

A RITE APPROACH GROUP LTD.

v.

M/S. ROSOBORONEXPORT

NOVEMBER 16, 2005

B [A.K. MATHUR AND CHAMBER JUDGE.]

Arbitration and Conciliation Act, 1996; Section 11(6):

C *Agency agreement between a Russian Company and a Singapore based company/an agent in India—Agent company providing its services to principal company in procuring a contract for supply of helicopter against payment of commission—Payment of commission denied—Filing of arbitration petition before the Chief Justice of India for appointment of an Arbitrator—Held: Arbitration clause in the Agreement categorically states that dispute if any arises, the same shall be referred to Arbitration Court established under the Chambers of Commerce and Trade of the Russian Federation—Thus, jurisdiction of Courts other than the Court so specified in the agreement ousted—Hence, Supreme Court can not assume jurisdiction to appoint arbitrator.*

E The petitioner, a foreign company, is represented in India by Austrian Trade Commission, New Delhi, carrying on business, *inter alia*, as an Agent of various foreign companies for negotiating and concluding contracts on their behalf in India. M/s. Federal State Unitary Enterprise/Russian Technologies was a Russian public sector company which later merged with the Respondent-company ROSOBORONEXPORT. M/s. Russian Technologies approached the
F petitioner for procuring orders in India for supply of helicopters to Border Security Force. The petitioner agreed to act as an Agent of the said Russian Enterprise, the predecessor-in-interest of the respondent. In terms of the written contract entered into between them, respondent was required to pay commission to petitioner in lieu of the service rendered by it. The petitioner
G helped the respondent in procuring the contract from Border Security Force for supply of six helicopters. Respondent did not pay the commission, hence the petitioner filed an arbitration petition for referring the matter to Arbitrator. The Chief Justice of India has designated Justice A.K. Mathur, Chamber Judge for nomination of Arbitrator for disposal of the petition.

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The respondent submitted that Clause 6.2 of the Agency Agreement provides that in case of dispute between the parties, they would resort to arbitration for resolution of their dispute and submit it to Arbitration Court to be established under the Chamber of Commerce and Trade of Russian Federation. Thus this Court has no jurisdiction to entertain this petition. A

Rejecting the petition, the Court B

HELD: 1.1. On 26.10.2005, a Seven Judge Bench of this Court in the case of *M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. & Anr.* has overruled the judgment of five Judge Constitution Bench in the case of *Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd.* by holding that the order passed by the Judge on designation by the Chief Justice shall be judicial order and not an administrative order. Therefore, the legal position as has been crystallized now is that the order passed by the Judge on nomination of the Chief Justice of India under Section 11 of the Arbitration and Conciliation Act shall be judicial order not amenable to any appeal. [272-B, C, D] C

M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. & Anr. decided by the Supreme Court on 28.10.2005, followed. D

2.1. In the present case, Clause 6.2 of the Agency Agreement categorically states that if any dispute arises between the parties then the same shall be submitted to Arbitration Court under the Chamber of Commerce and Trade of the Russian Federation. Therefore there is a specific clause mentioned in the Agency Agreement as to which Court will have jurisdiction to try and dispose of the matter. In view of the specific provision specifying the jurisdiction of the Court to decide the matter, this Court cannot assume the jurisdiction. [274-C, D] E

2.2. In view of the specific arbitration clause conferring power on the Chamber of Commerce and trade of the Russian Federation, it is that authority which alone will arbitrate the matter and the finding of that arbitral tribunal shall be final and obligatory for both the parties. [274-E] F

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 3 of 2005. G

(Under Section 11(6) of the Arbitration Act, 1996.)

Dr. A.M. Singhvi, Sanjeev Sen and Praveen Swarup for the Petitioner.

Dushyant A. Dave, Siddhartha Dave and Ms. Vibha Dutta Makhija for H

A the Respondent.

The Judgment of the Court was delivered by

A.K. MATHUR, J. This arbitration petition was filed before this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 for
B appointment of the Arbitrator. Hon'ble the Chief Justice of India has designated me to nominate the Arbitrator for disposal of dispute.

Notice of this petition was served on the parties and they were heard.

The petitioner is a company incorporated under the relevant laws of the
C Republic of Singapore having its registered office at 1101, Continental Tower, Tamasek Avenue, Singapore and represented in India by Austrian Trade Commission, 80, Jor Bagh, New Delhi-110003. The petitioner carries on business, *inter alia*, as an Agent of various foreign companies for negotiating and concluding contracts on their behalf.

D Federal State Unitary Enterprise Russian Technologies, hereinafter referred to as "Russian Technologies", was a Russian public sector company incorporated under the name and style of "FSUE Promexport" and the said "FSUE Promexport" subsequently merged with the Repondent ROSOBORONEXPORT. Consequently, all the contractual rights and liabilities
E of M/s. Russian Technologies vested in ROSOBORONEXPORT, the respondent herein. All the three entities have been/are owned by the Government of Russia. The registered office of M/s. ROSOBORONEXPORT is 27/3, Stromynika STR Moscow, 107076.

That between October 1999 and April 2000 M/s. Russian Technologies
F approached the petitioner for procuring orders in India for supply of helicopters to Border Security Force, Ministry of Home Affairs, Government of India. The petitioner agreed to act as the Agent of the said Russian Enterprise, the predecessor-in-interest of the respondent herein for procuring contracts in India for supply of helicopters for the BSF, Ministry of Home Affairs, Government of India. The Border Security Force, Ministry of Home Affairs,
G was approached and the Indian Authorities were persuaded to select the helicopters manufactured by M/s. Kazan Helicopters Ltd. which was to be supplied by M/s. Russian Technologies as acceptable to the Border Security Force. The petitioner through its representatives in India, also intimated to the respondent of the specific requirements of the Boarder Security Force of the
H Ministry of Home Affairs, Government of India so that their specific

requirements could be met by the respondent. A

. Thereafter number of meetings were held and ultimately on 1st March, 2000 pursuant to the petitioner's effort a Memorandum of Understanding was arrived at between the respondent and the Border Security Force of the Ministry of Home Affairs, Government of India whereby the modalities for the supply of helicopters were arrived at, after lot of correspondence and discussion. B

Subsequently, in recognition of the services rendered by the petitioner to the respondent, a written contract was entered into by and between the parties on 14th April, 2000 whereunder M/s. Russian Technologies was described as the "Principal" and the petitioner was described as the "Agent". C

Under the said agreement, Principal authorized the Agent i.e. petitioner to take the functions for organizing and conclusion of contracts between the Principal and the Border Security Force of the Ministry of Home Affairs, Government of India. Originally, the agency was for securing order for four helicopters which was subsequently enhanced to six helicopters. As per the agency agreement, the Agent-petitioner was given an obligation to facilitate signing of the contract between the Russian Technologies, the Principal and the Border Security Force of the Ministry of Home Affairs, Government of India, the customer. The petitioner was to render assistance to Russian Technologies in making negotiations with the Border Security Force of the Ministry of Home Affairs, Government of India to facilitate solving of any problems and other concerning preparations and conclusions of the contract and to render assistance to Russian Technologies in making negotiations with the Border Security Force of the Ministry of Home Affairs, Government of India on the specifications of supply of armaments and other goods for the helicopters. D E F

M/s. Russian Technologies, respondent was also to perform certain obligations i.e. to supply the Agent in time with necessary information and documentation in accordance with the Agent's request; to inform the Agent about all the changes concerning the conclusion and fulfilment of the contract signed under the said agency agreement; to pay to the Agent its commission from the amount received from Border Security Force of the Ministry of Home Affairs, Government of India for the goods delivered or services rendered to it with the petitioner's assistance. The quantum of commission under the said agreement was fixed at 16% of the payments which would be made by the Government of India to M/s. Russian Technologies. G H

A The petitioner acted as an Agent on behalf of the Russian Technologies and thereafter on behalf of the respondent and facilitated execution of a contract for supply of six helicopters to Border Security Force of the Ministry of Home Affairs, Government of India against payment of a total sum of Rs.180 crores of which a Memorandum of Understanding was signed in March 2000 and a letter of credit was opened on June, 2003.

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It is alleged that because of the petitioner's efforts, the contract for supply of six helicopters by M/s. Russian Technologies, which subsequently merged with M/s. ROSOBORONEXPORT became possible. The Petitioner came to know that the helicopters would be supplied by M/s. ROSOBORONEXPORT to the Government of India by the end of 2003.

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Therefore petitioner reminded the respondent about their obligation to pay 16% commission to the petitioner. But unfortunately M/s. ROSOBORONEXPORT denied the obligation to pay any commission to the petitioner. The stand of the respondent was that one of the petitioner's representatives in India, Dr. Eric Gutman, an Austrian citizen, who had rendered

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service to M/s. Russian Technologies for procuring this contract, had also claimed for the commission and on his behalf the Austrian Trade Commissioner in India had approached the respondent, M/s. Kazan Helicopters. The contention of the petitioner was that once the helicopters are supplied by respondent to the Government of India, and the Government of India makes

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the payment of the price of these helicopters to the Russian party, the petitioner would be left with no remedy and therefore petitioner prayed that an injunction order may be issued and the matter may be referred to Arbitrator. The petitioner has also referred to arbitration clause in Article 6 of Agency Agreement dated 14.4.2000 which reads as under:

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“Article 6

Solving of Disputes and Differences

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6.1. If any disputes and/or differences between the PRINCIPAL and the AGENT concerning the present agreement arise, both PARTIES will try to solve it by negotiations.

6.2 If differences and/or disputes could not be solved by both PARTIES through negotiations, they will be submitted to Arbitration Court under the Chamber of Commerce and Trade of the Russian Federation.

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The decision of the Arbitration Court will be final and obligatory for

both PARTIES.”

Therefore in this background petitioner filed this petition under Section 11(6) of the Arbitration Act, 1996 and sought prayer for appointment of arbitrator in India under the Indian Arbitration Act as according to the petitioner, it apprehends that it is not likely to get justice in Russia. A notice was also given but without any result, hence the petitioner approached this Court. Before this, petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Delhi High Court and the Delhi High Court passed interim order and directed Border Security Force of the Ministry of Home Affairs, Government of India to hold back 16% out of the amount payable to the respondent company in regard to the supply of the helicopters to Government of India in terms of the contract entered into in June, 2003.

Thereafter that matter came up before the Delhi High Court on 12.1.2004 and order dated 12.12.2003 was modified.

Thereafter on 17.03.2004 the claimant invoked arbitration clause in view of the differences and disputes existing between the parties and called upon the respondent to act as per the agreement within 30 days from the receipt of the notice failing which the claimant would be constrained to initiate appropriate legal action against the respondent. Thereafter on completion of pleadings of the parties on 25.05.2005 learned Single Judge of Delhi High Court after hearing parties dismissed the petition.

Thereafter petitioner filed an appeal before the Division Bench of the Delhi High Court and the Division Bench issued notice in the matter on 27.5.2004 and the said appeal is pending adjudication before the Division Bench.

In this background petitioner approached this Court by filing petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, and that is how the matter has come before me on designation by the Hon'ble Chief Justice of India.

The respondent opposed the petition by filing a detailed reply and one of the principal submissions of the learned counsel for the respondent was that Clause 6.2 of the Agency Agreement dated 14.4.2000 provides that in case of dispute between the parties, the parties will resort to arbitration for resolution of their dispute and they will submit to Arbitration Court under the

A Chamber of Commerce and Trade of the Russian Federation. Therefore this Court has no jurisdiction to entertain this petition.

The matter got adjourned for several times for one reason or the other for filing of the reply, ultimately the arguments were heard and order reserved.

B It may be relevant to mention here that since the matter was pending before the Seven Judge Bench with regard to the interpretation of certain provisions of the Arbitration & Conciliation Act, 1996, therefore arguments were heard and order was reserved awaiting the decision of the Seven Judge Bench. Now recently on 26.10.2005 the Seven Judge Bench has delivered its decision in Civil Appeal No. 4168 of 2003 (*M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. & Anr.*, and the earlier decision rendered in the case of *Konkan Railway Corporation Ltd. And Anr. v. Rani Construction Pvt. Ltd.*, [2002] 2 SCC 388 has been reversed and now it has been held that the order passed by the Judge on designation by the Hon'ble Chief Justice, the order shall be judicial order and not administrative order as was held in *Konkan Railway* case (supra). Therefore now legal position has been crystallized that the order passed by the Judge on nomination of the Hon'ble Chief Justice of India under Section 11 shall be judicial order not amenable to any appeal. The legal position has been summarized as under in above decision *M/s. S.B.P. & Co.*, (Supra) :-

- E** "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.
 - F** (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.
 - G** (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.
 - (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

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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.

- (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.
- (vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with 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.
- (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.
- (x) Since all were guided by the decision of this Court in *Konkan Railway Corpn. Lts. & Anr. v. Rani Construction Pvt. Ltd.*, [2002] 2 SCC 388 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.

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

B (xii) The decision in *Konkan Railway Corpn. Ltd. & Anr. v. Rani Construction Pvt. Ltd.*, [2002] 8 SCC 388] is overruled.”

C In the present case, as per the Agency Agreement dated 14.4.2000, Clause 6.2 categorically states that if any dispute arises between the parties then the same shall be submitted to Arbitration Court under the Chamber of Commerce and Trade of the Russian Federation. Therefore there is a specific clause mentioned in the Agency Agreement as to which court will have jurisdiction to try and dispose of the matter.

D In view of the specific provision specifying the jurisdiction of the Court to decide the matter, this Court cannot assume the jurisdiction. Whenever there is a specific clause conferring jurisdiction on particular Court to decide the matter then it automatically ousts the jurisdiction of other Court. In this agreement, the jurisdiction has been conferred on the Chamber of Commerce and Trade of the Russian Federation as the authority before whom the dispute shall be resolved. In view of the specific arbitration clause conferring power on the Chamber of Commerce and Trade of the Russian Federation, it is that authority which alone will arbitrate the matter and the finding of that arbitral tribunal shall be final and obligatory for both the parties.....

F Thus, in this view of the matter, I am of the opinion that this Court has no jurisdiction and the Chamber of Commerce and Trade of Russian Federation alone has jurisdiction to act as an arbitrator and resolve the dispute. Hence this application is rejected.

S.K.S.

Petition rejected.