

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7449 OF 2012
(Arising out of SLP(C) No. 28213 of 2011)

Hindustan Copper Ltd.

..... Appellant

Vs.

Monarch Gold Mining Co. Ltd.

..... Respondent

WITH

CIVIL APPEAL NO. 7450 OF 2012
(Arising out of SLP(C) No. 32255 of 2011)

JUDGMENT

JUDGMENT

R.M. LODHA, J.

Leave granted in both matters.

2. These appeals have raised the question about the procedure that is being followed by Calcutta High Court in consideration of the

applications under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act').

3. When the special leave petition filed by M/s. Choudhury Construction came up for consideration before the Bench, the learned counsel for the petitioner submitted that the procedure adopted by the Designate Judge while hearing petition under Section 11 of 1996 Act was unknown in law and not sanctioned by Section 11 inasmuch as although the Designate Judge has held that there are live disputes between the parties which have to be resolved through arbitration, yet the matter has been ordered to be placed before the Chief Justice for appointment of the arbitrator. In light of the submission made by the learned counsel, Registrar General, Calcutta High Court was ordered to be impleaded as party respondent.

4. In the matter of Hindustan Copper Limited, by an order dated 18.7.2012 this Court felt that the views of the Registrar General, Calcutta High Court were necessary as the issue involved was whether an application under Section 11(6) of the 1996 Act for appointment of an arbitrator could be considered in piecemeal by two Designate Judges.

5. In the matter of Hindustan Copper Limited, one Designate Judge first passed the order on 9.6.2011 holding that the request for appointment of the arbitrator was proper and then ordered that the

application should be referred to Hon'ble Delegate of the Chief Justice for appointment of an arbitrator. The relevant part of the order dated 9.6.2011 reads as under :

"Therefore, the request for appointment of arbitrator was proper. There is an arbitral dispute between the parties, as held above.

I also notice that the petitioner have not appointed their arbitrator, which they ought to have done by this time. Therefore, in the circumstances, I think this application should be referred to the Hon'ble delegate of the Hon'ble the Chief Justice for appointment of an arbitrator/arbitrators to adjudicate the disputes between the parties as mentioned in the letter of the petitioner dated 28th December, 2009.

I order accordingly."

6. In pursuance of the order dated 9.6.2011, the matter came up before another Designate Judge and he appointed the arbitrator by an order dated 8.7.2011. The following order reads as under :

"It appears from the order dated 9th June, 2011 passed by a learned Judge of this Court that His Lordship has already found that there exists an arbitration agreement between the parties and the dispute involved herein is covered by the said agreement.

In view of such fact, I, in exercise of power conferred under section 11(6) of the Arbitration & Conciliation Act, 1996 appoint Sri Rudrendra Nath Banerjee, a retired Judge of this Court as the Arbitrator on the fees of Rs. 15,000/- for each sitting."

7. In the appeal of M/s. Choudhury Construction, the Designate Judge on 6.9.2011 passed the following order :

"The State does not dispute the existence of the arbitration agreement but says that matters specifically excepted by the agreement cannot be made the subject matter of any arbitral

reference. If there is any excepted matter which is raised by the petitioner as claimant, it will be open to the State to object thereto, inter alia, under Section 16 of the Arbitration and Conciliation Act, 1996. Since it appears that there are live disputes to go to arbitration and the parties have failed to agree in the composition of the arbitral tribunal, AP No. 394 of 2009 is directed to be placed before the Hon'ble Designate of the Hon'ble The Chief Justice for constitution of an arbitral tribunal in accordance with the agreement between the parties to adjudicate upon the disputes covered thereby. There will be no order as to costs.

8. We have heard Mr. Gourab Banerji, learned senior counsel for the appellant – Hindustan Copper Limited, Mr. Soumya Chakraborty, learned counsel for the appellant – M/s. Choudhury Construction, Mr. Amit Kumar, learned counsel for Respondent No. 1– Monarch Gold Mining Co. Ltd., Mr. Anip Sachthey, learned counsel for the State of West Bengal and Mr. Jaideep Gupta, learned senior counsel for the Registrar General, Calcutta High Court.

9. Mr. Jaideep Gupta, learned senior counsel for the Registrar General, High Court, would submit that Section 11 of the 1996 Act did not put any embargo for piecemeal consideration of the matter. According to him, it is permissible that the Designate Judge considers the general power of the court to determine whether the pre-conditions for the exercise of that power have been fulfilled leaving the power of naming the arbitrator under Section 11 to the exclusive jurisdiction of the Chief Justice. He submits that this is in conformity with the Division Bench decision of the

Calcutta High Court in *Modi Korea Telecommunication Ltd. v. Appcon Consultants Pvt. Ltd.*¹.

10. Section 11 of 1996 Act provides for the appointment of arbitrators. It reads as under:

“S. 11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

¹ 1999 (II) Cal. H.C. Notes 107

(6) Where, under an appointment procedure agreed upon by the parties, –

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to –

- (a) any qualifications required of the arbitrator by the agreement of the parties; and
- (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India."

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8), and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

11. The Division Bench of the Calcutta High Court in *Modi Korea Telecommunication Ltd.*¹ was concerned with the question of the jurisdiction of a Single Judge who has been given the power for determination to entertain, hear and dispose of arbitration matters under Section 11 of the 1996 Act. The Division Bench dealt with the scheme of the 1996 Act, particularly, with reference to Sections 5,8,11,16 and 37(1). In the opinion of the Division Bench, Section 11 makes a distinction between the procedure for appointment of arbitrator and the actual appointment of the arbitrator. Keeping that distinction in mind, the Division Bench proceeded to consider the matter thus:

“48.Under section 11(2) parties can agree on the procedure for appointing the arbitrator. If there is no such agreement on the procedure section 11(3) prescribes the procedure to be followed. When the arbitration is to be of three arbitrators, section 11(3) provides that “each party shall appoint one arbitrator and the two appointed arbitrators shall appoint a third arbitrator who shall act as the presiding arbitrator”. If a party fails to appoint an arbitrator within 30 days from the receipt of request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institute designated by him under sub-section (4) of section 11.

49. Section 11(5) similarly provides that in the case of the arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within 30 days from the receipt of the request by one party from the other to do so, the appointment shall be made, upon request of a party by the Chief Justice or any person or institute designated by him. Section 11(6) deals with a situation where the appointment procedure has been agreed upon but there is non compliance of the agreed procedure. In this case also any party may request “the Chief Justice or any person or institute designated by him” to take the necessary measures unless the agreement on the appointment provides other means for securing the appointment.

50. A decision on the matter entrusted by sub-sections (4), (5) and (6) to the Chief Justice or any person or institute designated by him is final by virtue of section 11(7). Section 11(8) provides for considerations to which regard should be had before such power of appointment is exercised. Section 11(9) deals with International Commercial Arbitrations where the Chief Justice of India or any person or institute designated by him is given the powers of appointment. Section 11(11) deals with a situation where several requests are made to the Chief Justices of different High Courts or their designates. Section 11(12)(a) extends the operation of sub-sections (4), (5), (6), (7), (8) and (10) to International Commercial Arbitrations giving power of appointment to the Chief Justice of India in place of Chief Justice of the High Court. Section 11(12)(b) clarifies that the reference to Chief Justice means the Chief Justice of the appropriate High Court.

51. What does “appointment” mean—is it only limited to naming or does it include the adjudicatory process as to whether appointment should be made?

52. It is clear from a reading of section 11 that the word “appoint” has been used in section 11 to mean nomination or designation. Thus parties may appoint or name their arbitrator under Section 11(2), (3) and (4). The parties do not, in appointing an arbitrator, do more than name or designate him.

53. The power which has been conferred exclusively under section 11 on the Chief Justice is the power of appointment or the power to name an arbitrator. The Chief Justice may, if he so chooses, designate some other person or institute to exercise this power.

54. This power is to be distinguished from the general power of a court to determine whether the pre-conditions for the exercise of that power have been fulfilled. This is a judicial act. The bifurcation between the two powers has been recognized in the unreported decision of *Harihar Yadav v. Durgapur Projects Ltd.* (*supra*) when it was said:

“Undoubtedly the appointment of an arbitrator, on an application made by one of the parties involves a decision making process comprising the twin vital components and elements of consideration with regard to the points in issue, or the points of controversy between the parties and the actual act of appointment of the arbitrator. The act of actual appointment of an arbitrator has always to be preceded by a consideration as to whether in the facts and circumstances of the case the arbitrator in fact is required to be appointed or not. It is not only after this issue is resolved that the question of appointment of an arbitrator arises.”

55. Given the definition of the word ‘appointment’, in our view, section 11 does not say that the Chief Justice could alone exercise the general power of judicially determining whether the pre-conditions for such appointment have been fulfilled. To hold otherwise would, not only be contrary to the express language of the section, but it would also mean that

the Chief Justice could by designation clothe any person or institution with the power to discharge judicial functions.

56. Besides the legislature could not have intended to burden either the Chief Justice of India (in connection with all international arbitrations) or the Chief Justice of a High Court (in connection with all domestic arbitrations) to be saddled with the impracticable task of determining the existence of the preconditions for appointment of an arbitrator/arbitrators in all cases nor to empower the Chief Justice with the power to clothe any person or authority of his choice with the discharge of judicial functions exercisable by Courts. In facts section 11 does not say anything on the matter.

57. In our view such judicial determination is to be exercised only by a Court. A Court has been defined in section 2(e) of the Act as :

“(e) ‘Court’ means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary Civil Jurisdiction, having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.”

12. The Division Bench then considered Section 14 of the High Court Act, 1861, Clause 36 of the Letters Patent, Chapter V Rule 1 of the Original Side Rules and Article 225 of the Constitution of India and in paragraph 64 of the Report concluded as under :

“64. Pursuant to this power the Chief Justice has allocated the business of hearing matters pertaining to arbitrations to a Learned Single Judge. It is for that Learned Single Judge to exercise the general power referred to earlier, leaving the power of naming the arbitrator under section 11 to the exclusive jurisdiction of the Chief Justice.”

13. We find merit in the submission of Mr. Gourab Banerji, learned senior counsel for one of the appellants that the view taken by the Division Bench of Calcutta High Court in *Modi Korea Telecommunication Ltd.*¹ is completely knocked out by a majority decision of this Court in *SBP & Co. v. Patel Engineering Ltd. and another*².

14. In *SBP & Co.*², a seven-Judge Bench of this Court was concerned with the question in relation to the nature of function of Chief Justice or his designate under Section 11 of the 1996 Act. The necessity to consider the said question arose as a three-Judge Bench of this Court in *Konkan Railway Corporation Limited & Ors. v. Mehul Construction Company*³, as approved by a five-Judge Bench of this Court in *Konkan Railway Corporation Limited & Anr. v. Rani Construction (P) Ltd.*⁴ had taken the view that the function of the Chief Justice or his Designate under Section 11 was purely an administrative function; it was neither judicial nor quasi judicial and the Chief Justice or his nominee performing the function under Section 11(6) cannot decide any contentious issues between the parties.

15. The majority in *SBP & Co.*² held that looking at the scheme of the 1996 Act as a whole and the object with which it was enacted, it seemed proper to view the conferment of power on the chief justice as a

² (2005) 8 SCC 618

³ (2000) 7 SCC 201

⁴ (2002) 2 SCC 388

conferment of judicial power to decide on the existence of the conditions justifying the constitution of an arbitral tribunal. In the majority judgment, it was also observed that the power had been conferred under Section 11(6) on the highest judicial authority in their capacities as Chief Justices to pass an order contemplated under Section 11 of the Act. In paragraphs 42 to 44 of the Report (pg. 662-663), the majority in *SBP & Co.*² held as under :

“42. In our dispensation of justice, especially in respect of matters entrusted to the ordinary hierarchy of courts or judicial authorities, the duty would normally be performed by a judicial authority according to the normal procedure of that court or of that authority. When the Chief Justice of the High Court is entrusted with the power, he would be entitled to designate another Judge of the High Court for exercising that power. Similarly, the Chief Justice of India would be in a position to designate another Judge of the Supreme Court to exercise the power under Section 11(6) of the Act. When so entrusted with the right to exercise such a power, the Judge of the High Court and the Judge of the Supreme Court would be exercising the power vested in the Chief Justice of the High Court or in the Chief Justice of India. Therefore, we clarify that the Chief Justice of a High Court can delegate the function under Section 11(6) of the Act to a Judge of that Court and he would actually exercise the power of the Chief Justice conferred under Section 11(6) of the Act. The position would be the same when the Chief Justice of India delegates the power to another Judge of the Supreme Court and he exercises that power as designated by the Chief Justice of India.

43. In this context, it has also to be noticed that there is an ocean of difference between an institution which has no judicial functions and an authority or person who is already exercising judicial power in his capacity as a judicial authority. Therefore, only a Judge of the Supreme Court or a Judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act

as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a non-judicial authority cannot exercise judicial powers.

44. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.”

16. In paragraph 47 (pg. 663) of the Report, this Court in *SBP & Co.*² summed up its conclusions. To the extent they are relevant, the conclusions read as under :

“47. (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.”

17. The exposition of law by a seven-Judge Bench of this Court in *SBP & Co.*², leaves no manner of doubt that the procedure that is being followed by the Calcutta High Court with regard to the consideration of the applications under Section 11 of the 1996 Act is legally impermissible. The piecemeal consideration of the application under Section 11 by the Designate Judge and another Designate Judge or the Chief Justice, as the case may be, is not contemplated by Section 11. The function of the Chief Justice or Designate Judge in consideration of the application under Section 11 is judicial and such application has to be dealt with in its entirety by either Chief Justice himself or the Designate Judge and not by both by making it a two-tier procedure as held in *Modi Korea*

*Telecommunications Ltd.*¹. The distinction drawn by the Division Bench of Calcutta High Court in *Modi Korea Telecommunications Ltd.*¹ between the procedure for appointment of arbitrator and the actual appointment of the arbitrator is not at all well founded. *Modi Korea Telecommunications Ltd.*¹ to the extent it is inconsistent with *SBP & Co.*² stands overruled.

18. In view of the above, the impugned orders are set aside. The arbitration petitions are restored to the file of the High Court for appropriate consideration, as noted above. The appeals are allowed to the above extent. No order as to costs.

19. It is, however, clarified that orders passed by the Chief Justice or the Designate Judge under Section 11 of the 1996 Act which have attained finality and the awards pursuant to such orders shall remain unaffected insofar as the above aspect is concerned.

JUDGMENT

.....J.
(R.M. Lodha)

.....J.
(Anil R. Dave)

NEW DELHI.
OCTOBER 11, 2012.