CASE NO.:
Appeal (civil) 5315 of 2003

PETITIONER:
Hythro Power Corporation Ltd.

RESPONDENT:
Vs.
Delhi Transco Ltd.

DATE OF JUDGMENT: 30/07/2003

BENCH:
Shivaraj V. Patil & D.M. Dharmadhikari.

JUDGMENT:

J U D G M E N T

(Arising out of SLP (Civil) No.1775 of 2002)

Dharmadhikari J.

Heard learned counsel appearing for the parties. Leave to appeal, as prayed for, is granted.

The appellant Hythro Power Corporation Limited has approached this Court aggrieved by rejection of its application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act" for short). The learned judge of the Delhi High Court acting as designate or nominee of the Chief Justice, in exercise of his powers under Section 11 of the Act, by his order dated 7.12.2000 came to the conclusion that no agreement in writing having been executed by the parties with an arbitration clause, the prayer made by the appellant for seeking a reference of the disputes raised to arbitral Tribunal has to be rejected.

Aggrieved by refusal of the learned judge of the Delhi High Court to make a reference to the arbitration, the appellant-Corporation filed a Writ Petition in the High Court of Delhi. The Division Bench of the High Court by the impugned order dated 29.8.2001 came to the same conclusion that there exist no written arbitration agreement and hence the dispute between the parties cannot be referred for arbitration under Section 11 of the Act. The appellant-Corporation therefore has approached this Court by seeking leave under Article 136 of the Constitution.

The factual background and nature of dispute giving rise to the prayer for arbitration under Section 11 by the appellant-Corporation need examination.

The respondent Delhi Transco Limited issued a notice inviting tenders (NIT) for awarding the work of Erection, Testing and Commissioning of balance work of 220 KV DC Tower Line from Samaypur to Mehrauli. The NIT contained clause 25 which is a arbitration clause. Pursuant to the NIT, the appellant submitted its tender. The respondent issued a letter of intent in favour of the appellant. According the appellant, the respondent also sent a detailed letter showing acceptance of the award of the work to the appellant. It was also indicated that all terms and conditions of the NIT would form part of the contract.

According to the appellant, the exchange of letters and correspondence between the parties, pursuant to the issuance of NIT

and submission of offer by the appellant and its acceptance by the respondent constituted a contract and as the terms and conditions in the NIT, on which the contract was awarded, contained clause 25 providing forum of arbitration, "arbitration agreement" as defined in Section 7(4)(b) of the Act had come into existence to enable the appellant to invoke the said arbitration clause.

Learned Senior Counsel appearing for the appellant relies on a three-judge bench decision of this Court in Konkan Railway Corporation Ltd. vs. Mehul Construction Co. [2000 (7) SCC 201] and the Constitution Bench Judgment of this Court in Konkan Railway Corporation Ltd. vs. Rani Construction P.Ltd. [2002 (2) SCC 388]. On behalf of the appellant, it is argued that, as has been held by this Court in the cases (supra), the nominee or designate of the Chief Justice, when its power is invoked under Section 11 of the Act, merely exercises administrative functions and, therefore, has no jurisdiction to adjudicate upon the contentious issues between the parties on 'the existence or the validity of the arbitration Agreement.' It is submitted that 'arbitral tribunal' to whom the dispute is referred is alone conferred with jurisdiction to decide the existence or validity of the arbitration agreement as provided in Section 16(1) of the Act.

On the facts and background of the dispute briefly indicated above, we find that the designate of the Chief Justice acting administratively under Section 11 and the Division Bench of the High Court exercising powers under Article 226 of the Constitution were clearly in error in adjudicating upon the dispute regarding 'the validity and existence of the arbitration agreement' and holding that the dispute was not referable to arbitration.

This Court in three-Judge Bench decision and the Constitution-Bench decision in the case of Konkan Railway (supra) has held that the Chief Justice or his designate under Section 11 of the Act exercises purely administrative functions and it is not open to him to discharge any judicial function of adjudicating the dispute even regarding the 'existence of arbitration agreement.' Whether the letters and exchange of correspondence between the parties, pursuant to the NIT, can constitute a contract and an 'arbitration agreement' can be read into the same in terms of Section 7(4)(b) of the Act was a question solely within the jurisdiction of 'arbitral tribunal' under Section 16 of the Act. See decision in the case of Nimet Resources Inc. vs. Essar Steels Ltd. [2000 (7) SCC 497] wherein Justice Rajendra Babu of this Court acting as designate of the Chief Justice of India while exercising powers under Section 11 of the Act, observed thus:-

"I am conscious of the fact that M.Jagannadha Rao, J. in Wellington Associates Ltd. vs. Kirti Mehta, (2000) 4 SCC 272 held that the jurisdiction of the nominee of the Chief Justice of India to decide the question is not excluded by Section 16 of Act and such a power can be exercised in a suitable case. On this basis, it is no doubt permissible under Section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of Section 7 of the Act the appropriate course would be that the arbitrator should decide such a question under Section 16 of the Act rather the Chief Justice of India or his nominee under Section 11 of the Act.

I take this view because the power that is exercised by the nominee of the Chief Justice of India under Section 11 of the Act is in the nature of an administrative order. In such a case, unless the Chief Justice of India or his nominee can be

absolutely sure that there exists no arbitration agreement between the parties it would be difficult to state that there should be no reference to arbitration. Further such a view may not be conclusive in view of the nature of the powers that are exercised under Section 11(6) of the Act."

In the latest decision of two-Judge Bench of this Court in the case of Food Corporation of India vs. Indian Council of Arbitration & Ors. etc. etc., [JT 2003 (5) SC 480], similar view was taken. In that case reference of dispute to arbitration was opposed on the ground that under the arbitration clause the arbitrator was to be nominated by the Food Corporation of India as the employer and not by the Indian Council of Arbitration which was the institution from whose panel the arbitrator was to be selected. The designate of the Chief Justice under Section 11 refused to make a reference and the High Court in Writ Petition by an elaborate judgment expressed its opinion on the dispute that the Food Corporation of India should have nominated the arbitrator from the panel of Indian Council of arbitration. In the context of that dispute, this Court observed thus:

"Unfortunately, the High Court in this case seems to have proceeded to adopt an adjudicatory role and returned a verdict recording reasons as to the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator."

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"As indicated earlier even assuming without accepting for purposes of consideration that there is any infirmity in the arbitration clause which go to undermine as claimed by the respondents the legality, propriety and validity of the constitution of the Tribunal and/or even if there be any objections as to the existence of an enforceable or valid arbitration agreement, it had to be adjudicated by the very Arbitral Tribunal after a reference is made to it on being so constituted and it is not for the ICA or the learned Judge in the High Court to undertake this impermissible adjudicatory task of adjudging highly contentious issues between the parties. As observed by the Constitution Bench of this Court, there is nothing in Section 11 of the 1996 Act that requires the party other than the party making the request to be noticed and that it does neither contemplate a response from the other party nor contemplate any decision by the Chief Justice or his nominee on any controversy that the other party may raise, even in regard to its failure to appoint an Arbitrator within the stipulated period. The legislative intent underlying the 1996 Act is to minimize the supervisory role of courts in arbitral process and nominate/appoint the Arbitrator without wasting time, leaving all contentious issues to be urged and agitated before the Arbitral Tribunal itself. Even under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation.

Keeping in view the law as settled by this Court, the designate of the Chief Justice acting under Section 11 of the Act and the Division Bench of the High Court in exercise of power under Article 226 of the Constitution both acted under a misconception of law and wrongly held that the disputes were not referable to the arbitration.

The appellant sought reference of its disputes with the respondent/ company for adjudication through the arbitration in accordance with arbitration clause in the alleged agreement arrived at between them. Whether on the facts mentioned above an arbitration agreement can be said to have existed by recourse to arbitration clause in NIT was itself a dispute which deserved to be referred to the arbitral Tribunal in accordance with the arbitration clause. Section 16 empowers the arbitral Tribunal to decide the question of existence and validity of the arbitration agreement.

The present appeal, therefore, deserves to succeed and is hereby allowed.

The impugned order of the learned Single Judge passed under Section 11 of the Act and the order of Division Bench of the High Court in Writ Petition under Article 226, both are quashed. The case is remanded to the Chief Justice or his designate for hearing the parties on the limited question of constitution of an arbitral Tribunal in accordance with the arbitration clause in the NIT and for making a reference for arbitration in accordance with section 11 of the Act. The costs incurred by the parties in this case shall abide the final results of the arbitration proceedings.