, the bank guarantees in question had been encashed on 25.09.2010, thus making the Section 9 petition infructuous. At that, counsel for the appellant/HSCL had sought directions to the respondent/NTPC to secure the sums reflected by the bank guarantee during the pendency of the arbitration proceedings. Taking on record the assurance was given on behalf of the respondent/NTPC that at any given point in time, they shall retain in their bank account, monies equivalent to the bank guarantee in issue, which would finally abide by the Award, the said petition was disposed of. Though neither side have referred to the above petitions in the course of arguments, a reference to the said proceedings finds mention in the Awards dated 10.04.2012 and 10.05.2012.

6. Aggrieved by the aforesaid Awards, the respondent/NTPC filed an appeal before the Appellate Authority nominated under the PMA, which was allowed, vide order dated 11.2.2015 and both the Awards were set aside. This was followed by two review petitions filed by the appellant/HSCL before the Appellate Authority. The maintainability of the said review petitions was however questioned by the respondent/NTPC by filing an application, which came to be dismissed by the Appellate Authority vide order dated 5.1.2016. Aggrieved by the said dismissal

order, the respondent/NTPC filed a writ petition (WP(C)No.1635/2016) in the High Court for restraining the Appellate Authority from passing any order on the review petitions filed by the appellant/HSCL.

7. Vide order dated 29.2.2016, the learned Single Judge dismissed the captioned writ petition with the following observations :

“10. In the opinion of this Court, the Arbitration and Conciliation Act, 1996 deals not only with pendency of arbitration proceedings but also with pre and post arbitration awards. This Court is also of the view that the petitioner would have sufficient opportunity to challenge whatever decision is taken by Mr. Dinesh Bhardwaj, in accordance with the Arbitration and Conciliation Act, 1996. Further, the fact that PMA is an Alternative Dispute Resolution cannot be lost sight of. Consequently, the writ petition and the application are dismissed.”(emphasis added)

8. Thereafter, the Appellate Authority proceeded to hear the parties and finally dismissed the review petitions filed by the appellant/HSCL, vide order dated 30.3.2016. The said dismissal order was challenged in a writ petition filed by the appellant/HSCL [WP(C)No.5064/2016]. The said petition was dismissed *in limine* by the learned Single Judge vide order dated 30.5.2016. While passing the said order, the learned Single Judge referred to his earlier order dated 29.2.2016 passed in WP(C)1635/2016 and observed that it was not open to the parties to challenge the Appellate Authority's order/Award by filing a writ petition but it would be open to the appellant/HSCL to file appropriate proceedings under the A&C Act.

The operative para of the order dated 30.5.2016 is reproduced herein below:

*“Since this Court in the aforesaid order has already held that it is not open to the parties to challenge an Appellate Authority’s order/award by way of a writ petition, the issue whether the Arbitrator had the jurisdiction to pass the impugned order cannot be decided in the present proceedings. **In accordance with the aforesaid order it shall be open to the petitioner to file an appropriate proceeding under the Arbitration and Conciliation Act, 1996. With the aforesaid liberty, the present writ petition and the applications are dismissed.**”* (emphasis added)

9. Shortly thereafter, the appellant/HSCL filed an application under Section 34 of the Arbitration & Conciliation Act, 1996 for quashing the order dated 11.2.2015 passed by the Appellate Authority whereunder, the Awards dated 10.4.2012 and 10.5.2012 were set aside and for setting aside the subsequent order dated 30.3.2016, dismissing the two review petitions filed by it (OMP (COMM) 411/2016). The respondent/NTPC entered appearance in the said proceedings and filed an application for seeking rejection of the petition on the ground that the dispute between the parties was referred for settlement in terms of the PMA and the Awards made by an Arbitrator appointed under the said mechanism, were challenged by it in appeal before the Law Secretary, Government of India, designated as the Appellate Authority under the PMA and having exhausted all the remedies available to it under the said mechanism, the appellant/HSCL’s petition was not maintainable. In support of the aforesaid submission, learned

counsel for the respondent/NTPC had placed reliance on a decision of the Supreme Court dated 13.7.2016 in 'M/s. Northern Coldfield Ltd. vs. Heavy Engineering Corp. Ltd& Anr.', reported as **(2016) 8 SCC 685**.

10. Noting that the counsel for the appellant/HSCL (petitioner in the aforesaid OMP) did not dispute the legal position that an award being outside the framework of the law governing arbitration, will not be legally enforceable in a court of law and the awards impugned in the OMP were decisions rendered under the PMA, by the impugned order, the learned Single Judge dismissed the appellant's petition under Section 34 of the A&C Act and declined the request made on its behalf for referring the parties to a Sole Arbitrator on the ground that the said order could not be passed without the consent of the parties. However, taking note of the fact that the parties were engaged in pursuing the dispute for a considerably long time, the learned Single Judge opined that it would be advisable if the said disputes could be resolved within the scope of the Arbitration & Conciliation Act, 1996. Consequently, the Chairman-cum-Managing Director of the respondent/NTPC was directed to take a decision within a period of four weeks as to whether the disputes could be resolved by arbitration and in the event the parties were unable to do so, they were granted liberty to approach the court in accordance with law.

11. Immediately thereafter, counsel for the appellant/HSCL had addressed a letter dated 9.12.2016 to the Chairman-cum-Managing Director of the respondent/NTPC requesting him to convey his consent for the

parties to be referred to arbitration, whereafter a mutually agreed upon Sole Arbitrator could be appointed. However, vide letter dated 3.1.2017, the Chairman-cum-Managing Director of the respondent/NTPC declined the said request on the ground that the PMA is outside the purview of the A&C Act and the MOU dated 7.12.2015 issued by the Department of Public Enterprises, Government of India, contemplates that if the disputes remain unresolved, the parties would be referred to the Cabinet Secretariat for advice.

12. Aggrieved by the impugned order dated 7.12.2016 and the stand taken by the respondent/NTPC in its communication dated 3.1.2017, the appellant/HSCL has filed the present appeal.

13. Mr. Patwalia, learned Senior Advocate appearing for the appellant/HSCL canvassed that the learned Single Judge ought to have followed the decision of the Supreme Court in the case of M/s. Northern Coldfield Ltd. (supra) and taken the view expressed therein to its logical conclusion by directing the respondent/NTPC to agree for the appointment of a Sole Arbitrator instead of leaving the matter to the whims of the respondent/NTPC who has now declined its consent for being referred to arbitration under the A&C Act. It was argued that the position taken by the respondent/NTPC in its communication dated 3.11.2017, has virtually left the appellant/HSCL without a legal remedy. Learned counsel contended that in any event, the stand of the respondent/NTPC that the disputes between the parties ought to be referred to the Cabinet Secretariat under the

PMA, runs contrary to the judgment of the Supreme Court in the captioned case, wherein it has been held that arbitration proceedings conducted by an Arbitrator appointed under the PMA, is outside the statutory framework and any award made in terms of the PMA, is neither amenable for being set aside under the statute (earlier the Arbitration Act, 1940 and subsequently replaced by the A&C Act) and nor could the same be made rule of the court, for being enforceable as a decree.

14. Per contra, Mr. Alag, learned Senior Advocate appearing for the respondent/NTPC opposed the present appeal and referred to OM dated 7.12.2015 issued by the Department of Public Enterprises, Government of India on the aspect of settlement of commercial disputes *inter se* Public Sector Enterprises through the PMA, calling upon all the Administrative Ministries/Departments of the Government of India to desist from litigating in any court of law directly or through public sector undertakings under them and instead, approach the PMA for arbitration and the Appellate Authority, i.e., Secretary, Law in appeal and if the dispute remains unresolved, to refer the same to the Cabinet Secretariat for advice. He thus argued that the present appeal is not maintainable as the appellant/ HSCL has failed to exhaust the remedy of approaching the Cabinet Secretariat for advice, which is open to it and even otherwise, the appellant/HSCL cannot invoke the A&C Act, since it has a remedy before the civil court, as observed in the case of M/s. Northern Coldfield Ltd. (supra).

15. We have given our anxious consideration to the submissions made by the counsels for the parties and perused the decision of the Supreme Court in the case of Northern Coalfields (supra), relied on by both sides to substantiate their arguments.

16. The limited issue raised for our consideration is whether the learned Single Judge, while passing the impugned order dated 07.12.2016 and dismissing the appellant's petition under Section 34 of the A&C Act praying *inter alia* for setting aside the order dated 11.02.2015 passed by the Appellate Authority under the PMA, ought to have taken the next step of appointing a Sole Arbitrator by taking a cue from the captioned decision, instead of leaving it to the respondent/NTPC to decide as to whether the disputes could be resolved by arbitration.

17. In the case of Northern Coalfields (supra), the Supreme Court had the occasion to minutely examine the historical background in which the Government of India had created a Permanent Machinery of Arbitration as a special mechanism, whereunder instructions were issued to the Public Sector Undertakings (in short, 'PSU') and Public Sector Enterprises (in short, 'PSE') to settle their *inter se* disputes outside the framework of the Arbitration Act, 1940, which had then held the field. Later on, by a series of decisions in the three sets of ONGC cases [reported as **1995 Supp. (4) SCC 541** dated 11.10.1991, **(2004) 6 SCC 437** dated 07.01.1994 and **(2007) 7 SCC 39** dated 20.07.2007], directions were issued by the Supreme Court for constituting a Committee of Disputes (in short 'COD') headed by

the Cabinet Secretary and every PSE/PSU was required to ensure that in the event of any dispute, the matter must first be examined by the said Committee for grant or refusal of clearance for litigation. The Supreme Court had subsequently clarified that in the absence of clearance from the Committee, the Court would not proceed with the case but a suit could still be instituted by a PSU/PSE so as to save limitation. This clarification was issued to dispel the impression carried in some quarters that merely because the petitioners/plaintiffs were PSU's or Union of India, their statutory remedies stood automatically effaced. In the year 2004, the Supreme Court had gone on to observe that any delay in approaching the COD would not make the action illegal as there was no rigid timeline prescribed by the Court for the said purpose.

18. In the year 2010, the Supreme Court recognized the fact that numerous difficulties were being experienced by the COD and felt that it was time to revisit the orders earlier passed in the cases of ONGC. Ultimately, when the matter was referred to a Constitution Bench in the case of Electronics Corporation of India Ltd. vs. Union of India [reported as (2011) 3 SCC 404], after noticing the several flaws in the working of the COD, the Supreme Court recalled all its previous orders passed in the ONGC cases by holding that the said mechanism had outlived its utility.

19. In view of the aforesaid decision, the Government of India revised the Guidelines dated 22.01.2004, by issuing an Office Memorandum dated 12.06.2013, which provided for creation of a PMA and directed all PSEs,

CPSEs and Banks to incorporate a clause in the current and future contracts regarding non-application of the A&C Act to arbitrations conducted under the PMA. The OM dated 12.06.2013 also deleted para 13 of the earlier Guidelines, whereunder there was a requirement for obtaining clearance from the COD before invoking the statutory remedies.

20. Taking note of the aforesaid turn of events in the case of Northern Coalfields (supra), starting from March, 1989 when a PMA was set up by the Government of India for the first time and ending in June, 2013 when a decision was taken to dispense with the requirement of obtaining clearances from the COD, the Supreme Court summarized the effect of the above in para 22 in the following words:-

“22. The net effect of the above can be summarized as under:

(i) The Permanent Machinery of Arbitration was put in place as early as in March, 1989, even before ONGC II was decided on 11th October, 1991.

(ii) The Permanent Machinery of Arbitration was outside the statutory provision then regulating arbitrations in this country namely Arbitration Act, 1940 (10 of 1940).

(iii) The award made in terms of the Permanent Machinery of Arbitration being outside the provisions of the Arbitration Act, 1940 would not constitute an award under the said legislation and would therefore neither be amenable to be set aside under the said statute nor be made a rule of the court to be enforceable as a decree lawfully passed against the judgment debtor.

(iv) The Committee on disputes set up under the orders of this Court in the series of orders passed in ONGC cases did not prevent filing of a suit or proceedings by one PSE/PSU against another or by one Government department against another. The only restriction was that even when such suit or proceedings was instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party approaching the Court.

(v) The time limit fixed for obtaining such permission was also only directory and did not render the suit and/ or proceedings illegal if permission was not produced within the stipulated period.

(vi) The Committee on Disputes was required to grant permission for instituting or pursuing the proceedings. If the High Power Committee (COD) was unable to resolve the dispute for reasons to be recorded by it, it was required to grant clearance for litigation.

(vii) The Committee on Disputes experience was found to be unsatisfactory and the directives issued by the Court regarding its constitution and matters incidental thereto were recalled by the Constitution Bench of this Court thereby removing the impediment which was placed upon the Court's/Tribunal's powers to proceed with the suit/ legal proceedings. The Department of Public Enterprises has subsequent to the recall of the orders in the ONGC line of cases modified its guidelines deleting the requirements for a COD clearance for resorting to the Permanent Machinery of Arbitration and;

(viii) The Permanent Machinery of Arbitration was and continues to be outside the purview of Arbitration Act, 1940 now replaced by Arbitration and Conciliation Act, 1996.” (emphasis added)

21. In essence, the Supreme Court held that the PMA was and continues to remain outside the purview of the Arbitration Act, 1940, replaced later on by the A&C Act, 1996 and the remedies that are available to the Government on the administrative side are not a substitute for remedies that are available to a losing party according to the law of the land; that the losing party's right to demand effective adjudication recognized by law, cannot be denied simply because it happens to be a Government owned company for the reason that it has its own legal character as an entity, which is always separate from that of the Government; that resorting to the PMA procedure or taking part in the said proceedings cannot be treated as an estoppel against seeking redressal in accordance with law.

22. Mr. Patwalia, learned Senior Advocate appearing for the appellant/HSCL has urged that once the Supreme Court has declared the PMA to be outside the statutory provision, which regulates arbitrations in the country and any Award made in terms of the PMA cannot be treated as one made under the said legislation, not being amenable to be set aside under the said Statute and nor could such an Award be made a rule of the Court, so as to be enforceable as a decree, the respondent/NTPC cannot be permitted to insist that till a clearance is obtained by the appellant/HSCL from the Cabinet Secretariat in terms of the Memorandum dated 07.12.2015, issued by the Department of Public Enterprises, Government of India, it cannot resort to arbitration under the A&C Act.

23. The OM dated 07.12.2015 issued by the Department of Public Enterprises, Government of India adverts to the earlier OM dated 12.06.2013 with regard to the nature of cases that are covered under the PMA and refers to instances where CPSEs have sought to take legal recourse through courts of law to settle inter-se disputes. The said OM concludes by calling upon all CPSEs to approach the PMA for arbitration and the Appellate Authority, i.e., the Secretary (Law) for instituting an appeal and in the event the dispute remains unresolved, to approach the Cabinet Secretariat for advice.

24. We are of the opinion that once the COD stands abrogated/dissolved in view of reversal of the orders directing constitution of such a Committee by the Supreme Court, the OM dated 07.12.2015 would also stand obliterated. In the case of Northern Coalfields (supra), the Supreme Court has decisively held that the PMA was and continues to be outside the purview of the Arbitration Act, 1940, replaced by the A&C Act and any Award made in terms of the PMA is not enforceable in law as a decree. Given the above position, the insistence on the part of the respondent/NTPC that the appellant/HSCL must approach the Cabinet Secretariat for advise in terms of the mechanism provided in the OM dated 07.12.2015, appears to be unsustainable. The mandate of obtaining advise from the Cabinet Secretariat is nothing but a substitution of the earlier mechanism of obtaining clearance from the COD. Once the COD has been knocked out the said vacuum cannot be permitted to be filled up by

invoking OM dated 07.12.2015 and insisting that the appellant/HSCL is under a compulsion to seek a clearance from the Cabinet Secretariat.

25. Thus, the argument advanced on behalf of the respondent/NTPC that the impugned order having taken note of the appellant/HSCL's willingness to refer the disputes to the Sole Arbitrator, casts an obligation on it to obtain necessary clearances from the Cabinet Secretariat, is turned down as being devoid of merit.

26. The second plea of the respondent/NTPC that if aggrieved by the order dated 11.02.2015 passed by the Appellate Authority, setting aside the Awards dated 10.04.2012 and 10.05.2012 made by the Arbitrator under the PMA, the appellant/HSCL has a statutory remedy of filing a civil suit, which it ought to invoke, is also found to be meritless. Reliance placed by the respondent/NTPC on the observations of the Supreme Court in the case of Northern Coalfields (supra) to the effect that the remedy of a civil action was available to the appellant therein, would not be a ground to persist with its plea that a civil suit is the only efficacious remedy available to the appellant before us, as the fact situation is entire distinguishable.

27. In ordinary course, institution of a suit could have been an option available to the appellant/HSCL for setting aside the order dated 11.02.2015 passed by the Appellate Authority under the PMA, it being an inherent right vested in every person/entity, unless and until the statute imposes a bar on such an institution. But we cannot lose sight of the fact that the parties herein have themselves by means of an agreement in

writing, agreed to settle all their disputes arising from the contract through arbitration. In fact, para 22.1.0 of the LOA dated 31.07.2003 stipulates that all differences and disputes between the parties arising out of the contract shall be settled by the process of settlement and arbitration and the provisions of the A&C Act shall apply to the said proceedings. Even though OM dated 12.06.2013 issued by the Department of Public Enterprises states in Para V that all CPSEs and Government Departments shall ensure inclusion of an arbitration clause in all existing and future contracts in favour of PMA and without such an incorporation, the PMA shall not entertain the disputes referred to it, the aforesaid clause governing the parties herein has not been altered, amended or modified by them in any manner. In any event, the arbitration clause incorporate in the subsequent LOA dated 3.2.2004 executed by the parties no longer holds good in view of the law declared in the case of Northern Coalfields (supra).

28. The distinguishing facts referred to above are as follows. It is an undisputed position that after the parties had filed their claims and counter-claims before the learned Arbitrator appointed under the PMA, the respondent/NTPC had proceeded to take steps to encash the bank guarantee offered by the appellant/HSCL and aggrieved by the said action, the appellant had sought interim relief by filing a petition under Section 9 of the A&C Act before the High Court. Though the said petition ultimately came to be disposed of in the light of the submission made by learned counsel for the respondent/NTPC that the bank guarantee had been encashed before the interim order came to be passed in favour of the

appellant/HSCL, the order dated 19.10.2010 passed in OMP 567/2010, copy whereof has been downloaded from the website of the High Court, does not record any objection taken by the respondent/NTPC with regard to the maintainability of the said petition on the ground that the provisions of A&C Act could not have been invoked by the appellant/HSCL as the parties had submitted to arbitration under the mechanism prescribed under the PMA.

29. It is also undisputed that after the Awards dated 10.04.2012 and 10.05.2012 were set aside by the Appellate Authority under the PMA vide order dated 11.02.2015, the appellant/HSCL had filed a review application before the Appellate Authority, maintainability whereof was challenged by the respondent/NTPC by filing a writ petition in the High Court. Vide order dated 29.2.2016 passed in the said petition, the learned Single Judge had observed in so many words that the respondent/NTPC (petitioner in the said petition) would have an opportunity to challenge the decision taken by the Appellate Authority in accordance with the A&C Act, if aggrieved. However, no steps were taken by the respondent/NTPC to question the said observation; nor was the said order carried in appeal.

30. The sequence of events narrated earlier would further reveal that the Appellate Authority under the PMA had entertained the review petitions filed by the appellant/HSCL against the order dated 11.02.2015, but had ultimately dismissed the same on the ground that the pleas taken therein would require a detailed examination of merits, which was not warranted

under the OM dated 12.06.2013 relating to the PMA Scheme. The aforesaid dismissal order was tested by the appellant/HSCL in a writ petition, which was dismissed by the learned Single Judge by adverting to the earlier order dated 29.02.2016 passed in W.P.(C) 1635/2016 and yet again holding that the appellant/HSCL would have an option to file appropriate proceedings under the A&C Act, but no challenge could be laid against an order/Award by way of a writ petition. The said observations were a reiteration of the view expressed by the learned Single Judge in his earlier order dated 29.02.2016. However, the respondent/NTPC did not object to the said view with regard to the forum before which the appellant/HSCL could assail the order of the Appellate Authority.

31. Thus, it can be seen that three occasions had arisen for the respondent/NTPC to raise an objection with regard to non-availability of any remedy under the A&C Act, on the ground that the parties had opted for the mechanism contemplated under the PMA; the first time when the appellant/HSCL had filed OMP 567/2010, the second time when the respondent/NTPC had filed W.P.(C) 1635/2016 and the third time, when the appellant had filed W.P.(C) 5064/2016. But on none of the said occasions did the respondent/NTPC raise any objection with regard to the remedy under the A&C Act, not being available to the appellant/HSCL. In these circumstances, the appellant/HSCL cannot be faulted for assuming that the respondent/NTPC had in fact waived the said objection and consented to submitting itself to the frame work of law governing arbitration.

32. The averments of the respondent/NTPC in the application filed by it to oppose the Section 34 petition filed by the appellant/HSCL, reveals that it has referred to the decision of the Supreme Court in the case of Northern Coalfields (supra) wherein it has been held that the PMA was and continuous to remain outside the purview of the Arbitration Act, 1940 and the A&C Act, 1996. Even the impugned order records the fact that the respondent/NTPC had opposed the maintainability of the Section 34 proceedings filed by the appellant/HSCL under the A&C Act by raising a similar plea that the decisions rendered under the PMA, (i.e., the Awards dated 10.04.2012 and 10.05.2012 and the decision of the Appellate Authority dated 11.02.2015) were not amenable to the provisions of the A&C Act.

33. We are of the opinion that the respondent/NTPC has been unreasonably thwarting all attempts on the part of the appellant/HSCL to seek legal recourse against the order dated 11.02.2015 passed by the Appellate Authority under the PMA, by unnecessarily harping about an illusory remedy before the Cabinet Secretariat knowing very well that once the COD has been revoked, no legal sanctity can be attached to the OM dated 07.12.2015 that was issued by the Govt. prior to the decision of the Supreme Court in the case of Northern Coalfields (supra), that was pronounced on 13.07.2016. Thus, the insistence on the part of the respondent/NTPC that the appellant/HSCL cannot invoke the A&C Act for relief, appears to be an attempt to willy-nilly prevent it from seeking legal recourse in accordance with the law of the land governing arbitration.

34. We had enquired from learned counsel for the respondent/NTPC that even if the appellant/HSCL proceeds to institute a civil suit for declaring the order dated 11.02.2015 passed by the Appellate Authority as null and void and ultimately succeeds, thereby reviving the Awards dated 10.04.2012 and 10.05.2012, would it abide by the said Arbitral Awards delivered under the PMA. The response was found to be rather evasive. Learned counsel had sought to urge that unlike the facts of the case in Northern Coalfields (supra), where aggrieved by the Award made by the Arbitrator and the Appellate Authority under the in-house mechanism provided by the Government, the appellant therein had instituted a civil suit for declaring the said Award as illegal, in the present case, the respondent/NTPC having succeeded before the Appellate Authority that has set aside the Awards dated 10.04.2012 and 10.05.2012, NTPC need not take any further steps and it is for the appellant/HSCL to test waters in a civil suit.

35. Quite clearly, having succeeded before the Appellate Authority the respondent/NTPC seeks to maintain an upper hand, thereby leaving the appellant remediless. We deliberately use the word, 'remediless' as in our opinion, the plea of the respondent/NTPC that the appellant/HSCL can always approach the Cabinet Secretariat for advice, can by no stretch of imagination be treated as a remedy having a sanction of law. Further, there is no guarantee that after embarking on the said route, the parties will abide by the advise given. Thus no finality can be attached to the said mechanism.

36. We cannot lose sight of the fact that arbitration is an alternate disputes resolution mechanism that is founded on an agreement in writing between the parties and once they have expressed their intent to submit themselves to arbitration for resolution of their disputes, the respondent/NTPC cannot be heard to state that if aggrieved by the orders passed under the PMA, instead of seeking recourse under the A&C Act as contemplated under the LOA's, the appellant/HSCL must be relegated to instituting a civil suit, merely because the said remedy is not barred in law. The Awards made under the PMA and challenged before the Appellate Authority under the very same mechanism were and continue to remain outside the framework of law governing arbitration and cannot be legally enforced in any court of law. Thus under the PMA, no quietus can be achieved to the dispute between the parties, unless and until both sides agree to be bound by the advise that may be given by the Cabinet Secretariat and undertake not to question the same by seeking recourse before the Court. But that is not so.

37. The appellant/HSCL has been stoutly defending the Awards dated 10.04.2012 and 10.05.2012, partly allowing its claims against the respondent, which were set aside in appeal by the Appellate Authority. On its part, the respondent/NTPC is emphatically supporting the decision of the Appellate Authority as legal and valid. Here is a case where the parties have been at loggerheads since the year 2011 and over a period of six years, several rounds of litigation have already taken place, not only during the pendency of the proceedings before the Arbitral Tribunal but

even after the order dated 11.02.2015 was passed by the Appellate Authority, setting aside the Awards. That being the position, we are unable to persuade ourselves to accept the submission of the learned counsel for the respondent/NTPC that seeking redressal in accordance with law for the appellant/HSCL must necessarily mean that it ought to institute a civil suit.

38. It is the respondent's own case that the parties have given their consent to arbitration as an alternate disputes resolution mechanism whether under the PMA scheme, or under the A&C Act. The said intention has been clearly expressed in the LOA's dated 31.7.2003 and 3.2.2004. Thus there does not exist any vacuum for the appellant/HSCL to necessarily knock at the doors of the civil court. In such circumstances, interest of justice demands that the litigation between the parties be curtailed instead of calling upon the appellant to resort to civil remedies against the respondent. The said route would not only be long winded and arduous, entailing avoidable expenditure of public funds, it would also result in prolonging the litigation further as whichever party loses, is bound to go in appeal to the next higher forum, and after all the appeals available in law are exhausted, will the execution proceedings be launched and take their own time to wind up..

39. It is quite apparent from the tone and tenor of the impugned order, wherein the Chairman-cum-Managing Director of the respondent/NTPC was directed to take a decision, as to whether the disputes between the parties could be resolved by arbitration and if so, calling upon them to

make an endeavour to mutually appoint a Sole Arbitrator, that though the decision of the Appellate authority under the PMA cannot be set aside under the A&C Act, the parties would continue to walk the path of alternate dispute resolution mechanism, as agreed upon in the LOA dated 31.7.2003. In view of the impediments sought to be created by the respondent/NTPC by its insistence that the appellant/HSCL must submit to the Cabinet Secretariat for advice, which may be a remedy available on the administrative side, but is not a forum for enforcing legal rights, as declared by the Supreme Court in the M/s. Northern Coldfield Ltd. (supra), we are of the opinion that the parties must resolve their disputes within the parameters of the A&C Act. Non-availability of a statutorily recognized platform to assail the order of the Appellate Authority under the PMA, cannot be a ground to snap the underlying thread of arbitration that binds the parties. They still have the option of walking the chosen path by falling back on the arbitration clause contained in the LOA dated 31.7.2003, for resolution of their disputes, a route that was voluntarily elected by them.

40. In the course of arguments, we had enquired from learned counsel for respondent/NTPC if the Chairman-cum-Managing Director of NTPC would still be willing to name an Arbitrator, but he was reluctant to do so. On the other hand, learned counsel for the appellant/HSCL had left it to the Court to have all the claims and counter claims of both sides referred from adjudication as per law, to a Sole Arbitrator. Accordingly, the impugned order is modified. We deem it appropriate to refer all the disputes arising out of the Letters of Award dated 31.07.2003 and 03.02.2004 executed

between the appellant and the respondents to Justice Mr. Justice Vijender Jain (Retd. Chief Justice, Punjab & Haryana High Court) (Mobile No.08288067501), who is appointed as a Sole Arbitrator to adjudicate upon all the claims and counter claims that were raised by the parties before the learned Arbitrator under the PMA, subject matter of the Awards dated 10.04.2012 and 10.05.2012. In order to expedite the proceeding and avoid any further delay in the said adjudication, we request the learned Sole Arbitrator to commence the proceedings from the point of completion of pleadings of the claims/counter claims and if admission/denial of documents was conducted before the learned Arbitrator under the PMA, then from that stage. The parties shall appear before the learned Sole Arbitrator on 5.6.2017, for further proceedings.

41. The appeal is disposed of while leaving the parties to bear their own costs.

42. The Registry is directed to forward a copy of this order forthwith to the learned Sole Arbitrator, for information.

(HIMA KOHLI)
JUDGE

(SANGITA DHINGRA SEHGAL)
JUDGE

MAY 30, 2017
sk/rkb/ap