KONKAN RAILWAY CORPORATION

v.

M/S. MEHUL CONSTRUCTION CO.

AUGUST 21, 2000

[G.B. PATTANAIK, DORAISWAMY RAJU AND S.N. VARIAVA, JJ.]

Arbitration and Conciliation Act, 1996, s.11(6)—Nature of the order passed by Chief Justice or nominee appointing or refusing to appoint arbitrator—Held, order passed by Chief Justice or nominee in exercise of powers u/s. 11(6) is administrative in nature; Chief Justice does not function as a court or tribunal and order passed is not amenable to jurisdiction of Supreme Court under Article 136 of the Constitution.

Practice and Procedure—Arbitration and Conciliation Act, 1996, s.11(6)—Remedy available against refusal by Chief Justice to appoint arbitrator—Held, it would be a case of non-performance of duty against which the High Court could be approached for issuance of writ of mandamus—Constitution of India, Article 226.

In these special leave petitions and a writ petition under Article 32 against orders by the Chief Justices of the various High Courts or their nominees either refusing to appoint or appointing arbitrator in exercise of powers under s.11(6) of the Arbitration and Conciliation Act, 1996, two questions arose for determination :

(1) What is the nature of the order that is passed by the Chief Justice or his nominee in exercise of powers u/s. 11(6) of the Act? and

(2) Even if said order is held to be administrative in nature what is the remedy open against the refusal for appointment of an arbitrator?

Dismissing the petitions, the Court

HELD : 1.1. The order passed by the Chief Justice or his nominee is an administrative order. [571-A-B]

1.2. The nature and function performed by the Chief Justice or his nominee under s.11(6) being essentially to aid the constitution of the arbitral tribunal cannot be held to be a judicial function as otherwise

the legislature could have used the expression 'court' or 'judicial authority' instead or choosing the expression 'the Chief Justice or his nominee'. [569-G-H]

1.3. An order refusing to appoint an arbitrator will not be amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution. [571-B]

Sundaram Finance Ltd. **v.** *NEPC India Ltd.,* **[1999] 2 SCC 479 and** *Ador Samia Private Ltd.* **v.** *Peekay Holdings Limited,* **[1999] 8 SCC 572, approved.**

2.1. An order refusing to appoint an arbitrator would be an act of non-performance of duty. The aggrieved party has a remedy to approach the High Court for issuance of a writ of mandamus. [571-C]

2.2. The Chief Justice not having functioned as a Court or Tribunal and the order being administrative in nature, the observations and findings are not binding and will not be taken into consideration by the arbitral tribunal, if an objection to validity or existence of arbitration agreement is taken before it. Such objection, if taken, shall be decided on its own merits. [571-G-H]

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) Nos. 11522-11526 of 1999.

From the Judgment and Order dated 14/21.8.98 of the Bombay High Court in Arbitration Application Nos. 13-17 of 1996.

WITH

SLP(C) No. 19549/99, W.P.(C) No. 81/2000 and SLP(C) Nos. 11317/99, 12323/99, 8563/99 and 8581/99.

Mukul Rohtagi, Additional Solicitor General, F.S. Nariman, S.K. Dholakia, Rajiv Dhawan, P.C. Markande, Gopal Subramaniam, Atul Y. Chitale, Ms. Suchitra A. Chitale, Sushil Kumar Jain, A.P. Dhamija, Pradeep Aggarwal, Subhash Sharma, A. Mishra, Mrs. Kiran Bhardwaj, B.V. Balram Das, Sushma Suri, S.W.A. Qadri, T.V. Ratnam, Anil Katiyar, Guru Krishna Kumar, Sri Kala Guru K. Kumar, S.R. Setia, K.V. Sreekumar and V. Prasad Rao for the appearing parties.

The Judgment of the Court was delivered by

PATTANAIK, J. In this batch of cases an important question arises for consideration of this Court, namely, under the provisions of Arbitration and Conciliation Act, 1996, what should be the correct approach of the Chief Justice or his nominee in relation to the matter of appointment of an Arbitrator under Section 11(6) of the Act, and what is the true nature of the said order and further if a person is aggrieved by such order, can he file application in a Court and whether such an application could be entertained and if so, in which forum? In *Sundaram Finance Ltd.* v. *NEPC India Ltd.*, [1999] 2 Supreme Court Cases 479, while deciding the question as to whether under Section 9 of the Arbitration and Conciliation Act, 1996, the Court has jurisdiction to pass an interim order even before commencement of arbitration proceeding and before an Arbitrator is appointed, after analysing different provisions of Arbitration Act, 1940 and the present Act of 1996 an observation has been made to the effect "under the 1996 Act, appointment of Arbitrator is made as per the provisions of Section 11 which does not require the Court to pass a judicial order appointing Arbitrator." In *Ador Samia Private Ltd.* v. *Peekay Holdings Limited and Others,* [1999] 8 Supreme Court Cases, 572, this Court came to the conclusion that the Chief Justice of the High Court or his designate under Section 11(6) of 1996 Act, acts in administrative capacity, and such, an order of the Chief Justice is not passed by any court exercising any judicial function nor is it a tribunal having the trappings of a judicial authority and it must, therefore, be held that against such order, which is administrative in nature application under Article 136 of the Constitution would not lie. Notwithstanding the aforesaid decision of this Court in *Ador Samia Pvt. Ltd.* (supra) case when the present batch of cases came up for consideration before the Bench presided over by Majmudar, J. who was the author of *Samia's* case (supra) it was contended that the aforesaid decision requires consideration and having acceded to the request of the petitioner, the Bench passed the order to place this batch of cases before a Three Judge Bench and that is how these cases have come before us.

Two basic questions which really arise for consideration are, (1) what is the nature of the order that is passed by the Chief Justice or his nominee in exercise of power under sub-section (6) of Section 11 of the Act? and, (2) even if said order is held to be administrative in nature what is the remedy open to the person concerned if his request for appointment of an Arbitrator is turned down by the learned Chief Justice or his nominee, for some reason or other?

In deciding the latter question it would be necessary to find out the true intention of the legislature in substituting 1940 Act by the present Act and

A bearing in mind the object of enactment of the new Act what should be the approach of the learned Chief Justice or his nominee when an application for appointment of an Arbitrator is made invoking the jurisdiction under Section 11(6) of the 1996 Act.

B At the outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the Foreign Awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The increasing growth of global C trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade D Law way back in 1985 adopted the Uncitral Model Law of International Commercial Arbitration and since then, number of countries have given recognition to that Model in their respective legislative system. With the said Uncitral Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940 , which was the principal legislation on Arbitration in the country that had been E enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous F law. To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in Uncitral Model and, therefore, in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A G bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial H scrutiny of a Court of Law. Under the new law the grounds on which an award

of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the Arbitrator or want of proper notice to a party of the appointment of the Arbitrator or of Arbitral proceedings. The powers of the Arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate Arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the Court when there is a suit pending, have been removed. The importance of transnational commercial arbitration has been recognised and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the Arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the Court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a Court. When United Nations established the Commission on International Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when Uncitral Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting Uncitral Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process. If a comparison is made between the language of Section

A 11 of the Act and Article 11 of the Model Law it would be apparent that the Act has designated the Chief Justice of a High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of Arbitrator whereas under the Model Law the said power has been vested with the Court. When the matter is placed before the Chief Justice or his nominee B under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the arbitral tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious C issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the Arbitrator, and in respect of the jurisdiction of the Arbitrator could be raised before the Arbitrator who would decide the same. Section 13(1) provides that party would be free to agree D on a procedure for challenging an Arbitrator. Sub-section (2) of said Section provides that failing any such agreement, a party intending to challenge an Arbitrator, either on grounds of independence or impartiality or on the grounds of lack of requisite qualifications, shall within 15 days of becoming aware of the constitution of the Tribunal send a written statement for the challenge to the Tribunal itself. Section 13(3) provides that unless the Arbitrator withdraws E or the other party agrees to the challenge, the Tribunal shall decide on the challenge itself. Sub-section (4) of Section 13 mandates an Arbitrator to continue the arbitral proceedings and to make an award. Section 16 empowers the arbitral tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such F power on the Arbitrator under 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an Arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an Arbitrator. If this approach is adhered to, then there would G be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an Arbitrator and in such a case a party seeking appointment of Arbitrator cannot be said to be without any remedy. Bearing in mind the H purpose of legislation, the language used in Section 11(6) conferring power on

the Chief Justice or his nominee to appoint an Arbitrator, the curtailment of the powers of the Court in the matter of interference, the expanding jurisdiction of the Arbitrator in course of the arbitral proceeding, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing Arbitrator by the Chief Justice or his nominee under Section 11(6) has to be decided upon. If it is held that an order under Section 11(6) is a judicial or quasi-judicial order then the said order would be amenable for judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a Court of law even against an order of appointment of an Arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting Uncitral Model. If on the other hand, it is held that the order passed by the Chief Justice under Section 11(6) is administrative in nature, then in such an event in a case where the learned Chief Justice or his nominee refuses erroneously to make an appointment then an intervention could be possible by a Court in the same way as an intervention is possible against an administrative order of the executive. In other words, it would be a case of non-performance of the duty by the Chief Justice or his nominee, and therefore, a mandamus would lie. If such an interpretation is given with regard to the character of the order that has been passed under Section 11(6) then in the event an order of refusal is passed under Section 11(6) it could be remedied by issuance of a mandamus. We are persuaded to accept the second alternative inasmuch as in such an event there would not be inordinate delay in setting the arbitral process in motion. But, as has been explained earlier in the earlier part of this judgment, the duty of the Chief Justice or his nominee being to set the arbitral process in motion it is expected that invariably the Chief Justice or his nominee would make an appointment of an Arbitrator so that the arbitral proceeding would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved. In fact a Bench of this Court in *Sundaram Finance* case (supra) while considering the scope of Section 9 of the Act has approached the problem from this perspective and incidental observation has been made that Section 11 does not require the Court to pass a judicial order appointing Arbitrator. The nature and function performed by the Chief Justice or his nominee under sub- section (6) of Section 11 being essentially to aid the constitution of the arbitral tribunal cannot be held to be a judicial function as otherwise the legislature could have used the expression 'court' or 'judicial authority' instead of choosing the expression 'the Chief Justice or his nominee'. If a comparison is made with the English

A B C D E F G H

A Arbitration Act, 1996 it would appear that under the English Act it is the Court which has been vested with the function of appointment of an Arbitrator upon failure of the agreed appointment procedure and an order made by the Court becomes appealable under Section 11(5) whereas under the Arbitration and Conciliation Act of 1996 in India the power of appointment is vested with the
B Chief Justice or his nominee.

An analysis of different sub-sections of Section 11 would indicate the character of the order, which the Chief Justice or his nominee passes under Sub-section (6) of Section 11. Sub-section (3) and sub-section (4) deals with cases, in which a party fails to appoint an Arbitrator or the Arbitrators fail to
C agree on the third Arbitrator and thus seeks to avoid frustration or unreasonable delay in the matter of constitution of the arbitral tribunal. It authorises the Chief Justice of India or the Chief Justice of a High Court concerned, or any person or institution designated by him to make the appointment upon request of a party, if the other party has failed to appoint an Arbitrator within thirty days from the receipt of a request to that end. Sub-sections 4, 5 and 6 designedly
D use the expression "Chief Justice" in preference to a Court or other authority as in paragraphs (3) and (4) of Article 11 of the Model Law, obviously for the reason that the Chief Justice acting in his administrative capacity, is expected to act quickly without encroaching on the requirements that only competent persons are appointed as Arbitrators. Sub-section (4) does not lay down any
E time limit within which the Chief Justice or his nominee, designated by him, has to make the appointment. It, however, expects that these functionaries would act promptly. While sub-sections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the Arbitrator or Arbitrators, sub-section (6) seeks to remove obstacles arising when there is an agreed appointment procedure.
F These obstacles are identified in Clauses (a), (b) and (c) of sub-section (6). Sub-section (6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure i.e. to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appoint-
G ment. Sub-section (6), therefore, aims at removing any dead-lock or undue delay in the appointment process. This being the position, it is reasonable to hold that while discharging the functions under sub-section (6), the Chief Justice or his nominee will be acting in his administrative capacity and such a construction would subserve the very object of the new Arbitration Law.

H The nature of the function performed by the Chief Justice being essen-

tially to aid the Constitution of the Arbitration Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in *Ador Samia's* case and the observations of this Court in *Sundaram Finance Ltd.* case also is quite appropriate and neither of those decisions require any re-consideration. This being the position even an order refusing to appoint an Arbitrator will not be amenable to the jurisdiction of this Court under Article 136 of the Constitution. Needless to mention such an order refusing to appoint an Arbitrator after deciding the contentious issues would be an act of non-performance of duty and in view of what has been stated earlier the concerned authority could be directed by mandamus to perform its duty.

Having answered the two basic questions raised, as above, let us now examine the impugned orders in the different cases, which are before us. In S.L.P.(Civil) No. 11522-11526 of 1999, the order of the learned Chief Justice of Bombay High Court in appointing an Arbitrator is the subject matter of challenge. Since the order of appointment passed by the learned Chief Justice, is administrative in nature and the learned Chief Justice does not function as a Court or a Tribunal, the said order is not amenable to the jurisdiction of this Court under Article 136 of the Constitution. The special leave petitions, are accordingly dismissed.

Special Leave Petition (Civil) No.19549/99 is directed against the order of the learned Chief Justice of Gauhati High Court, refusing to appoint an Arbitrator, after entertaining contentious issues and deciding the said issues by elaborate consideration, on a finding that there is no valid agreement for arbitration. Even if, it was not open for the learned Chief Justice to entertain the contentious issues and deciding the same, but since the ultimate order is administrative in nature, as has been held by us and since the learned Chief Justice does not function as a Court or Tribunal, the order, cannot be subject to judicial scrutiny of this Court under Article 136 of the Constitution. The aggrieved party, however, has a remedy to approach the High Court for issuance of a writ of mandamus, if so advised, in accordance with law. It is clarified that the learned Chief Justice not having functioned as a Court or Tribunal and the order being administrative in nature, the observations and findings are not binding and will not be taken into consideration by the Arbitral Tribunal, if an objection to validity or existence of Arbitration Agreement is taken before it. Such objection, if taken, shall be decided on its own merits. The special leave petition stands rejected.

A Writ Petition (Civil) No. 81/2000 is a petition under Article 32 of the Constitution, against the very order of the learned Chief Justice of Gauhati High Court, which was the subject matter of challenge in Special Leave Petition(c) No. 19549/99. We fail to understand how a petition under Article 32, at all is entertainable against the order of the learned Chief Justice, refusing to appoint an Arbitrator under Section 11 of the Arbitration and Conciliation B Act, 1996. This petition under Article 32, accordingly stands dismissed.

Special Leave Petition (Civil) No. 11317/99 is directed against the order of the nominee of learned Chief Justice of Andhra Pradesh High Court, appointing an Arbitrator under Section 11(6) of the Act. The order in question C being administrative in nature and the nominee of the learned Chief Justice, not being a Court or a Tribunal, as held by us, this special leave petition stands dismissed.

Special Leave Petition (Civil) No. 12323 of 1999 is by the Union of India, against the order of the nominee of the learned Chief Justice of Andhra D Pradesh High Court, appointing an Arbitrator under Section 11(6) of the Act. For the reasons, already indicated in SLP(C) No. 11317/99, this special leave petition stands dismissed.

Special Leave Petition (Civil) No. 8563/99 is directed against the order of the nominee of the learned Chief Justice of Madras High Court, appointing E an Arbitrator under Section 11(6) of the Act. For the reasons, already indicated, the said order of appointment being administrative in nature and the nominee of the learned Chief Justice, not being a Court or a Tribunal, the order in question is not amenable to the jurisdiction of this Court under Article 136 of the Constitution and consequently, the special leave petition stands dismissed.

F Special Leave Petition (Civil) No. 8581/99 is directed against the order of the nominee of the learned Chief Justice of Madras High Court, appointing an Arbitrator under Section 11(6) of the Act. For the self same reasons, indicated in SLP (C) No. 8563/99, this special leave petition stands dismissed.

S.M. Petitions dismissed.