<!DOCTYPE HTML PUBLIC "-//W3C//DTD HTML 4.0 Transitional//EN"><!-- saved from url=(0045)http://www.supremecourtcaselaw.com/konkan.htm -->M/s. Konkan Railway Corporation Ltd. and Anr. etc.

Vs

M/s. Rani Construction Pvt. Ltd. etc.

Civil Appeal Nos. 5880-5889 of 1997 etc.

(M.Jgannadha Rao and K.G.Balakrishnan,JJ)

19.10.2000

ORDER

M. Jagannadha Rao, J.:- Learned Solicitor General of India Sri Harish Salve, appearing for the appellants, has submitted that the order dated 4.7.97 of the learned Chief Justice of the Bombay High Court, under section 11 of the Arbitration and Conciliation Act, 1996 on the preliminary issues is a judicial order and, on facts, is liable to be set aside under Article 136 of the Constitution of India. It is contended that, even if it is to be treated as administrative in nature, it is amenable to Article 136.

The learned Chief Justice in his order dated 4.7.97 held that inasmuch as the appellant-company failed to appoint Arbitrators as required under the arbitration clause, the appellants should be compelled to furnish a panel of names of arbitrators to the respondent-contractors and one name should be suggested by the appellants. The learned Chief Justice had also rejected the plea of the appellants that no reference be made as the matters were 'excepted matter's and held that the question whether the claims related to 'excepted matters' or not was also to be decided by the arbitrators after recording evidence and verifying that facts. Learned Solicitor General contends that such an order of the Chief Justice deciding rights preliminary points cannot be characterised as an administrative order.

Appellant is confronted with the three judge Bench in Konkan Railway Corporation Ltd. vs. M/s. Mehul Construction Co. ([2000 (6) SCALE 71] which has held that no appeal is maintainable under Article 136 against such an order passed by the Chief Justice Directing appointment of arbitrators under section 11 inasmuch as such ordered are administrative in nature even if they contain reasons and decision on certain preliminary issues raised by the parties at the stage of appointment of arbitrator.

It is pointed out by the learned Solicitor General of India that the above judgment requires reconsideration. Counsel pointed out that initially in Sundaram Finance Ltd. vs. NEPC India Ltd. [1999(2) SCC 479] in a case which arose under section 9 (and not under section 11), a passing observation was made by Kirpal, J. (in para 12) that under section 11 the Chief Justice or his nominee would not be passing a judicial order. That was by way of obiter. Later on, in Ador Samia Private Ltd. vs. Peekay Holdings Limited & Others [1999 (8) SCC 572], a Bench consisting of Majmudar and Mohapatra, JJ. held that against an order under section 11 passed by the Chief Justice, no application for special leave could be filed under Article 136 inasmuch as the order was an administrative order and the Bench relied upon the observations of kirpal, J. in Sundaram

Finance Ltd., The Bench also referred to the judgment of construction Bench in Indo-China Steam Navigation Co. Ltd. vs. Jasjit Singh [AIR 1964 SC 1140: 1964 (6) SCR 534 (at 603) which held that a purely administrative order or executive order was not amenable to Article 136. However, it appears that a Bench presided over by Majmudar, J. referred the question as to the nature of the order to a three judge Bench in Kokan Railway Co. Limited. The three judge Bench took the view (see 2000 (6) 3 scale 71) that no special leave petition could be filed under Article 136 against the order passed by the Chief Justice or his nominee under section 11. According to the learned Solicitor General, this view of the three judge Bench requires reconsideration.

Learned Solicitor General submits that, it is now well-settled in several countries, where the UNCITRAL model has been adopted and where the arbitrator also is permitted to decide questions as to the existence of the arbitration clause or validity of the agreement - that the Court can decide certain preliminary disputes which are raised before it at or before the appointment of arbitrators - such as disputes relating to existence of the arbitration agreement or a question as to the very existence of a 'dispute' or as to whether the items of disputes fell within 'excepted' matters the items of disputes fell within 'excepted' matters or whether an arbitrator, could be appointed where the invocation of the clause by one party was beyond the prescribed period in which one has to ask the otherwise to appoint an arbitrator, etc. It is true that under section 16(1) of the new Act, the arbitrator is now empowered to decide his own jurisdiction including any objection sa to the existence or validity of the agreement and for that purpose the arbitration clause is deemed to be independent of the main contract (called Kompetenz-Kompetenz principle). Counsel contends that, it may be that in situations where the matter has straightway gone before an arbitrator by act of parties without intervention of Court, the arbitrator is now statutorily empowered to decide these basic questions also. But when a case comes before judicial authority and the defendant pleads that there is an arbitration clause (see section 8 of the new Act) or where, on account of the non-appointment of an arbitrator, the Court is approached for appointment of arbitrator (see section 11), the Court can decide these preliminary issues judicially and need not mechanically appoint an arbitrator under section 11 in such cases. The power of the Court has not been taken away by the new Act. It is contended, that this is still the law in all countries where the UNICTRAL model has been adopted. In all such cases, the order of the court or the Chief justice (or his nominee) will be a 'judicial' one and not an administrative order. It is pointed out that the UNCITRAL Model Law, in fact, uses the words 'Court or other authority' in Article 6 and Article 11. She is this connection Article II(3) of the New York Convention, Article 4(1) Geneva Protocol, Article 8 of the Model Law and section 9 of the English Act of 1996.

We may note that in para 5.49 (pp.273-274) of 'Law and Practice of International Commercial Arbitration' by Alan Redfern and Martin Hunter (3rd Ed.) (1999), it is stated, in relation to the procedure adopted now in various countries following the UNICTRAL model as follows:

"The third course of action is for the respondent to ignore the arbitral tribunal and to go to Court to resolve the issue of jurisdiction. There are various ways in which this may be done. The respondent may, for example, seek an injunction or similar remedy to restrain the arbitral tribunal from proceeding. Or the respondent may seek a declaration to the effect that the arbitral tribunal does not have jurisdiction in respect of the particular claim or claim put forward by the claimant-for instance, on the basis that there was no valid arbitration agreement. Or, again by way of example, the respondent may take the offensive and commence litigation in respect of the matters in dispute. The claimant in the arbitration would presumably defend such a challenge to the jurisdiction of the arbitral tribunal by seeking to have the arbitration agreement enforced. This would be a straightforward matter of reliance upon Article II of the New York Convention (such as section 9 of

the English 1996 Act) or a similar provision of the law governing abitration at the seat of the arbitration (as in Article 8 of the Model Law). The relevant national Court must decide whether the arbitration agreement is null and void, inoperative or incapable of being performed; if it is not, the parties will be referred to arbitration."

[See also para 5.51 which deals with a 'combined approach').

In several countries, the negative effects of the 'Kompetenz-kompetenz' principle, conferring powers on the arbitrator, has been considered.

In this connection, there is an exhaustive and detailed discussion of this aspect in 'Fouchard, Caillard Goldman on Enternational) Arbitration) (1999) (Para 672 to 682) (pages 407-413), referring to the post-UNCITRAL case-law in France, Austria, Sweden, Belgium, Netherlands, USA etc. to the effect that if the Court is first seized of these preliminary issues before appointment of arbitrator, - even in cases where the arbitrator, under the statute, is empowered to decide these questions - the Court can and will decide these issues first rather than permit the arbitrator to decide them. The experience of the various Courts in these countries where the UNCITRAL Model has been adopted long ago in a matter for consideration in India, where we have recently adopted the model.

In France, in Caprodag vs. Dame Bohin (1995 Rev. Arb. 617) the Court of Appeal has held recently that the arbitrators can decide these questions in cases where the Court is not seized with these questions earlier. This is also so under the 1961 European Convention. Where, however, the matter straightway goes before the arbitrator by act of parties and the arbitrators are first seized of these problems, they can decide but their decisions will still be subject to the decision of the Court. Reference is made by the authors (Fouchard etc.) to the US cases in Comptek Telecom Inc vs. IVD Corp. (1995 US Dist. Lexis 11876) (W.D.N.Y. Aug. 1, 1995) (10. Intl Arb. Rep. 1) SMG Swedish Machine Group vs. Swedish Machine Group Inc. (1991 US Dist. Lexis 780) holding that if the Court is seized of these issues first, it had better decide them. The position is that same under Swidesh Law in the 1999 Arbitration Act (Sec 2, para 1). The authors (Fouchard etc.) refer (p.409) to the Belgium Law (Art. 1679, para 1 of the Judicial Code), the 1986 Neherlands Arbitration Act (Act 1022 (1) of the Code of Civil Procedure), the 1987 Swiss Private International Law Statute (Art 7) - all stating that the arbitrators shall decide these issues except where the Court is seized of these issues at an earlier stage. The Swiss case law, the 1996 English Arbitration Act are also referred to. In para 676, the Authors say

"As a result, and although it was at one time relatively isolated, the rule found in French law and in the 1961 European Convention has recently gained substantial acceptance."

In para 678, under the heading 'Policy Considerations', it is stated thaat if matter has not gone straight to the arbitrators but has come initially before the Court can decide these preliminary issues and this saves (i) time and (ii) costs of arbitration. It is said:

"The approach whereby the Courts seized of the merits of the case the entitled to rule immediately on the existence and validity of the arbitration agreement arguably leads to a certain degree of time and cost avoidance. It may prevent parties having to waait several months, or in some cases, years, before knowing the final outcome of the dispute regarding jurisdiction it will often take long for the arbitrators and then the Courts to reach their decisions."

In a very recent case in Azov Shipping Co. vs. Baltic Shipping Co. (1999 (1) LL LR 68), which arose under the 1996 Act, the parties had first gone before the arbitrator on the preliminary question of jurisdiction, the matter was argued for three days to ascertain whether or not there was a contract with the respondent and the arbitrator held that the respondent before him was a party to the contract. The matter then came under Section 67 before the Court. The Court observed that this was perhaps a case where the parties could have straight come first before the Court for determination on this issue and that would have saved costs and time. (The English Act permits parties to take consent or by consent of the arbitrator, to go to Court on jurisdiction issues). Rix J said (p.70):

"This was perhaps a case where the parties might well have come to Court, either by agreement or upon an application from the one side or the other, for the Court to determine issues of jurisdiction, on the ground, that it was likely to produce substantial savings in cost and that there was good reason why the matter should be decided by the Court".

[See also 'A Practical Approach to Arbitration Law by Keran Tweeddale and Andrew Tweeddale' (1999) (at p.79)]

It is, therefore, contended that the Chief Justice or his nominee, is, therefore, entitled to decide these issues notwithstanding the arbitrator's 'competence' to decide these issues and if there is a decision, the order deciding rights of parties cannot be 'administrative' but can only be a judicial order amenable to Article 136.

As to the nature of the order to be passed under section 7 of the International Arbitration Act which deals with reference of disputes falling under the Convention to arbitration, the Federal Court of Australia (New South Wales) in its judgment dated 30.6.97 held:

"Each of these determinations which may arise under section 7 of the Act, calls for the exercised by the Court of judicial power".

(See Hi-Fert Pty. Ltd. vs. Kiukiang Maritime Carriers reported in Vol. xxiii - 1998, Year Book of Commercial Arbitration of ICCA p. 606 at p.612).

The learned Solicitor General of India Sri Salve has also contended that under section 11 the Chief Justice (or his nominee) has now replaced the jurisdiction of the Court under section 8 of the old Arbitration Act, 1940. More or less, the same powers are now conferred on the Chief Justice and this has been done only to enthuse more confidence among the litigants in the person who is appointed as arbitrator. The District Court has been previously performing judicial functions under Section 8 of the Arbitration Act, 1940 and even now the Chief Justice performs only judicial functions. The UNCITRAL MODEL law, (on which the 1996 Act is modeled) and several statutes passed in various countries on the UNCITRAL model use the word 'Court' and do not use the word 'Chief Justice'. It is contended that merely because the word 'Chief Justice' (or his nominee) is now used in the new Indian Act, the order of thie Chief Justice (or his nominee) cannot be treated as an administrative order. The order does not relate to administrative functions of the Chief Justice of India or of the Chief Justice of the High Court - such as those concerning the internal administration of the Supreme Court or High Court or of the Subordinate Judiciary, as the case may be. On the other hand, the order judicially decides preliminary issues raised by two contracting litigating parties. Such an order cannot be said to be administrative in nature. That is the contention.

It was pointed out by the learned Solicitor General that in this very case, the learned Chief justice of

the Bombay High Court had passed a judicial order on the preliminary issues raised - and which could be raised at the stage anterior to the appointment of the arbitrator. These issues had to be decided. Order examples are also referred to. The case in SLP(C) No. 19549 of 1999 which was heard by the three Judge Bench (from the order of the Chief Justice, Gauhati) alongwith Konkan Railway Corporation's cases, (see para 8 at p.77) is one such. But the three Judge Bench however, characterised a detailed reasoned judicial order of the Chief Justice, Gauhati in that SLP as an 'administrative order' though the Chief Jusitce had decided a preliminary issue concerning the existence or otherwise of an arbitration agreement. Learned Solicitor General argued that the judgment of the three Judge Bench was not correct in stating that the Chief Justice of Guwahati was "not functioning" as a Court when the said order was passed. A similar question arose in Wellington Associates Ltd. vs. Mr. Kirit Mehta [JT 2000 (4) SC 135] (before one of us, Jagannadha Rao, J.) as to the existence of the arbitration clause and after deciding about the competence of the Court and the Kompetenz-Kompetenz principle, the issue was decided as a matter of law by assigning reasons and in fact, it was held that there was no arbitration clause at all. (Of course, in Nimet Resources Inc. & Anr. vs. Essar Steels Ltd. [JT 2000 (Suppl. 1) SC 95], Rajendra Babu, J. while dealing with the question of existence of the contract, referred to the above casee in Wellington Associates Ltd., but felt bound by the three Judge Bench in Konkan Railway case). In yet another case, in M/s Datar Switchgears Ltd. vs. Tata Finance Ltd. and Anr. (Civil Appeal arising out of SLP(c) No. 13812 of 2000 disposed of on 18.10.2000), a question arose whether when one party had, on demand by the other party, appointed an arbitrator - through beyond the period stipulated in the contract, - the Chief Justice (or his nominee), could, when approached by the other party, appoint another (sole) arbitrator. Such a question, it would be obvious, had to be decided at that stage and could not be left to be decided by one of the arbitrators because the question would be as to who among them would then be the 'sole' arbitrator? It is pointed out that there could be a variety of situations where preliminary issues arising at the stage of Section 11 would have to be decided by the Chief Justice or his nominee, by a judicial order and this would save time and expenditure and that this view is not inconsistent with the UNCITRAL Model.

It was pointed out that there is a more important aspect of a practical nature which had to be borne in mind. If such an order of the Chief Justice (or his nominee) was to be treated as an administrative order, it could be challenged before a Single Judge of the High Court and then before a Division Bench and then in this Court under Article 136, and such a procedure would only delay the arbitration proceedings more than if the order was accepted as a judicial order and was permitted to be challenged directly under Article 136. In fact, if the order was to be treated as administrative in nature, even the order of the Chief Justice of India (or his nominee) could be challenged first before a Single Judge of the High Court and then before a Division Bench and then under Article 136 - rather than being treated as a final order of this Court. That would only delay the proceedings further. Similarly, if the order of the Chief Justice of the High Court or his nominee is treated as a Judicial order, ther would be only one appeal to this Court under Article 136 of the Construction. It was contended that the reasoning of the three Judge Bench, that if the order was to be treated as an administrative order, time would be saved, - could thus be rendered nugatory. In practice, the defaulting party could drag on the matter for years at the two stages of Article 226 proceedings even on the preliminary issues, it is pointed out.

We are of the view that in the light of the above contentions and material, which in our opinion have a substantial bearing on the matter, and further inasmuch as this question is one arising almost constantly in a large number of cases in the various High Courts, it is desirable that this Court re-examines the matter.

We, therefore, direct the papers to be placed before the Hon’ble Chief Justice of India for passing appropriate orders.