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ASIAN THERMAL INSULATION (I) P. LTD.

v.

BRIDGE & ROOF CO. (I) LTD.

AUGUST 13, 2007

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[DR. ARIJIT PASAYAT, C.K. THAKKER AND  
LOKESHWAR SINGH PANTA, JJ.]

C

*Arbitration and Conciliation Act, 1996—s.11(6)—Dispute between Company and the Contractor—Agreement between them contained an arbitration clause—Issue of appointing arbitrator—On application of Company, High Court directing the matter to be placed before the Chief Justice—Appeal by Contractor before Supreme Court—Contractor had already nominated its arbitrator—Parties agreed on a consensual arrangement—Appeal accordingly disposed of—Company to nominate its arbitrator within 30 days—Thereafter Chief Justice of High Court to nominate the Presiding Arbitrator.*

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**Respondent-company had entered into an agreement with Appellant-contractor. The agreement contained an arbitration clause. Disputes arose between the parties. Order was passed by the High Court on the application filed by Respondent. The matter was directed to be placed before the Chief Justice of High Court for naming an arbitrator. High Court declined to recall the order on the Appellant's petition.**

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**During pendency of appeal before this Court, the parties agreed on a consensual arrangement.**

**Disposing of the appeal, the Court**

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**HELD:** Though arguments were advanced in support of the respective stand about the legality of the impugned order, it was agreed to by the parties that following arrangement can be made : The appellant has nominated one Sri J. Chawla to be its arbitrator. Within a period of 30 days the respondent shall nominate its arbitrator. Thereafter the Chief Justice of the High Court shall nominate the Presiding Arbitrator who shall be a retired Judge of any High Court. [Para 6] [1008-B-C]

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*SBP & Co. v. Patel Engineering Ltd. & Anr.*, [2005] 8 SCC 618, relied on. A

*Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.*, [2002] 2 SCC 388, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3696 of 2007. B

From the Order dated 19.9.2005 of the High Court of Calcutta in A.P. No. 209 of 2005.

Kumud Lata Das for the Appellant.

Puneet Jain, Sushil Kumar Jain, H.D. Thanvi, Sarad Singhanian and Christy Jain for the Respondent. C

The Judgment of the Court was delivered by

**DR. ARIJIT PASAYAT, J. 1.** Leave granted. D

2. Controversy lies within a very narrow compass.

3. The factual background as projected by the appellant is as follows:

On 22.12.2003 work order was issued by the respondent to the appellant. There was a clause for arbitration in the agreement which was to the following effect: E

“41. *ARBITRATION*

B&R confidently feel that there shall not arise any disputes or differences during execution and completion of this order by the Contractor. F

However, in the event of any disputes or differences arise between Company (B&R) and Contractor (hereinafter called the said parties) touching or concerning the interpretation of the terms and conditions as performance of the order or in connection therewith or the rights and liabilities of either of the said parties hereto, the said parties shall endeavour to settle the same amicably through mutual agreement between them, but if the mutual settlement is not possible between the Company and the Contractor, the provisions of the Indian Arbitration & Conciliation Act, 1996 and all statutory re-enactment and H

A modifications thereof and the rules made thereunder shall apply to such arbitrations."

4. On 27.11.2004 a notice of demand was sent to the site of the respondent and it was returned with the postal endorsement "refused". On 30.6.2005 the request was reiterated. On 9.8.2005 an order was passed by the

B High Court on the application filed by the respondent. The matter was directed to be placed before the Chief Justice of the High Court for naming an arbitrator. On 19.9.2005 the High Court refused to recall its order dated 9.8.2005 on the appellant's petition. On 26.10.2005, this Court in *SBP & Co. v. Patel Engineering Ltd. & Anr.*, [2005] 8 SCC 618 has dealt with the nature of power exercised by the Chief Justice of High Court or Chief Justice of India, as the

C case may be, under the Arbitration and Conciliation Act, 1996 (in short the 'Arbitration Act') and held that same is a judicial power and not an administrative power. The decision in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.*, [2002] 2 SCC 388 was overruled in *SBP & Co.* (supra). The conclusions per majority were as follows:

D "47. 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.

E (ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

F (iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

G (iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of

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- nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge. A
- (v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act. B
- (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. C
- (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 to the Supreme Court. D
- (viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.
- (ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act. E
- (x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* 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. F G
- (xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand H

A transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Rly. Corpn. Ltd. v. Rani construction (P) Ltd.* is overruled".

B 5. Though arguments were advanced in support of the respective stand about the legality of the impugned order, it was agreed to by learned counsel for the parties that following arrangement can be made.

C "The appellant has nominated one Sri J. Chawla to be its arbitrator. Within a period of 30 days the respondent shall nominate its arbitrator. Thereafter the Chief Justice of the High Court shall nominate the Presiding Arbitrator who shall be a retired Judge of any High Court."

7. Appeal is accordingly disposed of with no order as to costs.

D B.B.B.

Appeal disposed of.