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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **EX.P. 316/2012 & Ex. APPL (OS) 691/2012**

ENGINEERING PROJECTS (INDIA) LTD. Decree Holder

Through Mr Manoj Kumar Das, Advocate.

versus

M/S STEEL AUTHORITY OF INDIA LTD Judgement Debtor

Through Ms Mansi Kukreja, Advocate for
Mr Yashraj Singh Deora, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
15.03.2017

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VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 36 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') seeking to enforce the Award dated 17.02.2011 rendered by the arbitrator appointed under the Permanent Machinery of Arbitration (hereafter 'PMA'). The PMA was constituted pursuant to the executive order (OM) dated 22.01.2004, which required the Central Public Sector Undertakings to resolve their, *inter se*, disputes by arbitration under the PMA.

2. The said OM expressly provided that the "*PMA shall not entertain the disputes referred to it without the proper Arbitration Clause*". The arbitration clause annexed with the OM expressly provided that the Act

would be inapplicable to arbitration conducted under the PMA. The said clause reads as under:-

"In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such disputes 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 India 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 further 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 & 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."

3. The question as to the enforceability of an award rendered under the PMA and the applicability of the provisions of the Act were considered by a Division Bench of this court in *M/s IRCON International Ltd. v. M/s National Building Construction Corporation Limited* : EFA (OS) No. 22/2006 decided on 28.11.2008. In the said case, the Division Bench of this court held as under:-

"24. Resolution of disputes by arbitration is now governed by the Arbitration and Conciliation Act, 1996, under which parties may by means of agreement in

writing, agree to refer to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It also makes provisions about composition of the Arbitral Tribunal, its jurisdiction, the conduct of arbitral proceedings, the making of arbitral award and termination of proceedings, the recourse against the award.

25. If by an agreement the parties exclude the provisions of an Act they can easily escape the clutches of law without any difficulty. Every jural relationship has to be governed by some law of the land and the parties cannot contract out of statute.

26. It is well established that a statute ousting jurisdiction of a civil court must be strictly constructed, and it is for the party seeking to oust the jurisdiction of an ordinary civil court to establish that there is no jurisdiction. (see AIR 1966 SC 1718 para 9; AIR 1967 SC 781 Para 13). In the case of Smt. Ganga Bai v. Vijay Kumar AIR 1974 SC 1126 the Supreme Court held :

"There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by any statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for maintainability requires no authority of law and it is enough that no statute bars the suit."

27. The object of the rule is, that no party/person should be left remedy less. Necessary corollary to this would be that, if no adequate remedy is provided for by a special statute through the Forum established under it for a particular purpose/situation, civil courts remedy to administer justice cannot be said to be ousted to deal with even such cases.

28. So far as the part in the arbitration clause in the said

agreement regarding the non-applicability of the Act of 1996 is concerned, we consider that it is void and the parties cannot by themselves exclude the statute itself which is being drafted by the Legislature to look after the arbitration matters."

4. In view of the aforesaid decision, the arbitral award rendered under PMA was enforceable under Section 36 of the Act.

5. The respondent, Steel Authority of India Limited (hereafter 'SAIL'), challenged the arbitral award by way of a writ petition, being W.P. (C) 7970/2012. The said writ petition was dismissed as the court held that SAIL could not be permitted to impugn the jurisdiction of the Appellate Tribunal after having participated in the proceedings before the Appellate Tribunal. It is stated that SAIL has preferred an appeal against the said decision which is pending consideration before the Division Bench of this court.

6. The question whether the provisions of the Act would be applicable to an award rendered under PMA has been authoritatively settled by the Supreme Court in a recent decision in *M/s Northern Coalfield Ltd. vs Heavy Engineering Corp. Ltd. & Anr.*: 2016 (8) SCC 685; the Supreme Court has unequivocally held that the provisions of the Act would not be applicable to such an award. The Court summarised the law in paragraph 22 of the said judgment, which reads as under:-

"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 arbitration 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 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."

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.

8. The learned counsel appearing for the petitioner earnestly contended that the decision in the case of *M/s Northern Coalfield Ltd.* (*supra*) cannot be applied retrospectively and would be inapplicable to awards rendered prior to the said decision. The said contention is unpersuasive as in the above case, the Supreme Court considered the interpretation of the arbitration clause as expressly agreed between the parties. Admittedly, the agreement entered into between the parties clearly states that the provisions of the Arbitration and Conciliation Act, 1996 would not be applicable. In the circumstances, the question of reading the decision of the Supreme Court as applicable only to proceedings initiated after the date of the said decision, is unmerited.

9. The learned counsel for the petitioner also referred to the decision of the Supreme Court in the case of *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd* : (2006) 11 SCC 245 and on the strength of the said decision contended that a two tier arbitration was not opposed to the

provisions of the Act. He contended that the decision in the case of *M/s Northern Coalfield Ltd. (supra)* was rendered in the context of determining the enforceability of a two tier arbitration and, therefore, the decision in *Centrotrade Minerals & Metals Inc. (supra)* would impliedly overrule the decision in the case of *M/s Northern Coalfield Ltd. (supra)*. In my view, the aforesaid contention is also bereft of any merit. Plainly, one of the principal questions involved in the case of *M/s Northern Coalfield Ltd. (supra)* was whether the provisions of the Act were applicable to the PMA in view of the express language of the OM and the arbitration clause.

10. In view of the above, the present petition is dismissed for the sole reason that a petition under Section 36 of the Act for enforcement of the award rendered under the PMA is not maintainable.

MARCH 15, 2017
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VIBHU BAKHRU, J