HIGH COURT OF GUJARAT

ESSAR OIL LIMITED
Versus
UNITED INDIA INSURANCE COMPANY

Date of Decision: 29 December 2005

Citation: 2005 LawSuit(Guj) 832

Hon'ble Judges: M R Shah

Eq. Citations: 2006 2 GLH 1

Subject: Arbitration, Civil, Constitution

Acts Referred:
Constitution Of India Art 136, Art 226
Arbitration And Conciliation Act, 1996 Sec 11(6), Sec 16

Advocates: K S Nanavati, Nanavati Associates, Rajni H Mehta

Cases Referred in (+): **2**

M. R. Shah, J.

[1] By way of this petition under Article- 226 of the Constitution of India, the petitioner has challenged the legality and validity of the order dated 10.2.2005 passed in IAAP No. 32 of 2003 by the learned Nominee of the Hon'ble the Chief Justice in dismissing the said application filed under Section-11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act for short and brevity) and in refusing to appoint the Arbitrator.

[2] It is the case on behalf of the petitioner that in pursuance of the licence granted by the Government of India for setting up an oil refinery at Vadinar, District Jamnagar, the petitioner commenced construction and related activities in relation to the oil refinery in the year 1996. In order to cover various risks associated with the refinery project, the petitioner had availed an insurance from the respondents covering all risks of physical loss or damange or third party liability and Advance Loss of Profit (`ALOP' for short) on the terms and conditions contained in an Insurance Policy dated 23.8.1996 issued by the respondents in favour of the petitioner. According to the petitioner, the sum insured under the above ALOP cover was Rs. 1072 crores and the aforesaid policy

was valid upto 24.9.1999. It is the case on behalf of the petitioner that due to a severe cyclone that hit the coastal area of Gujarat State on 9.6.1998, the petitioner suffered physical loss or damage in respect of the project works and the assets connected therewith and the petitioner also suffered loss of profit etc. which was determined to the tune of Rs. 886.30 crores which fell under ALOP. It is the case on behalf of the petitioner that on 29.6.1998 the petitioner claimed from the respondents a sum of Rs. 205 crores with respect to the loss or damage caused to the projected related assets / works and the respondents paid an aggregate sum of Rs. 30.00 crores towards the aforesaid loss or damage caused to the project related assets / works to the petitioner. It is further case of the petitioner that on 27.9.1999 the petitioner had claimed from the respondents a total sum of Rs. 886.30 crores towards ALOP. It is also case on behalf of the petitioner that after several meetings and rounds of discussions, a settlement was arrived at whereunder the respondents agreed to pay a sum of Rs. 269 crores over and above the sum of Rs. 30 crores already paid as aforesaid to the petitioner in satisfaction of all claims of the petitioner under all sections of the aforesaid insurance policy. It is the case on behalf of the petitioner that as many as eight drafts of settlement deeds were exchanged between the parties to record the terms of settlement for making payment of the settled sum to the petitioner. According to the petitioner, the respondents, however, postponed formal signing of the deed of settlement and at last, by their letter dated 20.2.2003, i.e. after a lapse of 42 months from the date of claim made by the petitioner for ALOP, repudiated th claim of the petitioner for payment of ALOP. As per the petitioner, since the aforesaid insurance policy contained a clause for arbitration, the petitioner through its Advocate's letter dated 19.5.2003 addressed to the respondents invoked the arbitration clause and called upon the respondents to nominate their arbitrator and also filed a protective suit thereafter before the learned Civil Judge (S.D.) at Vadodara for the recovery of money due under the policy considering the fact that the policy contained a clause for forfeiture of benefits under the policy if no action was taken by the petitioner within the period specified therein. It appears that the respondent replied to the petitioner's aforesaid notice invoking the arbitration clause by submitting that the claim under the policy having already been repudiated by them, there was no dispute as regards the amount to be paid under the policy and accordingly, the arbitration clause is legally not enforceable. It is the case on behalf of the petitioner that due to failure by the respondents to appoint their arbitrator as per the appointment procedure prescribed in the clause for arbitration contained in the aforesaid insurance policy, the petitioner filed Arbitration Petition No. 32 of 2003 for appointment of an arbitrator / arbitrators under Section-11(6) of the Act to adjudicate upon the disputes arisen under the aforesaid insurance policy, before this Court and the same came to be heard by the learned Nominee / Designated Judge of the Hon'ble the Chief Justice of this Court, who by her

order dated 10.2.2005 rejected the said petition for appointment of arbitrator or arbitral tribunal holding that:

> [i] While exercising the powers conferred by Section-11(6) of the Act, the Hon'ble the Chief Justice or his nominee is exercising the administrative powers and contentious issues are not required to be gone into.
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> [ii] That the petition does not involve the contentious issues.
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> [iii] There was no admission of liability to pay insurance money under the head of SAdvance Loss of Profit and the arbitration clause clearly stipulates that the said clause can be invoked only in case where the insurance company admits its liability to pay the insurance money under the said head.
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> [iv] The petitioner company has availed of the remedy before the Civil Court and therefore also, the question of invoking arbitration clause does not arise.

[3] Being aggrieved by and dissatisfied with aforesaid order dated 10.2.2005 passed in Arbitration Application No. 32 of 2003 in rejecting the same and refusing to appoint arbitrator / arbitral tribunal, the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

[4] Shri Rajani H. Mehta, learned advocate appearing on behalf of the respondents relying upon the judgment of the Hon'ble Supreme Court in case of S.B.P. & Co. v. Patel Engineering Ltd., 2005 8 SCC 618 has raised preliminary objection with regard to maintainability of this petition under Article 226 of the Constitution of India against the impugned order passed by the learned Nominee of the Hon'ble Chief Justice passed under Section-11(6) of the Act refusing to appoint arbitrator or arbitral tribunal.

[5] Shri K.S. Nanavati, learned senior advocate appearing on behalf of the petitioner has also strongly relied upon the latest decision of the Hon'ble Supreme Court in case of S.B.P. & Co. v. Patel Engineering Ltd., 2005 8 SCC 618. Shri Nanavati, learned senior advocate for the petitioner has relied upon Paragraph-38 and 46 of the aforesaid judgment. He has submitted that as held by the Hon'ble Supreme Court in the aforesaid judgment, the function of the Hon'ble the Chief Justice or his designated Judge of that Court in considering the application under Section- 11 of the Arbitration Act for appointment of arbitrator or arbitral tribunal, is not an administrative power but judicial power and appeal will lie against the order under Section- 11 of the Act only under Article 136 of the Constitution of India before the Hon'ble Supreme Court. According to Shri Nanavati, the judgment in the case of PATEL ENGINEERING LTD is prospective in nature as held in para-46(x). That being so, maintainability of a petition to be decided in light of the observations made in the said judgment, more particularly,

paras-25 and 31. Shri Nanavati has submitted that assuming without admitting that by reasons of the observations made in paras-25 and 31,the order passed under Section-11 is not open to challenge under Article 136 by way of an appeal to the Hon'ble Supreme Court, and these observations would apply to only those cases where judicial orders are passed in exercise of the power under Section- 11 and in the instant case, admittedly, the Hon'ble Designated Judge has not passed the judicial order, but an administrative order against which, no appeal under Article 136 of the Constitution of India would lie and therefore, the petitioner would be without any remedy. Learned Advocate Shri Nanavati has further submitted that in any case, as held by the Hon'ble Supreme Court in the said judgment, neither the Hon'ble Chief Justice, nor the designated Judge has jurisdiction to decide whether a claim made is one which comes within the purview of the arbitration clause and it will be appropriate to link that question to be decided by the Arbitral Tribunal on taking evidence along with merits of the claims involved in the arbitration. In support of his submission, he has relied upon paragraph-38 of the aforesaid judgment read with final conclusion in Paragraph-46(iv). However, it is submission of Shri Rajani H. Mehta that as per the judgment of the Hon'ble Supreme Court in the aforesaid case, the Hon'ble the Chief Justice or the Designated Judge will have the right to decide the preliminary aspect as indicated in the paragraph-38 and 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. Shri Nanavati has therefore submitted that whether the dispute is covered by arbitration clause or not is not to be gone into while considering the application under Section- 11 and reference is to be made without adjudicating this issue. Shri Nanavati, learned senior advocate has further submitted that since the learned Designated Judge has held that function exercised by the learned Judge is administrative in nature which is now contrary to the decision of the Hon'ble Supreme Court, this Court in exercise of writ jurisdiction can make proper order after considering the facts and circumstances of the case. On merits, Shri Nanavati has submitted that it is a matter of record that after the claim was made by the petitioner, the respondent did not dispute or repudiate the liability, but held negotiations for almost 42 months on the question of quantum and as many as eight draft of settlements were exchanged between the parties and according to him, in the course of these negotiations, the Insurance Company has admitted its liability of the disputed amount claimed by the petitioner as damages / compensation, particularly when an amount of Rs. 30.00 crores has been paid during the course of negotiation and the Insurance Company is therefore estooped from disputing the liability and strategic repudiation of its liability by letter dated 26.5.2003 cannot defeat the arbitration agreement. According to him, in any case, this is a serious dispute which we will have to be gone into as and when the evidence is laid before the Arbitral Tribunal which will

have to be gone into as and when the evidence is laid before the Arbitral Tribunal and therefore, this is a fit case where the arbitrator ought to be appointed under Section-11 of the Act.

[6] Shri Nanavati, learned senior advocate has further submitted that the learned Designated Judge has clearly and categorically stated in the impugned order that she has passed the order in exercise of her administrative function and therefore, the present writ petition is maintainable. The contention of the respondents that against the impugned order only an appeal under Article 136 of the Constitution of India would lie to the Hon'ble Supreme Court and therefore, present petition is filed by the petitioner is not maintainable and therefore, deserves to be dismissed by this Court, is totally misconceived and untenable, both in law and on facts. According to him, as a matter of fact, the impugned order being admittedly an administrative order, the petitioner cannot file an appeal against the same under Article 136 of the Constitution of India to the Hon'ble Supreme Court. As held by the Hon'ble Supreme Court in the aforesaid judgment, it is only and only against the judicial order an appeal will lie under Article 136 of the Constitution of India to the Supreme Court and therefore, the respondents' objection to the maintainability of the present petition, is devoid of any merits. Shri Nanavati, learned senior advocate has further submitted that as held by the Hon'ble Supreme Court in the aforesaid judgment, more particularly, para-38 of the judgment, the Hon'ble Chief Justice of the High Court or his designated Judge of that Court has the jurisdiction to decide his own jurisdiction having regard to certain preliminary aspects only as indicated in para-38 and as observed by the Hon'ble Supreme Court in para-38 Sit may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause, it will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the petition.

[7] He has further submitted that the question whether there is an admission of liability or not on the part of the respondents insurance company in respect of the claim of the petitioner for payment of ALOP, is a question of fact to be decided on the basis of both documentary as well as oral evidences of the parties and the same can be considered only after leading oral as well as documentary evidences and therefore, the learned Nominee of the Hon'ble the Chief Justice has materially erred in rejecting the application and refusing to appoint arbitrator / arbitral tribunal, more particularly, admittedly the Insurance Policy contains arbitration clause. According to him, unpaid claims of the petitioner under the aforesaid insurance policy are live and not barred by time. He has further submitted that considering all these questions, whether the disputes between the parties comes witalwhin the purview of the arbitral clause is only to be decided by the arbitral tribunal on taking evidence and not by the Hon'ble Chief

Justice of the High Court or his designated Judge of that Court, as the same cannot be said to be an adjudication relating to his own jurisdiction on jurisdictional facts. Shri Nanavati has further submitted that as clarified by the Hon'ble Supreme Court in para-45 of the aforesaid judgment, that the said judgment will have prospective operation and as such, the aforesaid judgment does not apply to the present case and therefore, the present petition is maintainable.

[8] The sum and substance of the arguments and submissions made on behalf of the petitioner is that the impugned order passed by the learned Designated Judge is purely an administrative order and in passing such order, the learned Designated Judge has, without jurisdiction and authority of law, decided a contentious issue i.e. whether the claim of the petitioner falls or not within the purview of the arbitration clause contained in the aforesaid insurance policy, and this Court in exercise of the powers under Article 226 of the Constitution of India can always direct to appoint a sole arbitrator or an arbitral tribunal to save time and money, without remanding the matter to the learned Designated Judge for passing the judicial order. Therefore, it is requested to allow the present Special Civil Application.

[9] Per contra, Shri Rajani H. Mehta, learned advocate appearing on behalf of the respondents while supporting the order passed by the learned Designated Judge has submitted that the impugned order passed by the learned Designated Jude is based on legal, just and valid grounds and the learned Designated Judge has dismissed the petition for an appointment of arbitrator on, inter alia, two main grounds;

[a] That there had been no admission of liability by the Respondent, and therefore, there was no arbitrable dispute within the terms of the arbitration clause.

[b] That the petitioner had in any case availed of the remedy before the Civil Court at Baroda (Special Civil Suit No. 319 of 2003) and therefore, there was no question of invoking the arbitration clause.

[10] Relying upon the judgment of the Hon'ble Supreme Court in case of PATEL ENGINEERING, Shri Mehta, learned advocate for the respondents has submitted that the present writ petition is not maintainable as the Hon'be Supreme Court has held in the aforesaid judgment that an order passed by the Hon'ble Chief Justice or his designated Judge can only be challenged before the Hon'ble Supreme Court under Article 136 of the Constitution of India. He has relied upon para-46 (vii) of the aforesaid judgment in support of his above preliminary objection.

[11] Meeting with the contention raised on behalf of the petitioner that the decision of the Hon'be Supreme Court in the case of PATEL ENGINEERING is prospective in nature and the same is not applicable in the present case, Shri Mehta, learned advocate for

the respondents has heavily relied upon para-46(x) of the said judgment and according to him, as per Para-46(x) of the said judgment, the said decision will be applicable prospectively only where the arbitrator / arbitral tribunal is already appointed, meaning thereby, where appointment of arbitrator is not made or is declined, the said judgment will be made applicable and therefore, the present petition under Article 226 of the Constitution of India against the impugned order passed by the learned Nominee is not maintainable. He has relied upon Para-43 of the decision in case of PATEL ENGINEERING in support of his submission that the order passed by the Hon'ble Chief Justice or its Nominee under Section- 11(6) of the Act is a judicial order and the same, so far as the High Court is concerned, would be final and only avenue open to a party feeling aggrieved by the order of the Hon'ble Chief Justice / or its Nominee would be to approach to the Supreme Court under Article 136 of the Constitution of India. According to him, the status of the present writ petition being pending, the judgment of the Hon'ble Supreme Court in case of PATEL ENGINEERING would be applicable and would be binding to this Court.

[12] Relying upon Para-24 of the judgment in the case of PATEL ENGINEERING and the observations made by the Hon'ble Supreme Court that dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his objection is upheld by the arbitral tribunal. Shri Mehta has submitted that the Designated Jude has rightly refused to appoint the arbitrator or arbitral tribunal considering the fact that no arbitral dispute existed between the parties. He has also further submitted that the learned Designated Judge has rightly refused to appoint an arbitrator by holding that the controversy raised by the petitioner does not fall within the purview of the arbitration clause at all.

[13] Relying upon the Clause-7 of the Arbitration Clause of the policy, Shri Mehta has submitted that the learned Nominee and the Designated Judge has rightly refused to appoint the arbitrator / arbitral tribunal by holding that at no point of time the Insurance Company had agreed to or admitted liability and that arbitral clause clearly stipulates that the said clause can be invoked only in case where the insurance company admits its liability to pay insurance money under the said head.

[14] He has also further submitted that the learned Nominee / Designated Judge has rightly refused to appoint arbitrator / arbitral tribunal considering the fact that the petitioner company has availed of the remedy before the Civil Court. He has submitted that the contention on behalf of the petitioner that the suit came to be filed by the petitioner to save limitation and while invoking the arbitration clause, simultaneously, the suit came to be filed is factually incorrect. According to him, the suit came to be

filed earlier and thereafter the arbitration clause came to be invoked. According to him, once the petitioner has filed Civil Suit for the dispute in question, the petitioner has waived its right for invoking arbitration clause and therefore, the learned Nominee has rightly refused to appoint arbitrator / arbitral tribunal by holding that as the petitioner company has already availed the remedy before the Civil Court, the question of invoking arbitration clause shall not arise. Shri Mehta, learned advocate for the respondents has also further submitted that before the learned Nominee to the Hon'ble Chief Justice, the following materials were before her.

[a] The petition with affidavit

[b] Accompanying documents to the petition.

[c] Reply of the Respondent dated 21.8.03.

[d] The petitioners affidavit in rejoinder dated 3.10.2003

[e] The petitioner's additional affidavit of 25.10.04 with accompanying documents, in all running into approximately 295 pages.

[15] Therefore, according to Shri Mehta, the learned Designated Judge has passed the impugned order after going through the aforesaid documents and thereafter, she has come to the conclusion that the arbitral clause could not be invoked since the dispute falls outside the arbitration clause. He has further submitted that such a decision is in consonance with the judgment of the Hon'ble Supreme Court in the case of PATEL ENGINEERING, more particularly, para-37 of the said judgment. Therefore, it is requested to dismiss the present special civil application by further submitting that the petitioner's grievance, if any, against the order of the learned Designated Judge, can only be now raised before the Hon'ble Supreme Court under Article 136 of the Constitution of India. It is also lastly submitted by Shri Mehta in the alternative that the learned Designated Judge has rightly refused to appoint arbitrator / arbitral tribunal by observing that the present dispute is not amenable to arbitration as per the relevant arbitration clause in the policy issued to the petitioner and the petitioner has waived and abandoned its right to arbitrate, if any, by invocation of a civil suit before the Civil Court at Vadodara. Therefore, it is requested to reject the present Special Civil Application.

[16] Heard the learned advocates appearing on behalf of the parties at length. After considering the rival submissions made by the learned advocates on behalf of the parties, the following issues arise for consideration of this Court.

[i] Whether against the impugned order passed by the learned Nominee and the Designated Judge passed under Section-11(6) of the Arbitration and Conciliation Act, 1996 (in the present case refusing to appoint arbitrator / arbitral tribunal) the present petition under Article 226 of the Constitution of India is maintainable or not ?

[ii] Whether the learned Nominee / Designated Judge while refusing to appoint arbitrator / arbitral tribunal has rightly observed and considered whether the dispute falls within arbitral clause or not.

[iii] On filing of the civil suit by the petitioner with regard to the same subject matter and the dispute is in question, whether arbitral clause can be invoked by the petitioner or not.

[17] As such, all three aforesaid three issues are interconnected and therefore, they are answered jointly accordingly.

[18] Before considering the rival submissions made on behalf of both the parties, few paragraphs of the judgment of the Hon'ble Supreme Court in case of S.B.P. & Co. v. Patel Engineering Ltd., 2005 8 SCC 618 are required to be considered which are as under:

[1] What is the nature of the function of the Chief Justice or his designate under Section- 11 of the Arbitration and Conciliation Act, 1996 is the question that is posed before us. The three Judges bench decision in Konkan Rly. Corporation Ltd. v. Mehul Construction Co. as approved by the Constitution Bench in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt Ltd. has taken the view that it is purely an administrative function, that it is neither judicial nor quasi judicial and the Chief Justice or his nominee performing the function under Section 11(6) of the Act, cannot decide any contentious issue between the parties. The correctness of the said view is questioned in these appeals.

[6] Section 12 sets out the grounds of challenge to the person appointed as arbitrator and the duty of an arbitrator appointed, to disclose any disqualification he may have. Sub-Section (3) of Section 12 gives a right to the parties to challenge an arbitrator. Section- 13 lays down the procedure for such a challenge. Section-14 takes care of the failure of or impossibility for an arbitrator to act and Section-15 deals with the termination of the mandate of the arbitrator and the substitution of another arbitrator. Chapter IV deals with the jurisdiction of arbitral tribunal. Section- 16 deals with the competence of an arbitral tribunal, to rule on its jurisdiction. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration

agreement. A person aggrieved by the rejection of his objection by the tribunal on its jurisdiction or the other matters referred to in that Section, has to wait until the award is made to challenge that decision in any appeal against the arbitral award itself in accordance with Section 34 of the Act. But an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under Section 37 of the Act. Section 17 confers powers on the arbitral tribunal to make interim orders. Chapter V comprising of Sections 18 to 27 deals with the conduct of arbitral proceedings. Chapter VI containing Sections 28 to 33 deals with making of the arbitral award and termination of the proceedings. Chapter VII deals with recourse against an arbitral award. Section 34 contemplates the filing of an application for setting aside an arbitral award by making an application to the Court as defined in Section 2(e) of the Act. Chapter VIII deals with finality and enforcement of arbitral awards. Section 35 makes the award final and Section 36 provides for its enforcement under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of court. Chapter IX deals with appeals and Section 37 enumerates the orders that are open to appeal. We have already referred to the right of appeal available under Section 37(2) of the Act, on the Tribunal accepting a plea that it does not have jurisdiction or when the arbitral tribunal accepts a plea that it is exceeding the scope of its authority. No second appeal is contemplated, but right to approach the Supreme Court is saved. Chapter X deals with miscellaneous matters. Section 43 makes the Limitation Act, 1963 applicable to proceedings under the Act as it applies to proceedings in Court.

[8] Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, sub-Section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or Institution designated by him in respect of matters falling under sub-Section (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on its power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless, the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the

performance of that duty, exist. Therefore, unaided by authorities and going by general principals, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him, is a party, whether the conditions for exercise of the power have been fulfilled and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

[9] The very scheme, if it involves an adjudicatory process, restricts the power of the Chief Justice to designate, by excluding the designation of a non-judicial institution or a non-judicial authority to perform the functions. For, under our dispensation, no judicial or quasi-judicial decision can be rendered by an institution if it is not a judicial authority, court or a quasi-judicial tribunal. This aspect is dealt with later while dealing with the right to designate under Section 11(6) and the scope of that designation.

[10] The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under Section 11(6) of the Act, do not exist or that qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, all are adjudications which affect the rights of the parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party who is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasized, when sub-Section (7) designates the order under sub-Sections (4), (5) and (6) a 'decision' and makes the decision of the Chief Justice final on the matters referred to in that sub-Section. Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the Chief Justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statue confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

[35] Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existing of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties is that, either the claim for appointing an arbitral tribunal leading to an award is denied to a party or the claim to have an arbitration proceedings set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to opposite side before appointing an arbitrator.

[36] It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section- 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or arbitral tribunal. It is really the giving an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made 10 or 20 years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the concerned party had certified that he had no no further claims against the other contracting party. In other words there have been 0519 occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the concerned arbitration clause at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator, obviously, this is an adjudicatory process. As an opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by Ridge v. Baldwin, 1963 2 AllER 66, are well known. Therefore, to the extent, Konkan Railway states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be no sustainable.

[38] It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he

has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a deed one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.

[43] 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 to the Supreme Court under Article 136 of the Constitution of India. 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 avaoid considerable delay in the process, an object that is sought to be achieved by the Act.

[44] It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section - 37 makes certain orders of the arbitral tribunal appellable. Under Section- 34, the aggrieved party has an avenue for ventilating his grievances against award including any in-between orders that might have been passed by the arbitral tribunal acting under Section- 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section- 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all the creature of a contract between the parties, the arbitration agreement, even though if the occasions arises,the Chief Justice may constitute it based on the contract between the parties, but that would not alter the status of arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

[46] We, therefore, sum up our conclusions as follows:

[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.

[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 judge designated 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 judge designate.

[vi] Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

[vii] Since an order passed by the Chief Justice of the High Court or by the designated judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

[x] Since all were guided by the decision of this Court in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Otd. and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

[19] At this stage, Clause-VII of the Arbitration Clause of the policy is also required to be considered which reads as under:

If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision or two Arbitrators, one to be appointed in writing by each of the parties, within one calender month after having been required in writing so to do by either of the parties, or, in case the Arbitrators do not agree, of an Umpire to be appointed in writing by the Arbitrators do not agree, of an Umpire to be appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings. The making of an award shall be a condition precedent to any right of action against the company.

[20] It is the preliminary objection raised by the learned advocate appearing on behalf of the respondents with regard to maintainability of this petition under Article 226 of the Constitution of India against the order passed by the learned Designated Jude refusing to appoint arbitrator / arbitral tribunal under Section-11(6) of the Act and in support of his above submission, Shri Mehta, learned advocate for the respondents has heavily relied upon para-43 as well as para-46(vii) of the judgment of the Hon'ble Supreme Court in case of PATEL ENGINEERING. It is the contention on behalf of the petitioner that the present Special Civil Application is maintainable as the learned Designated Judge has specifically held that she has exercised the administrative powers while exercising the powers conferred under Section-11(6) of the Act and contentious issues are not required to be gone into and in that view of the matter, as the learned Nominee has not exercised the judicial powers, appeal before the Hon'ble Supreme Court under Article 136 of the Constitution of India is not maintainable and the only remedy available to the petitioner is present petition under Article 226 of the

Constitution of India. It is also contention on behalf of the petitioner that as held by the Hon'ble Supreme Court in para-46(x) of the aforesaid judgment, the said judgment would be made applicable prospectively and therefore also, the present petition under Article-226 of the Constitution of India is maintainable. At this stage, it is required to be noted that it is true that in one of paragraphs the learned Nominees has observed that while exercising the powers conferred under Section-11(6) of the Act, the Hon'ble Chief Justice or his Nominee is exercising the administrative powers and contentious issues are not required to be gone into, however, it is also required to be noted that in subsequent paragraph the learned Nominee after considering the material before her and the relevant documents, such as, arbitration agreement, and other documents and the pleadings of both the sides has specifically held that arbitration clause cannot be invoked as the insurance company in the present case has not admitted its liability to pay insurance money under the head SAdvance Loss of Profit and as per the arbitration clause, said clause can be invoked only in case where the insurance company admits its liability to pay insurance money under the said head. The learned Nominee has also considered that as the petitioner company has availed of the remedy before the Civil Court, a question of invoking arbitral clause shall not arise. Therefore, it cannot be said that the learned Nominee has refused to appoint arbitrator or arbitral tribunal under Section-11(6) of the Act only on the ground that she was exercising administrative powers and contentious issues are not required to be gone into. If the learned Nominee would not have decided the same on merits and would have refused to appoint arbitrator solely on the ground that she was exercising the administrative powers and contentious issues are not required to be gone into, then it is different case. As held by the Hon'ble Supreme Court in the aforesaid decision of PATEL ENGINEERING, the order passed by the Hon'ble Chief Justice of the High Court or his Designated Judge of that Court is a judicial order and therefore, the appeal will lie against the order only under Article 136 of the Constitution of India to the Hon'ble Supreme Court. So far as the contention on behalf of the petitioner that the aforesaid judgment would be applicable prospectively considering Para-46(x) is concerned, the same has no substance. The Hon'ble Supreme Court has clearly observed in para-46(x) that Sappointment of Arbitrators / Arbitral Tribunal thus far made, are to be treated as valid and all objection being left to be decided under Section- 16 of the Act. As and from this date, the position as adopted in this judgment will govern even in case of pending applications under Section-11(6) of the Act. Therefore, from the aforesaid paragraph-46(x), it is crystal clear that the Hon'ble Supreme Court has clearly held that the appointment of arbitrator / arbitral tribunal already appointed and / or made considering the judgment of Hon'ble Supreme Court in case of Konkan Railway Corporation Ltd. v. Mehul Construction Co. the same is not to be disturbed, meaning by, where the appointments of arbitrators / arbitral tribunal are not made, and / or even applications under Section-11(6) of the Act are pending, the judgment in case of PATEL ENGINEERING

would be made applicable. Therefore, so far as the proceedings challenging the order passed by the Hon'ble Chief Justice and / or his Designated Judge refusing to appoint arbitrator / arbitral tribunal under Section-11(6) of the Act, are on the same footing, of pending applications under Section-11(6) of the Act. Therefore, the ratio of the judgment in the case of PATEL ENGINEERING LIMITED and the said judgment would be applicable in full force to the facts of the present case as well as the present Special Civil Application also. In view of the above, the only conclusion can be that against the impugned order passed by the learned Nominee refusing to appoint the arbitrator / arbitral tribunal while exercising the powers under Section-11(6) of the Act on the grounds that;

[i] While exercising the powers conferred by Section-11(6) of the Act, the Hon'ble the Chief Justice or his nominee is exercising the administrative powers and contentious issues are not required to be gone into.

[ii] That the petition does not involve the contentious issues.

[iii] There was no admission of liability to pay insurance money under the head of SAdvance Loss of Profit and the arbitration clause clearly stipulates tha the said clause can be invoked only in case where the insurance company admits its liability to pay the insurance money under the said head.

[iv] The petitioner company has availed of the remedy before the Civil Court and therefore also, the question of invoking arbitration clause does not arise. is not maintainable and the only remedy available to the petitioner is to approach the Hon'ble Supreme Court by way of an appeal under Article- 136 of the Constitution of India.

[21] In view of my above finding with regard to the issue No. 1 in respect of non-maintainability of the present Special Civil Application under Article 226 of the Constitution of India against the order passed by the learned Nominee refusing to appoint arbitrator or arbitral tribunal exercising the powers under Section-11(6) of the Act on the aforesaid grounds, the other disputes on merits and whether the learned Nominee has rightly held or not, and the further issue that whether the arbitration clause could have been invoked by the petitioner or not; and whether on availing the remedy before the Civil Court by the petitioner, whether question of invoking arbitration clause would arise or not, are not required to be decided by this Court as according to me the present Special Civil Application under Article 226 of the Constitution is not maintainable.

[22] For the reasons stated above, the petition fails. Rule is discharged. However, there will be no order as to costs.