* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: March 28, 2016

\+ LPA 103/2016

STEEL AUTHORITY OF INDIA LIMITED ..... Appellant

Through: Mr.A.K.Ganguli, Sr.Adv. with Mr.Sunil K.Jain, Mr.T.N.Durga Prasad, Mr.Shantanu Jain, Ms.Reeta Chaudhary, Advs.

Versus

INDIAN COUNCIL OF ARBITRATION & ANR. ..... Respondents

Through: Mr.Amitava Majumdar, Adv. with Mr.Arvind Kumar Gupta, Mr.Arjun Mittal, Mr.Anshul Garg and Mr.Abhishek Goel, Advs. for R-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V.P.VAISH

J U D G M E N T

: Ms.G.ROHINI, CHIEF JUSTICE

1. This appeal is preferred against the order of the learned Single Judge dated 16.11.2015 in W.P.(C) No.3013/2013. Steel Authority of India Ltd. (SAIL), the unsuccessful petitioner in W.P.(C) No.3013/2013, is the appellant before us.

2. The said writ petition, which was filed assailing the appointment of an Arbitrator on behalf of SAIL by the respondent No.1/Indian Council of Arbitration vide letter dated 09.04.2013 as well as the subsequent proceedings carried out by the Arbitral Tribunal, was dismissed by the learned Single Judge by the order under appeal with costs of Rs.75,000/-.

3. The facts leading to the filing of the writ petition are as under.

(i) The writ petitioner/appellant (SAIL) and the respondent No.2 herein (GE Shipping) are parties to the Charter Party dated 19.12.2007 which contained the following Arbitration Clause:-

> "57. Arbitration Clause:
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> All disputes arising under this Charter Party shall be settled in India in accordance with the provisions of the Arbitration & Conciliation Act, 1996, (No. 26 of 1996) or any further amendments thereof and under the Maritime Arbitration Rules of the Indian Council of Arbitration. The Arbitrators to be appointed from out of the Maritime Panel of Arbitrators of the Indian Council of Arbitration. The Arbitrators shall be commercial men."

(ii) A dispute arose between SAIL and the respondent No.2 and the same was referred for arbitration in terms of the above Arbitration Clause. An award was passed on 7/10th May, 2010 by the Arbitral Tribunal holding *inter alia* that the claim of the respondent No.2 for demurrage and balance freight did not survive. The respondent No.2 preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 before this Court for setting aside the said award dated 7/10th May, 2010. This Court by order dated 09.05.2012 allowed the said petition and set aside the award dated 7/10th May, 2010 holding that the rejection by the Arbitral Tribunal of the claim of the respondent No.2 for demurrage and balance freight cannot be sustained in law.

(iii) Thereafter, the respondent No.2 made a fresh application dated 20.07.2012 before the respondent No.1/Indian Council of Arbitration requesting to refer the same dispute which was the subject matter of the

earlier award dated 7/10th May, 2010 for arbitration under ICA Maritime Arbitration Rules and naming their nominee Arbitrator. In pursuance thereof, the respondent No.1 by letter dated 16.08.2012 called upon SAIL to forward the name of their nominee Arbitrator within 30 days failing which the nominee Arbitrator will be appointed by the Maritime Arbitration Committee under Rule 10(3)(b) of ICA Maritime Arbitration Rules. While enclosing a copy of the statement of claim made by the respondent No.2, SAIL was also asked to file its defence statement on or before 16.09.2012. SAIL vide its letter dated 28.09.2012 opposed entertaining the request of respondent No.2 for arbitration contending that since the dispute has already been adjudicated, the proposed proceedings are hit by the principles of *res judicata*. The respondent No.1 having opined that the issue regarding the maintainability of the application seeking *de novo* arbitration needs consideration by the Arbitral Tribunal itself, proceeded further and constituted the Arbitral Tribunal by appointing a nominee Arbitrator on behalf of SAIL and the presiding Arbitrator. The said fact was informed to SAIL by letter dated 09.04.2013.

(iv) Aggrieved by the same, SAIL filed W.P.(C) No.3013/2013 on 06.05.2013 which was dismissed by the learned Single Judge by the order under appeal. Pending the writ petition, since the proceedings before the Arbitral Tribunal were not stayed, the Tribunal proceeded further and an award was passed on 30.06.2015.

(v) We were informed at the bar during the course of the hearing that SAIL filed an application under Section 34 of the Arbitration and

Conciliation Act to set aside the said award dated 30.06.2015 and that the same is now pending before this Court.

4. A perusal of the order under appeal shows that the learned Single Judge formulated the following three questions for consideration:-

(a) whether in the facts and circumstances any interference with the arbitration proceedings pending between GE Shipping and SAIL is warranted by this court in proceedings under Article 226 of the Constitution of India;

(b) whether the arbitration proceedings initiated by GE Shipping are maintainable, given that the proceedings are in respect of disputes that have been the subject matter of an earlier arbitration award, which was set aside under Section 34 of the Act; and

(c) whether the appointment of Arbitrators to the Arbitral Tribunal by ICA is illegal and contrary to the provisions of Section 11 of the Act.

5. After considering the submissions of both the parties, the learned Single Judge held on Question No.1 that the petition under Article 226 of the Constitution of India is not maintainable. The learned Single Judge had also rejected the contention of the writ petitioner/SAIL that the arbitration proceedings initiated by respondent No.2 are barred by principles of *res judicata*. Placing reliance upon the decision of the Supreme Court in ***Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.;*** **2006 (6) Scale 220**, the learned Single Judge held that once an award has been set aside, the parties would be free to begin the arbitration once again.

6. Assailing the said order, It is vehemently contended by Sh.A.K.Ganguli, the learned Senior Counsel appearing for the appellant/SAIL that the action of the respondent No.1/ICA in entertaining the request of the respondent No.2 and referring the dispute, which was already adjudicated by award dated 7th/10th May, 2010 for arbitration amounted to usurpation of the power under Section 11(6) of the Arbitration and Conciliation Act, 1996 which could be exercised only by the Chief Justice of the High Court and could be delegated only to a judge of the High Court but not to any institution. It is also contended that having held that the writ petition is not maintainable, the learned Single Judge should not have gone into the merits of the case and negatived the contention of SAIL that *de novo* arbitration is not permissible since the Arbitration and Conciliation Act does not contemplate repeated arbitration proceedings regarding the same claims and counter claims.

7. Per contra, it is contended by Sh.Amitava Majumdar, the learned counsel appearing for the respondent No.2 that the conclusions of the learned Single Judge which are in conformity with the well settled principles of law laid down in ***SBP. & Company v. Patel Engineering Ltd. &Anr***: **(2005) 8 SCC 618**, ***Iron and Steel Company Ltd. v. M/s Tiwari Road Lines***: **AIR 2007 SC 2064**, ***Mcdermott International Inc. v. Burn Standard Corporation Ltd.***:**2006 (6) Scale 220** cannot be held to be erroneous on any ground whatsoever and, therefore, no interference is warranted.

8. We have also perused the order under appeal and the other material placed on record. According to us, the following two issues arise for consideration in the present appeal.

i) Whether the conclusion of the learned Single Judge that the writ petition is not maintainable under Article 226 of the Constitution of India suffered from any infirmity.

ii) Having held that the writ petition is not maintainable, whether the learned Single Judge had committed any error in considering the other issues on merits of the case.

Issue No. (i):

9. The learned Single Judge held the writ petition to be not maintainable observing:

> "34. The petitioner's contention that ICA has usurped a judicial function, which is required to be interfered with under Article 227 or 226 of the Constitution, is unmerited. Appointment of an arbitrator in terms of the agreed procedure is not a judicial function. ICA had merely acted in terms of the contract between parties and did not perform any adjudicatory function. As explained hereinabove, request under Section 11(6) of the Act could be made by a party only in cases where the Arbitral Tribunal has not been constituted for the reasons as stated in clauses (a), (b) and (c) of Section 11(6) of the Act. In the present case, the occasion for GE Shipping to make a request under section 11(6) of the Act did not arise as the Arbitral Tribunal had been constituted in terms of the procedure agreed by SAIL and GE Shipping.
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> 35. The contention that ICA exercises quasi judicial powers which are subject to supervisory jurisdiction of this Court under Article 226/227 of the Constitution of India is also wholly unfounded and without any merit. The functions performed by ICA are in terms of agreement between the parties and such functions are in the realm of contract between the parties and cannot be termed as judicial or quasi judicial function. ICA has acted in

terms of the agreement between SAIL and GE Shipping and its decision to appoint the second arbitrator does not determine the rights of either parties; such decision does not have any trappings of a judicial function.

36. The action of ICA is not in the realm of public law; the action of appointment of an arbitrator by ICA was not in discharge of public duties or any public function. Such action is purely in terms of the contractual agreement between the parties and no interference under Article 226/227 of the Constitution is called for.

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39. It is also important to note that ICA's action that is impugned in the present petition - appointment of an arbitrator - is not in performance of a public function or a statutory duty but under a procedure as contractually agreed to between the parties. Thus, even if it was assumed that ICA was a State its actions in the private law domain could not be subject to judicial review unless it was shown that such actions offend any of the constitutional guarantees. The petitioner has made out no such case.

40. More importantly, the statutory scheme of the Act also does not permit any interference in arbitration proceedings. Section 5 of the Act expressly provides that no judicial authority would intervene except as provided that "notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part"

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43. Thus, in my view, the present petition is not maintainable and is liable to be rejected."

10. Having carefully considered the submissions of both sides, we do not find any reason to differ from the above conclusion of the learned Single Judge. Admittedly, there is an agreed procedure between the parties for resolution of disputes by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. As per the procedure agreed upon, in case the other party fails to appoint the second Arbitrator within 30 days or within the extended time agreed between the parties, the second Arbitrator will be appointed by the Maritime Arbitration Committee of ICA. The impugned action of the respondent No.1 in nominating an Arbitrator on behalf of SAIL in terms of the Arbitration clause was thus in the realm of contract between the parties and cannot be termed as judicial or quasi judicial function. As rightly opined by the learned Single Judge even if it was assumed that ICA is a State within the meaning of Article 12 of the Constitution of India, the impugned action of appointment of Arbitrator being in the private law domain could not be subject to judicial review. The ratio laid down in ***U.P. State Coop. Land Development Bank Ltd. vs. Chandra Bhan Dubey;*** **(1999) 1 SCC 741** and ***Jai Singh vs. MCD*** **(2010) 9 SCC 385** cited by the learned Senior Counsel for the appellant is, therefore, not applicable to the case on hand.

Issue No. (ii):

11. It is no doubt true that this Court normally does not enter into the merits of the case after recording a finding that the petition itself is not maintainable. However, as is evident from Para 44 of the order under appeal, the issues on merits of the case were pressed by the learned counsel appearing for the appellant and thus the learned Single Judge had proceeded to consider the issues on merits of the case. Hence, it is not open to the

appellant now to contend that the learned Single Judge should not have gone into the merits of the case.

12. Having held so, it is necessary for us to consider the further contention of the appellant that by appointing the second Arbitrator, the respondent No.1 has usurped the judicial power under Section 11(6) of the Arbitration and Conciliation Act.

13. Section11(6) of the Arbitration and Conciliation Act enables a party to request the Chief Justice or any person or institution designated by him to appoint an Arbitrator where an Arbitral Tribunal could not be constituted under the circumstances specified therein. In the present case, the Arbitration clause itself empowered the respondent No.1 to appoint a second arbitrator in case the other party fails to nominate the second Arbitrator within 30 days. The respondent No.1 has thus followed the procedure prescribed under the agreement. Since the agreement itself provides the procedure to be adopted where the other party fails to respond, Section 11(6) is not attracted.

14. The learned Senior Counsel sought to distinguish ***McDermott International Inc. vs. Burn Standard Co.Ltd. & Ors.*** **2006 (6) SCALE 220**, contending that the issue as to whether there could be multiple arbitration proceedings on the self same cause of action did not arise for consideration in the said case. In support of his submission that repeated arbitrations on the same cause of action are not permissible under law, the learned Senior Counsel relied upon ***Dolphin Drilling Ltd. vs. ONGC Ltd.*** **(2010) 3 SCC 267**.

15. We do not find any substance in the said contention. In the present case the award dated 7/10th May, 2010 was set aside by the Court on a petition filed under Section 34 of the Arbitration and Conciliation Act.

Consequently, the dispute between the parties stood revived. Since Clause 57 of the Charter Party provides that "all disputes arising under the Charter Party" shall be settled by way of arbitration following the procedure specified therein, the parties are at liberty to invoke the arbitration clause for settlement of the dispute which stood revived. Such a course, according to us, does not amount to repeated/multiple arbitrations as sought to be contended by the learned Senior Counsel for the appellant.

16. It may be true that in ***McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors. (Supra)***, it was not expressly held that in the event of the Arbitral award being set aside by the Court under Section 34, the parties can again invoke Arbitration clause on the basis of the same casue of action. However, it was made clear that consequent to quashing of the award, the parties are free to bring the arbitration again.

17. The decisions of the Division Benches of this Court in ***National Highways Authority of India vs. ITD Cementation India Ltd.*** **2008 (100) DRJ 431 (DB)** and ***BSNL vs. Canara Bank*** **169 (2010) DLT 253 (DB)** holding that the power to remit disputes back to the Arbitral Tribunal is envisaged in Section 34 (4) of the Arbiration and Conciliation Act, 1996 cannot be understood to have laid down that in the absence of such remand by the Court, the parties are precluded from invoking the Arbitration clause for settlement of the same dispute. As already mentioned above, we are of the view that in the event of the Arbitral award being set aside by the Court under Section 34, the dispute between the parties stands revived and the same can be settled in terms of the Arbitration clause under the agreement.

18. While considering the question whether a claim is barred by *res judicata* needs consideration in a proceeding under Section 11 of the

Arbitration and Conciliation Act, it was held in ***Indian Oil Corporation Limited vs. SPS Engineering Limited*** **(2011) 3 SCC 507** that the question whether the claim is barred by the principles of *res judicata* has to be examined by the Arbitral Tribunal since a decision on *res judicata* requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. It was also held that there can be no threshold consideration and rejection of a claim on the ground of *res judicata* while considering an application under Section 11 of the Arbitration and Conciliation Act.

19. On application of the said principle, it appears to us that it is not open to the appellant to raise an objection on the ground of principles of *res judicata* at the stage of nomination of the Arbitrators as provided under Maritime Arbitration Rules of ICA. Hence, the respondent No.1/ICA was justified in considering the request of the respodnent No.2 and proceeding further to appoint an Arbitrator on behalf of SAIL.

20. For the aforesaid reasons, the appeal is devoid of any merit and the same is accordingly dismissed.

CHIEF JUSTICE

V.P. VAISH, J.

MARCH 28, 2016
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