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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision:19.09.2017

+ O.M.P. (COMM) 248/2016 & I.A.Nos.1556/2015 & 20395/2015

M/S STEEL AUTHORITY OF INDIA LTD Petitioner

Through: Ms.Surabhi Diwan, Advocate

versus

M/S ENGINEERING PROJECT INDIA LTD Respondent

Through: Mr.Manoj Kumar Das, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. In this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking to impugn the Appellate Award dated 16.04.2012 passed by the Law Secretary, Govt. of India cum Appellate Authority under Permanent Machinery of Arbitration (PMA).

2. Facts of the case are that on 13.11.1991 a contract for lumpsum value of Rs. 46,94,13,000/- (Rupees Forty Six Crores Ninety Four Lacs Thirteen Thousand only) for design, manufacture, supply and delivery at site of plant and equipment and steel structures etc. was awarded by the petitioner to the respondent. It is noteworthy that both the parties are public sector undertakings. As disputes arose between the parties, the petitioner was compelled to lodge its claims before the Joint Secretary, Ministry of Heavy Industries and Public Enterprises, who was appointed as the Sole Arbitrator as per the scheme of Permanent Machinery of Arbitration. The said Sole

Arbitrator is stated to have passed Award dated 16.05.2011. The respondents filed an appeal before the appellate authority under the Permanent Machinery of Arbitration. The appellate authority has now passed the alleged impugned award. Hence, the present petition.

3. The petitioner first filed a writ petition impugning the award dated 16.04.2012 passed by the appellate authority. The learned Single Judge in the writ petition by his order dated 07.11.2014 took the view that the award is covered by the provision of the Arbitration and Conciliation Act. He dismissed the writ petition. An LPA is pending against the said order dismissing the writ petition.

4. Learned Single judge in W.P.(C) 3570/2012 titled as ***M/s Steel Authority of India vs. Engineers project India Ltd.*** by his order dated 07.11.2014 while dealing with the background facts of the arbitration proceedings stated as follows:

“4. Since, the parties are Central Public Sector Enterprises, the arbitration clause in the contract dated 13.11.1991 was substituted by an arbitration agreement, as per the draft annexed to the Office Memorandum (hereafter ‘OM’) dated 22.01.2004, for resolution of their disputes through PMA. The said arbitration agreement reads as under:-

“In the event of any dispute or differences relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the Sole Arbitrator in the Department of Public. Enterprises to be nominated by the Secretary to the Government of Indian In-Charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause.

The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a future reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary / Additional Secretary, when so authorized by the Law Secretary whose decision shall bind the Parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator. ”

5. It is thereafter that the petitioner has filed the present petition under Section 34 of the Act.
6. Learned counsel for the respondent has submitted that in ***Northern Coalfields Ltd. v. Heavy Engg. Corpn. Ltd. & Anr., (2016) 8 SCC 685***, the Supreme Court has held that the arbitration award in terms of permanent in-house administrative machinery is dehors the 1996 Act. Hence, he urges that the present petition is not maintainable as the Arbitration and Conciliation Act does not apply to the so called award or to the appellate order. He also submits that between the same parties for an identical project the arbitrator had passed an award in favour of the respondents. The respondents had sought to execute the said award by filing a petition under Section 36 of the Act. The learned Single Judge of this court in Execution Petition No.316/2012 dated 15.03.2017 dismissed the execution petition holding that the Act does not apply relying upon the judgment of the Supreme Court in ***Northern Coalfields Ltd. (supra)***.
7. Learned counsel for the petitioner submits that the main counsel is not

available and she is unable to assist the court.

8. However, I perused the order-sheets in this case. Perusal of the earlier orders dated 17.08.2016 and 26.09.2016 would show that the learned Senior counsel appearing for the petitioner had also relied upon the judgment of the Supreme Court in ***Northern Coalfields Ltd.*** (*supra*).

9. As both the parties are relying on the same judgment i.e. ***Northern Coalfields Ltd.*** (*supra*), no purpose will be served by adjourning the matter.

10. A perusal of the judgment in ***Northern Coalfields Ltd.*** (*supra*) would show that the Supreme Court has now settled the legal position as follows:

“23. The net effect of the above can be summarised as under:

23.1. The Permanent Machinery of Arbitration was put in place as early as in March 1989, even before ONGC-2 [Oil and Natural Gas Commission v. CCE, 1995 Supp (4) SCC 541] was decided on 11-10-1991.

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

23.3. 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.

23.4. 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 were instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party approaching the Court.

23.5. 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.

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

23.7. 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 [Electronics Corpn. of India Ltd. v. Union of India, (2011) 3 SCC 404 : (2011) 1 SCC (Civ) 729 : (2011) 1 SCC (L&S) 514] of this Court thereby removing the impediment which was placed upon the courts/tribunals' 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

23.8. The Permanent Machinery of Arbitration was and continues to be outside the purview of the Arbitration Act, 1940 now replaced by the Arbitration and Conciliation Act, 1996.”

11. I may also refer to the order of the learned Single Judge of this court in Execution Petition No.316/2012 dated 15.03.2017. In that case the question was about the enforceability of an award rendered by the PMA and the applicability of the provisions of the Act. The learned Single Judge

while relying on the judgment of the Supreme Court in *Northern Coalfields Ltd.* (*supra*) has held as under:

“7. In view of the above, the decision of the Division Bench of this court in M/s IRCON International Ltd. v. M/s National Building Construction Corporation Limited (supra), no longer holds good. As the provisions of the Act have been held to be inapplicable to the proceedings under the PMA, the present petition for enforcement of the award under Section 36 is not maintainable.”

12. In view of the above settled legal position, it is manifest that the impugned order is not an award under the Act and cannot be challenged under Section 34 of the Act. The present petition being not maintainable is accordingly dismissed along with pending applications.

SEPTEMBER 19, 2017
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JAYANT NATH, J.