

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7528 of 2004
with
Special Civil Application No. 9710 of 2004
with
Special Civil Application No. 16075 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

=====

1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

SAURASHTRA CHEMICALS LTD. & Others.

Versus

HON'BLE MR. JUSTICE K. RAMAMOORTHY. (RETD.)

Appearance:

1. Special Civil Application No. 7528 of 2004
SINGHI & CO for Petitioner No. 1
DS AFF.NOT FILED (N) for Respondent No. 1
MR ZUBIN F BHARDA for Respondent No. 2
M/S TRIVEDI & GUPTA for Respondent No. 3
-

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 13/05/2005

CAV JUDGEMENT

As common questions of law and facts arise in all the three petitions, they are being disposed of by this common Judgment and Order.

2. In Special Civil Application No. 7528 of 2004, the petitioner, Saurashtra Chemicals Ltd., [hereinafter be referred to as "SCL") has challenged the legality and validity of the order passed by the Sole Arbitrator, Justice K. Ramamoorthy (Retd.) dated 20th May 2004 by which the learned Sole Arbitrator had dismissed the application submitted by the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). It is also further prayed for a declaration that the proceedings before the respondent No.1, i.e., learned Sole Arbitrator are a nullity in the eye of law and that the Sole Arbitrator has no jurisdiction to adjudicate upon the alleged disputes between the parties.

3. In Special Civil Application No. 9710 of 2004, the petitioner, Birla VXL Limited [hereinafter referred to as "Birla VXL"] also challenged the order passed by the respondent No.1, Sole Arbitrator, Justice K. Ramamoorthy (Retd.) dated 20th May 2004 by which the Sole Arbitrator has also dismissed the application submitted by the petitioner under Section 16 of the Act. It is also further prayed for an appropriate writ, direction or order declaring that the Sole Arbitrator, respondent No.1 has no jurisdiction to adjudicate upon respondent No.2 D.L.F. Universal Limited's claim as against the petitioner Birla VXL Ltd., and that the proceedings before him qua the petitioner are a nullity.

4. So far as Special Civil Application No. 16075 of 2003 is concerned, the same is filed by SCL challenging the order passed by the Sole Arbitrator late Justice N.J. Pandya (Retd.) dated 23rd September 2003 in dismissing the application submitted by the petitioner under Section 16 of the Act not staying the proceedings pending before it during the notification under the provisions of the Bombay Relief Undertaking Act ("BRU Act" for short). It is also further prayed for an appropriate writ, direction or order directing the respondent No.1 Sole Arbitrator to stay the proceedings pending before him at the stage where the said notification under BRU Act was received till the date of expiry of the said notification or till such date to which the said notification is extended. It is also further prayed for directing the respondent No.1 Sole Arbitrator not to proceed with the pronouncement of the award till said notification remains in force till the date of expiry of the said notification or till such

date to which the said notification is extended.

5. In the present group of petitions, the following questions arise for consideration;

- (i) Whether against the interlocutory order and/or order passed by the Sole Arbitrator passed under the provisions of the Act a writ petition under Article 226 of the Constitution of India is maintainable;
- (ii) If against the interlocutory order/order passed by the Sole Arbitrator passed under the provisions of the Act more particularly order passed under Sec. 16 of the Act a petition under Article 226 of the Constitution of India is maintainable in that case whether the petition is required to be entertained or not;
- (iii) In view of the Notification issued by the State Government under the provisions of BRU Act declaring the company as 'Relief Undertaking' whether the arbitration proceedings against the said company can be proceeded further or is required to be stayed till the validity of the said Notification.

6. Few facts are necessary for the purpose of determination of the present group of petitions. The respondent No.2, DLF Universal Limited (hereinafter referred to as "DLF") entered into a contract with the petitioner of Special Civil Application No. 9710 of 2004, Birla VXL and the said Birla VXL placed 3 purchase orders upon DLF in the month of December 1994 for its Chemical Division. It appears that during performance of the contract certain disputes arose between DLF and Birla VXL pursuant to which DLF invoked the Arbitration Act contained in the said purchase orders and DLF sent a notice invoking arbitration agreement to Birla VXL. In the meanwhile vide order dated 20th October 1999 this Court sanctioned a scheme of arrangement proposed between Birla VXL and SCL whereunder the Chemical Division of the Birla VXL was merged into SCL and accordingly it was transferred and vested in SCL. DLF filed a Petition No. 5 of 2002 under Section 11 of the Act for appointment of Arbitrator before this Court and Birla VXL as well as SCL were also parties to the said arbitration petition. The Nominee to Hon'ble the Chief Justice of this Court vide order dated 29.10.2002 was pleased to appoint Justice K. Ramamoorthy (Retd) as Sole Arbitrator. It is the case of the respective petitioners that while appointing the

respondent No.1 as Sole Arbitrator liberty was reserved to raise their preliminary contentions before the learned Sole Arbitrator. It appears from the record that being aggrieved and dissatisfied with the aforesaid appointment and the order passed in Arbitration Petition No. 5 of 2002 the SCL had preferred Special Civil Application No. 460 of 2003 before this Court and the learned Single Judge of this Court vide order dated 17th March 2003 dismissed the said Special Civil Application against which a Letters Patent Appeal was preferred which was subsequently withdrawn. It appears that thereafter the learned Sole Arbitrator issued notice dated 6.1.2003 to the parties to appear for a preliminary hearing on 28.1.2003. However as there was a stay granted by this Court the matter was adjourned. However, in view of the dismissal of the aforesaid Special Civil Application No. 460 of 2003 and vacation of the interim relief the Sole Arbitrator once again issued a notice dated 22.4.2003 directing the parties to attend for a preliminary hearing on 27.5.2003 and the matter was adjourned to 11.8.2003 for filing claim statement and reply thereto and for admission/denial of documents. It is the case of the petitioner SCL that in the meantime the Labour and Employment Department of Government of Gujarat by Notification dated 5.6.2003 declared the SCL to be a Relief Undertaking under the BRU Act and according to the petitioner considering Section 4 of the BRU Act the rights, privileges, obligations and liabilities (other than those liabilities etc., towards its employees) occurred or incurred before 5th June 2003 and any remedy for enforcement thereof is required to be suspended and the proceedings relating thereto pending before any Court, Tribunal, Officer or Authority is required to be stayed during one year commencing from 5th June 2003 and ending on 4th June 2004 and that thereafter the said notification has been renewed till 4.6.2005. It is the case of the petitioner of Special Civil Application No. 7528 of 2004, i.e., SCL that they preferred an application under Section 16 of the Arbitration Act before the learned Sole Arbitrator stating that pursuant to the scheme of arrangement between Birla VXL and SCL all liabilities of Chemical Division of Birla VXL came to be vested in the petitioner and the DLF ought to have sent the notice invoking arbitration to the SCL. The primary and mandatory requirement of the Arbitration Act was not challenged by DLF and thus arbitral proceedings before the respondent No.1 Sole Arbitrator were not maintainable against SCL. It also appears from the record that SCL also preferred an application under Section 20 of the Arbitration Act for change of venue of arbitration to Porbandar in terms of Clause 15 of the

purchase orders as the arbitration proceedings were being conducted at New Delhi. The petitioner SCL also preferred an application under Section 16 of the Arbitration Act for stay of arbitral proceedings in view of the fact that SCL being declared as a Relief Undertaking under the BRU Act. The learned Sole Arbitrator rejected all the above three applications by its order dated 20.5.2004 and therefore the petitioner has preferred the Special Civil Application under Article 226 of the Constitution of India for the aforesaid reliefs.

6.1. It appears from the record of Special Civil Application No. 9710 of 2004 that petitioner of the said Special Civil Application Birla VXL also moved an application under Section 16 of the Arbitration Act before the Sole Arbitrator for a declaration that there is no existing arbitration agreement between Birla VXL and DLF and that in absence of any arbitration agreement between Birla VXL and DLF the learned Sole Arbitrator does not have any jurisdiction relating to the present arbitration proceedings qua Birla VXL and it was further prayed to delete Birla VXL's name from the array of parties with regard to claim filed by DLF and it is also further prayed for rejection of DLF's claim against Birla VXL. The aforesaid application and the prayer was made by Birla VXL contending inter alia that in view of sanction of the scheme by this Court demerging the Chemical Division of Birla VXL and transferring the Chemical Division of Birla VXL to SCL all assets and liabilities of the Chemical Division came to be transferred to SCL and with the sanction of the scheme of demerger between Birla VXL and SCL by the Hon'ble Gujarat High Court Saurashtra Chemicals stand substituted in the contract with DLF and consequently with effect from 1.7.1998 there is no privity of contract between DLF and Birla VXL. The aforesaid application also came to be dismissed by the learned Sole Arbitrator by order dated 20th May 2004 against which the petitioner Birla VXL has preferred the present Special Civil Application No. 9710 of 2004 under Article 226 of the Constitution of India.

6.2. It appears from the record of Special Civil Application No. 16075 of 2003 that the dispute is between one Krupp Industries (I) Ltd and the SCL and the said Krupp Industries (I) Ltd., [hereinafter referred to as "KIL"] had entered into a contract with the SCL by Purchase Order dated 1.6.1994. As there was a dispute between the said KIL and the SCL the Arbitration Clause was invoked and late Mr. Justice N.J. Pandya (Retd.) was appointed as Sole Arbitrator; during the pendency of

the arbitration proceedings between the KIL and the SCL before the Sole Arbitrator, by notification dated 5.6.2003 issued by the Labour and Employment Department, Government of Gujarat, dated 5.6.2003 the SCL came to be declared as a relief undertaking under the BRU Act which is extended upto 4.6.2005 and as according to the SCL by virtue of Section 4 of the BRU Act, rights, privileges, obligations, liabilities (other than those liabilities etc., towards its employees) occurred or incurred before 5th June 2003 any remedy for the enforcement thereof shall be suspended and proceedings relating thereto pending before any Court, Tribunal, Officer or Authority shall be stayed during one year commencing from 5th June 2003 and ending on 4th June 2004 which has been extended till 4.6.2005 the arbitration proceedings before the Sole Arbitrator was required to be stayed during the period of the said notification; and therefore the SCL submitted an application under Section 16 of the Arbitration Act before the Sole Arbitrator for staying the arbitration proceedings and the Sole Arbitrator by his order dated 23.9.2003 rejected the application of the SCL for such arbitration proceedings which is challenged by the petitioner SCL before this Court by way of present Special Civil Application No. 16075 of 2003 under Article 226 of the Constitution of India.

7. Heard Shri Mihir Thakore, learned Senior Advocate for M/s. Singhi & Company appearing for Saurashtra Chemicals Ltd; Shri KS Nanavati, learned Senior Advocate for M/s. Trivedi & Gupta for Birla VXL Limited; Shri M.L. Verma, learned Senior Advocate with Shri Anil Sheth for DLF Universal Limited, and Shri P.M. Thakkar, learned Senior Advocate for Krupp Industries (I) Ltd.

8. Shri Mihir Thakore, the learned Senior Advocate appearing on behalf of SCL has relied upon the following decisions/judgments in support of his contention and submission that a writ can lie to an Arbitrator appointed by the parties;

- (1) Andi Mukta Sadguru Shree Muktajeevandas Swami
Suvarna Jayanti Mahotsav Smarak Trust and Others
Vs. V.R. Rudani And Others, reported in (1989) 2
SCC 691;
- (2) ONGC Ltd. Vs. Saw Pipes Ltd, reported in (2000) 5
SCC page 705;
- (3) M/s. Anuptech Equipments Private Ltd. Vs. M/s.
Ganpati Co-op. Housing Society Ltd., Mumbai and

others, reported in AIR 1999 Bombay 219;

(4) Indian Oil Corporation Limited Vs. ATV Projects India Limited and Another, reported in 2004 (2) Arbitration Law Report Page 432 (Delhi High Court);

(5) Subash Singh & Co. Vs. Girnar Fibres Ltd., reported in 2000(1) Arbitration Law Report, Page 430 (Punjab & Haryana) Para 10 at Page 439.

8.1. Shri Thakore, learned Senior Advocate has submitted that the writ can be issued to any person or authority so long as he performs public duty irrespective of whether it is a "State" under Article 12 of the Constitution of India. Relying upon paragraphs 15, 20 and 22 of the Judgment of the Hon'ble Supreme Court in the case of Andi Mukta Sadguru Shree Muktajeevandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani And Others (Supra), it is submitted that against the order passed by the Arbitrator under the provisions of the Arbitration Act a petition under Article 226 of the Constitution of India is maintainable. It is further submitted that the Arbitral Tribunal constituted as per the provisions of the Arbitration Act owes a positive obligation towards the parties to the arbitration and such obligation is cast on the Tribunal both by contract and by statute. Relying upon Section 28(1)(a) of the Arbitration Act, it is submitted that it imposes a duty on the Arbitral Tribunal to try and decide the dispute in accordance with the substantial law for the time being in force in India and for that purpose Shri Thakore has relied upon the judgment in the case of ONGC Ltd Vs. Saw Pipes Ltd (supra) more particularly paras 14, 15 and 31 of the said Judgment. It is therefore submitted that it is a duty cast upon an Arbitration to act within the parameters of the public policy of the Government of India. It is further submitted that an Arbitral Tribunal owes a duty under Section 28(1) of the Arbitration Act to act in accordance with the terms of the Act and any order of an Arbitrator which is contrary to the terms of the contract would be in contravention to the said provisions of the Act and thereby contrary to the public policy of India and/or against the established substantial law of India. It is also further submitted that an Arbitral Tribunal is required to adjudicate upon civil rights of the parties, which otherwise would be adjudicated upon by the Courts of India, under the relevant statutes and therefore the Arbitral Tribunal discharges a judicial function, which

squarely falls within the ambit of phrase "public duty". Section 34 and Section 37 of the Arbitration Act clearly envisage the Legislative intent that an Arbitral Tribunal being under the supervisory control of the Courts of India it cannot be contended that an Arbitral Tribunal, though appointed by the agreement between the parties, is not discharging any "public function". It is further submitted an Arbitral Tribunal owes a duty to the parties to determine whether a claim is barred by limitation under the provisions of the Limitation Act, 1963. Section 27(5) of the Act provides that persons guilty of contempt to the Arbitral Tribunal shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the Arbitral Tribunal as they would incur for the like offences any suits tried before the Court. It is also further submitted that apart from the public duties which an Arbitral Tribunal owes the Arbitral Tribunal also performs public functions. For that purpose, provisions of Section 36, Section 20(2), Section 34 and Section 37 of the Arbitration Act are relied upon. It is submitted that Section 36 of the Act provides that on expiry of time for making an application to set aside an arbitral award or on rejection of such an application, the said award shall be enforced under the provisions of the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. It is further submitted that an Arbitral Tribunal is required to adjudicate upon the civil rights of the parties, which otherwise would be adjudicated upon by the Courts of India under the relevant statutes. Thus an Arbitral Tribunal discharges a judicial function. It is also further submitted that even otherwise the Arbitral Tribunal is under supervisory control of the Courts as defined under Section 2(1)(e) of the Arbitration Act which in turn under the appellate, revisional and supervisory jurisdiction of the High Court and consequently amenable to the writ under Article 226 of the Constitution of India. For that purpose, Shri Thakore has also relied upon the judgment of the Bombay High Court in the case of M/s. Anuptech Equipments Private Ltd. Vs. M/s. Ganpati Co-op. Housing Society Ltd., Mumbai and others, (supra), by which the Bombay High Court has entertained the writ petition against the decision of the Arbitral Tribunal. Shri Thakore has relied upon Para 17 of thereof which reads as under;

17. The question that will arise is whether
this Court can exercise its extra ordinary
jurisdiction under Article 226 of the
Constitution or Article 227. Article 227 is the

power of superintendence of this Court over Tribunals. For that purpose it will have to be examined whether the Arbitral Tribunal as constituted under the Act of 1996 is a Tribunal over which this Court would have supervisory jurisdiction. the other aspect of the matter would be to consider whether the Arbitral Tribunal would come under the expression of "other person" and as such a writ could be issued to such person or authority under Article 226. Before proceeding to examine the matter it would be advisable to consider some judgments of the Apex Court in so far as appointment of Arbitrators are concerned. At this outset let me make it clear that a distinction has been drawn between a statutory Tribunal and a Tribunal appointed by consent of parties. It is in that context the need to examine the decisions rendered under Section 10-A of the Industrial Disputes Act, 1947. The first such judgment before Section 10(A) was amended is in the case of Engineering Mazdoor Sabha v. Hind Cycles Ltd. AIR 1963 SC 874. The question before the Apex Court was whether against an award by an Arbitrator appointed under Section 10-A of the I.D. Act, an appeal could lie to the Apex Court under Article 136. An appeal lies only from order of Courts or Tribunals. The question was whether the Arbitrator appointed under Section 10(A) was a Tribunal. Gajendragadkar, J., as the learned Chief Justice then was, observed as under (At Pp. 881-882 of AIR):-

"Article 226 under which a writ

of certiorari can be issued in an appropriate case is, in a sense, wider than Article 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of Courts or Tribunals. Under Article 226 (1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under Section 10-A is not a Tribunal under Article 136 in a proper case, a writ may lie against his award under Art. 226".

The next judgment is in the case of Rohtas Industries Ltd. v. Rohtas Industries Staff Union, AIR 1976 SC 425. A reference was made under Section 10-A of the Industrial Disputes Act, 1947. An award came to be passed. The said Award when challenged before the High Court of Calcutta was rejected in so far as denial of wages during the strike period. However, the Court quashed part of the award which directed payment of compensation by the workers to the management. The company came in appeal against the said judgment. Before the Apex Court various challenges were raised. We are concerned with the first challenge which was formulated as under:-

"An award under Section 10-A of the Act Saviours of a private arbitration and is not amenable to correction under Art. 226 of the Constitution."

To the same argument there was an additional argument which ran as under:-

"Even if there be jurisdiction, a discretionary desistence from its exercise is wise, proper and in consonance with the canons of restraint this Court has set down"

While answering the said issue the Apex Court has observed as under [AIR 1976 SC 425, Para 9]:-

"The expansive and extraordinary power of the High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person --even a private individual--and be available for any (other) purpose, even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Article 226(1-A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to "the residence of such person".

The Court examined the judgment in Engineering Mazdoor Sabha (AIR 1963 SC 874) and thereafter proceeded to answer as under (At P. 429 of AIR 1976 SC):-

"We agree that the position of an arbitrator under Section 10-A of the Act (as it then stood) vis a vis Article 227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise under Section 10-A as well as the course of the force of the award on publication derives from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory Tribunals amenable to judicial review. This observation made en passant by us is induced by the discussion at the bar and turns on the amendments to Section 10-A and cognate provisions like Section 23, by Act XXXVI of 1964".

Relying on these judgments it was sought to be argued that the arbitral Tribunal under the Act of 1996 would be such other person to whom a writ could go under Article 226 of the Constitution. Before proceeding to consider that aspect of the matter, it is essential to refer to the subsequent judgment of the Apex Court in the case of Raipur Development Authority v. M/s. Chokhamal Contractors, AIR 1990 SC 1426. The judgment of Rohtas Industries (AIR 1976 SC 425) came up for consideration before the Apex Court in the case of Raipur Development Authority (supra). It was sought to be contended that under the Act of 1940 the Arbitrators were bound to give reasons as that was a requirement of natural justice and in the event reasons were not given the Award was liable to be remitted or set aside. In other words the Apex Court was called upon to consider the question whether an arbitrator appointed under the Act of 1940 was exercising quasi judicial powers and as such on failure to give reasons the award was liable to be set aside. Reliance was also placed in the case of Rohtas Industries. (AIR 1976 SC 425). the same was distinguished by the Apex Court by observing as under (Para 32 of AIR 1990 SC 1426):-

"A distinction was thus made between statutory arbitrations under Section 10-A of the Industrial Disputes Act and private arbitrations. It is not necessary to refer to the other cases cited before us which have a bearing on Section

10-A of Industrial Disputes Act, 1947".

What is important to bear in mind are the following observations in para 37 of the judgment which are reproduced hereinbelow :-

"There is however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and Governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and requires to act in accordance with law with their concomitant obligations for reasoned decisions are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to expeert the State's sovereign judicial power".

It is thus clear from the said judgment that the Apex Court came to the conclusion that trappings of a body which discharges judicial functions and requires to act in accordance with law with their concomitant obligation for reasoned decisions are not attracted to a private adjudication of the nature of arbitration as the latter is not supposed to expeert the State's sovereign judicial power. Before proceeding further it will also be necessary to refer to the judgment relied upon by the respondents in the case of Smt. Rukmanibai Gupta v. Collector, Jabalpur, (1980) 4 SCC 556: (AIR 1981 SC 479). In that case the question before the Apex Court was that in case of a Governmental contract, if there were difference or dispute the matter was left to the State for its final decision. It was held that such a clause was a clause of arbitration. A petition came to be filed challenging the said award under Article 226 of the Constitution of India. The High Court dismissed the Writ Petition on the ground that the award could not be challenged by way of Article 226 but only under the provisions of the Arbitration Act. While answering the question in paragraph 10 the Apex Court held that the reliefs sought by the appellant by invoking the extraordinary jurisdiction of the High Court under Article 226 could have been obtained by proceeding in accordance with the relevant provisions of the Arbitration Act. In that situation, if the High Court had declined to entertain the writ petition, no exception could

be taken to it as the writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligation voluntarily incurred.

Therefore, considering the above judgments can it still be said that this Court can exercise the extraordinary jurisdiction under Article 226. As pointed out earlier, a writ can go to any person or authority. Under the Act of 1940 arbitrations under the Arbitration Act, 1940 have been held to be in the nature of private arbitrations and not in exercise of the State's sovereign judicial power. A distinction has been made between the provision for statutory arbitration and for private arbitration. Does the Act of 1996 make any distinction in so far as this aspect is concerned. If the Act is in pari materia with the Act of 1940 in that event it will not be possible to hold that a writ could go under Article 226 of the Constitution. To my mind the Arbitration & Conciliation Act, 1996 has made a departure and an arbitral Tribunal under the Act of 1996 can be said to be a person if not a Tribunal to whom a writ could go. Even in *Engineering Mazdoor Sabha* (AIR 1963 SC 874) (supra) the Apex Court noted that the Arbitration under Section 10-A is different from a private Arbitration. The following observations in para.16 are relevant :-

"(16). It may be conceded that having regard to several provisions contained in the Act, and the rules framed thereunder, an arbitrator appointed under S. 10-A cannot be treated to be exactly similar to a private arbitrator to whom a dispute has been referred under an arbitration agreement under the Arbitration Act. The arbitrator under S. 10-A is clothed with certain powers, his procedure is regulated by certain rules and the award pronounced by him is given by statutory provisions a certain validity and a binding character for a specified period. Having regard to these provisions, it may perhaps be possible to describe such an arbitrator, as in a loose sense, a statutory arbitrator and to that extent, the argument of the learned Solicitor General may be rejected. But the fact that the arbitrator under S. 10-A is not exactly in the same position as a private arbitrator, does not mean

that he is a Tribunal under Art. 136. Even if some of the trappings of a Court are present in his case, he lacks the basic, the essential and the fundamental requisite in that behalf because is not invested with the State's inherent judicial power. As we will presently point out, he is appointed by the parties and the power to decide the dispute between the parties who appoint him is derived by him from the agreement of the parties and from no other source. The fact, that his appointment once made by the parties is recognised by Section 10-A and after his appointment he is clothed with certain powers and has thus, no doubt, some of the trappings of a Court, does not mean that the power of adjudication which he is exercising is derived from the State and so, the main test which this Court has evolved in determining the question about the character of an adjudicating body is not satisfied. He is not a Tribunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties. His position, thus, may be said to be higher than that of a private arbitrator and lower than that of a Tribunal. A statutory Tribunal is appointed under the relevant provisions of a statute which also compulsorily refers to its adjudication certain classified classes of disputes. That is the essential feature of what is properly called statutory adjudication or arbitration. That is why we think the agreement strenuously urged before us by Mr. Pal that a writ of certiorari can lie against his award is of no assistance to the appellants when they contend that such an arbitrator as a Tribunal under Article 136."

The reasons are as under:- Reading of Section 8 with Section 5 of the Act of 1996 in cases where there is an arbitration agreement, no judicial authority can intervene except when so provided in the Act. The jurisdiction is exclusive. Section 10 controls the composition of the Arbitral Tribunal. Section 16 confers a power upon the Tribunal to decide on its own jurisdiction. Section 17 has conferred a power on the Tribunal to make an order as an interim measure for protection of the subject matter of a dispute. Under Section 37 such an order granting or rejecting interim relief is subject to appeal

to the Court. Under sub-section (4) of Section 19 of the Arbitral Tribunal has been given power to determine the admissibility, relevance, materiality and weight of any evidence. Under Section 25 the Tribunal can terminate the proceedings if claims statement is not filed within the time stipulated under Section 23 and if no sufficient cause is shown. Under proviso to Section 24(1) the Tribunal is bound to grant oral hearing on request by the parties. More important is sub-section (5) of Section 27 if persons are guilty of any contempt of the Arbitral Tribunal during the conduct of arbitral proceedings they are subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for like offences in suits tried before the Court. In the Act of 1940 there was no specific reference to contempt of arbitral Tribunal which has been conferred by Section 27 of the Act of 1996. Once a person can be punished for contempt of the Tribunal, which can be done where the Act tends to bring the administration of justice into disrespect or interference with the administration of justice, shows that such a 'Tribunal' discharges the inherent judicial functions of the State. By virtue of Section 36 the Award is deemed to be a decree which can be enforced under the Act unlike the Act of 1940 when it had to be made a decree by the order of the Court. Under Section 37(2), an Appeal is provided for against certain orders made by the Arbitral Tribunal. In other words its orders are appealable. To my mind on consideration of those provisions even if it be held that the Tribunal is not a Tribunal within the meaning of Article 226 of the Constitution, it would nevertheless be a person to whom a writ could go under Art. 226 of the Constitution. I am, therefore, clearly of the opinion that where a remedy is not available to an aggrieved person and considering Section 5 of the Arbitration Act of 1996 this Court can exercise its extraordinary jurisdiction under Article 226 of the Constitution. In passing I may mention that this exercise had to be undergone in view of non-availability of remedy to aggrieved parties. It is true also that one of the objectives of the Act of 1996 is to minimise the supervisory role of Courts. On the other hand proceedings in arbitration involve the

Civil rights of the parties. It is a cardinal principle of our jurisprudence that no man should be left without a remedy. Judicial review cannot be made dependent on men who pass orders. Hierarchy of Courts is an answer to that."

Shri Thakore has also relied upon the order passed by the learned Single Judge of this Court dated 30th September 2004 rendered in Special Civil Application No. 2673 of 2003 (Unreported Judgment) in the case between ONGC Ltd. Vs. Samarth Builders by which the learned Single Judge has entertained the writ petition against an Arbitrator appointed by agreement of parties.

9. Shri M.L. Varma, learned Senior Advocate appearing on behalf of DLF has relied upon the following judgments in support of his submission that against an order passed by a Sole Arbitrator petition under Article 226 of the Constitution of India is not maintainable:

- (1) Balkishen Gulzari Lal Vs. Panna Lal Sud & Others, reported in AIR 1973 Delhi 108;
- (2) State of Orissa Vs. Lakshminarayan Samantaray & Anr., reported in AIR 1982 Orissa 93;
- (3) M. Moideen Kutty Vs. Divisional Forest Officer, Nilambur & Ors., reported in 1988 (2) ALR Page 37;
- (4) R. Vs. Dispute Committee of the National Joint Council & Ors., reported in 1953 (1) All England Reports. (Q.B.D.) 327;
- (5) Executive Committee of Vaish Degree College, Shamli & Ors. Vs. Lakshmi Narain & Ors., reported in (1976) 2 SCC Page 58;
- (6) General Manager J & K Cooperative Supply and Marketing Federation Vs. Rama Rice & General Mills, reported in (1994) 1 ALR Page 259;
- (7) Dharma Prathisthanan Vs. Madhok Construction Pvt. Ltd., reported in (2004) 3 ALR Page 432 (SC);
- (8) Veena Ojha Vs. U.P. Stock Exchange Association Ltd. & Ors., reported in (2000) 1 ALR Page 19

(Allahabad);

(9) State of U.P. & Ors. Vs. Bridge and Roof Co.
(India) Ltd., reported in (1996) 6 SCC Page 22.

9.1. Relying upon the judgment of the Delhi High Court in the case of Balkishen Gulzari Lal Vs. Panna Lal Sud & Others, (supra), it is submitted that any Arbitrator appointed under the Arbitration Act is not amenable to High Court's jurisdiction under Article 226 of the Constitution of India. It is submitted that an arbitration is an arrangement for investigation and determination of a matter between the contesting parties by one or more unofficial persons chosen by the parties and such an Arbitrator appointed under the Arbitration Act is a private Arbitrator. Merely because the Courts have been given power under the Arbitration Act to deal with the Arbitrator or his award it does not mean that the Arbitrator is a statutory Arbitrator in the sense of being a public body to whom either the arbitration has necessarily to be referred to or in the sense that his award by itself has been given a finality and recognition of a stature. Relying upon the aforesaid Judgment, it is submitted that the Arbitrator appointed under the Arbitration Act is not amenable to jurisdiction of High Court under Article 226 and therefore a writ cannot be issued. Relying upon the judgment of the Orissa High Court in the case of State of Orissa Vs. Lakshminarayan Samantaray & Anr. (supra), it is submitted that the Arbitrator is not amenable to the extraordinary jurisdiction of the High Court. Relying upon the judgment of the Kerala High Court in the case of M. Moideen Kutty Vs. Divisional Forest Officer, Nilambur & Ors. (supra), it is submitted that an arbitrator being a private firm agreed upon between the parties no writ can lie against an award and the only remedy is what has been provided in the Arbitration Act. Relying upon the judgment of the Hon'ble Supreme Court in the case of Executive Committee of Vaish Degree College, Shamli & Ors. Vs. Lakshmi Narain & Ors., (supra), it is submitted that as held by the Hon'ble Supreme Court "the adoption of certain statutory provisions by itself is not sufficient to clothe the institution with a statutory character and the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers." It is also further submitted that arbitration proceeding pending between the private arbitrator under private agreement is not subject to writ petition and that the Arbitral Tribunal which is creature of private agreement between the parties, derives its authority from the

agreement and it is not a court of law, and its orders are not judicial orders and is not performing any judicial function. It is also further submitted that the Tribunal though being subject to provisions of Arbitration Act is not a statutory body and private arbitration is not a statutory arbitration created by statute and is merely governed by a statute. For that purpose, Shri Varma has relied upon paragraph Nos. 7, 12 and 19 of the Judgment of the Hon'ble Supreme Court in the case of Dharma Prathisthanan Vs. Madhok Construction Pvt. Ltd., (supra), which read as under;

"7.The Law of Arbitration does not make the Arbitration an adjudication by a statutory body but it only aids in implementation of the Arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference."

"12.According to Russell (Arbitration, 20th Edition, P. 104), "An Arbitrator is neither more nor less than a private Judge of a private Court (called an Arbitral Tribunal) who gives a private judgment (called an Award). He is a Judge in that a dispute is submitted to him...."

"19.The Constitution Bench in Khardah Company Ltd. vs. Raymon & Co. (India) Private Ltd., AIR 1962 SC 1810, decided the issue from the view of jurisdictional competence and held that what confers jurisdiction on the Arbitrator to hear and decide a dispute is an Arbitration agreement and where there is no such agreement there is an initial want of jurisdiction which cannot be cured even by acquiescence. It is clearly spelled out from the law laid down by the Constitution Bench that the Arbitrators shall derive their jurisdiction from the agreement and consent."

Relying upon the judgment of the Hon'ble Supreme Court in the case reported in AIR 2004 S.C. Page 1344, more particularly Para 41 of the said Judgment, it is submitted an Arbitral Tribunal is not a Court of law and its functions are not judicial functions and the jurisdiction of the Arbitrator being confined by the 4

corners of the agreement, he passed only such an order, which may be subject matter of reference. From the above it is submitted that if the arbitration is arising from an arbitration clause in a private contract which is not a statutory arbitration nor an Arbitrator a Court it does not perform a judicial function. As the arbitration is before a private firm flowing from private agreement of the private parties not the arbitrator is not performing judicial function. Thus the writ petition is not maintainable against the order of the Arbitrator nor can the arbitration proceedings be stalled. The stalling of the arbitration proceedings is against the object and scheme of the Act. It is a settled law that a writ petition against private arbitration proceeding is not maintainable.

10. Now, considering the aforesaid submissions, what is required to be considered is whether against an award passed by the Arbitral Tribunal under the provisions of the Arbitration Act petition under Article 226 of the Constitution of India is maintainable or not. The Hon'ble Supreme Court, in the case of Andi Mukta Sadguru Shree Muktajeevandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani And Others (Supra), in Para 15 has held as under;

"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. the aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their

pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super added protection by university decisions creating a legal right duty relationship between the staff and the management. When there is existence of this relationship mandamus cannot be refused to the aggrieved party."

In Para 20 of the said Judgment, it is also held and observed as under;

"20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

Para 22 of the said Judgment reads as under;

"22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states : "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the

rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

As held by the Hon'ble Supreme Court in the case of ONGC Ltd (supra), the Arbitral Tribunal has to try and decide the dispute in accordance with the substantial law for the time being in force and that an Arbitrator has to act within the parameters of the public policy of India.

10.1. It is required to be noted that an Arbitral Tribunal is required to adjudicate upon the civil rights between the parties which otherwise would be adjudicated upon by the courts of India under the relevant statutes. An Arbitral Tribunal discharges judicial function and the award passed by the Tribunal is subject to challenge before the Civil Court. An Arbitral Tribunal owes a duty to the parties to determine whether the term is barred by limitation under the provisions of the Limitation Act or not. As per Section 36 of the Act, the award can be enforced under the provisions of Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court. Considering the aforesaid facts and circumstances and the scheme of the Arbitration Act of 1996 and the aforesaid judgments, it cannot be said that against an order passed by the Arbitral Tribunal under the provisions of the aforesaid Act of 1996 petition under Article 226 of the Constitution of India is not maintainable. Under the circumstances, I am not in agreement with the view taken by the other High Courts that the petition under Article 226 of the Constitution of India against the order passed by the Arbitral Tribunal is not maintainable. The answer to the first question is in affirmative.

11. Now, the second question, which is required to be considered, is whether against an passed by an Arbitral Tribunal a petition under Article 226 of the Constitution of India requires to be entertained or not. The learned Advocates appearing on behalf of the respective petitioners, relying upon the judgments which are stated hereinabove which are cited while considering the question with regard to maintainability of the petition

under Article 226 of the Constitution of India, have also submitted that for the said reasons the petition under Article 226 is also required to be entertained. It is submitted that in the present case so far as 'SCL' is concerned in absence of any notice served upon the SCL invoking the arbitration clause the learned Sole Arbitrator has no jurisdiction to proceed further with the arbitration proceedings and therefore the petition is required to be entertained. It is also further submitted that in view of the Notification issued under the provisions of the BRU Act declaring the SCL as a relief undertaking the arbitration proceedings before the Arbitrator is required to be stayed and when the application was submitted under Section 16 of the Arbitration Act to stay the proceedings which came to be dismissed by the Sole Arbitrator which is challenged in the present Special Civil Applications, the present group of petitions are required to be entertained. It is also further submitted by SCL that as per the Arbitration Clause the venue of the arbitration would be at Porbandar and the arbitration proceedings are not maintainable as the same are going on at New Delhi, for which an application was given under Sections 20 and 21 of the Arbitration Act which came to be dismissed and the same is also challenged in the present Special Civil Applications. Therefore considering the provisions of Section 20 and 21 of the Arbitration Act it is requested to entertain the petition under Article 226 of the Constitution of India. It is also further submitted on behalf of Birla VXL that in view of the demerger of Chemical Division of Birla VXL from SCL on sanctioning the scheme by this Court there is no privity of contract in existence between Birla VXL and DLF and therefore the arbitration proceedings against Birla VXL are not required to be continued and thus the learned Sole Arbitrator has no jurisdiction to decide the dispute between Birla VXL and DLF, and as an application preferred under Section 16 of the Arbitration Act came to be dismissed, the present Special Civil Applications have been filed and therefore it is requested to entertain the petitions under Article 226 of the Constitution of India as they go to the root of jurisdiction of the learned Sole Arbitration in proceeding with the arbitral proceedings.

11.1. Shri Verma, learned Senior Advocate appearing on behalf of DLF has relied upon the following decisions in support of his submission that assuming without admitting that the writ petition under Article 226 of the Constitution of India against the order passed by the Arbitral Tribunal is maintainable but the same should not

be entertained;

- (1) Konkan Railway Corporation Ltd., vs. Mehul Construction Co.- (2000) 7 SCC 201;
- (2) New India Assurance Co. Ltd. Vs. Hanjer Fibres Ltd., - AIR 2003 Guj. 311 (F.B.);
- (3) BASF Styrenics Pvt.Ltd. Vs. Offshore Industrial Construction Pvt.Ltd. & Anr. - 2003 (3) Arb.L.R. 14 (Bom.D.B.) (Para 6, 10,11);
- (4) Assam Urban Water Supply & Sewage Board Vs. Subhas Project & Marketing Ltd. & Anr. - 2003 (2) Arb.L.R. 301 (Gau.) (Para 9 to 13);
- (5) Babar ali Vs. UOI (D.B. Delhi);
- (6) Babar Ali Vs. Union of India - 2000 (2) SCC 178;
- (7) BHEL Vs. C.N. Garg - 2000 (3) Arb.L.R. 674 (D.B. Delhi);
- (8) National Buildings Construction Corporation Ltd. Vs. Antia Electricals Pvt.Ltd. & Ors. - 2003 (2) Arb.L.R. 91;
- (9) M. Mohan Reddy Vs. Union of India & Ors., - 2000(1) Arb. L.R. 39 (A.P.);
- (10) Mangayarasi Apparels Pvt.Ltd. Vs. Sundram Finance Ltd., Madras; - 2002(3) Arb.L.R. 210 (Madras).

Considering the Statement of Objects and Reasons of the Act of 1996 it is submitted that the main objective of the Legislature was to minimise the supervisory role of the Courts in the arbitral process, and considering the provisions of Section 16 of the Act there is an adequate and proper remedy provided to have the arbitral award set aside under Section 34 of the Act. It is further submitted that considering the scheme of the Act more particularly Section 16 of the Act if the Arbitral Tribunal holds that it has jurisdiction such an order cannot be said to be illegal or without jurisdiction at that stage and such an order can be challenged only in the manner laid down in sub-section (5) and (6) of Section 16 i.e. after the proceedings are over and the award is made. Therefore, it is requested not to

entertain the present Special Civil Applications.

11.2. Considering the submissions made on behalf of the parties, the second question, which is required to be considered is whether against the order passed by the Arbitral Tribunal under Section 16 of the Act to proceed further with the arbitration proceedings a petition under Article 226 of the Constitution of India is required to be entertained or not.

11.3. In deciding the said issue, it would be necessary to find out the true intention of the Legislature in substituting the 1940 Act by the Act of 1996. Prior to 1996 Act, the Arbitration Act of 1940, which was in force in India, provided for domestic arbitration and no provision was there to deal with the foreign awards. The increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an alternative dispute resolution system, more particularly in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law, way back in 1985 adopted UNCITRAL Model Law of International Commercial Arbitration and since then a number of countries have given recognition to that model in their Legislative systems. With the said UNCITRAL Model Law in view, the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing Indian Arbitration Act, 1940 which was the principal legislation on arbitration in the country that had been enacted during the British rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to international commercial arbitration too. The Indian Law relating to the enforcement of foreign arbitration awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. As observed by the Hon'ble Supreme Court in the case of Konkan Railway Corporation Ltd., (Supra) while interpreting the provisions of 1996 Act, Courts must not ignore the objects and purpose of the enactment of 1996 Act. The Hon'ble Supreme Court of India, in the aforesaid decision, has observed as under;

"A bare comparison of different provisions of the Arbitration Act, 1940 with the provisions of the

Arbitration and Conciliation Act, 1996 would unequivocally indicate that the 1996 Act limits intervention of the Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law."

The Hon'ble Supreme Court also further observed as under;

"Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision".

The Hon'ble Supreme Court further observed in the aforesaid decision that -

"The provisions of the Act aim in achieving the sole objective of resolving the dispute as expeditiously as possible so that trade and commerce are not affected on account of litigation. The statement of objects and reasons of the Act clearly envisages that the main objective of the Legislation was to minimise the supervisory role of the Courts in the arbitral process."

As held by the Hon'ble Supreme Court, in the case of Kvaerner Cementation India Ltd. Vs. Bajrang Lal Aggarwal & Anr., reported in (2001) 6 SCC Page 265, "A bare reading of Section 16 makes it explicitly clear that Arbitral Tribunal has the power to rule on its own jurisdiction even without any objection with respect to existence or validity of an arbitration agreement is raised and a conjoint reading of sub-sections (2)(4)(6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act."

11.4. The Bombay High Court in the decision in the case of BASF Styrenics Pvt.Ltd. Vs. Offshore Industrial Construction Pvt.Ltd. & Anr. reported in 2003 (3) Arb.L.R. 14, (supra) has held as under;

"The scheme of the Act is clear, and it is that if the Arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent legislature has conferred the power on the Arbitral Tribunal "to rule on its own jurisdiction". Hence, such an order can be challenged only in the manner laid down in sub-sections (5) and (6) of Section 16, viz., after the arbitration proceedings are over and the award is made".

11.5. The Guwahati High Court, in the case of Assam Urban Water Supply & Sewage Board Vs. Subhas Project & Marketing Ltd. & Anr. 2003 (2) Arb.L.R. 301 (Gau.), (supra) it is held as under;

"If the Court is allowed to interfere at each and every stage of arbitration proceedings to examine the correctness of the finding or decision, it will be a never ending business and it can safely be apprehended that the arbitration will be a more time consuming process than the Court process as there will be two forums instead of one".

The Guwahati High Court has also held that "the Arbitrator has the power to decide about his own jurisdiction and such decision is not amenable to writ jurisdiction and the aggrieved party may challenge the same as provided under Section 16(6) of the Act after the arbitration proceeding is over and the award is made."

11.6. In a case where the vires of Arbitration Act of 1996 were challenged on the ground that order under Section 16(5) of the Act is not subject to judicial scrutiny, the Hon'ble Supreme Court in the case of Babar Ali Vs. Union of India - 2000 (2) SCC 178 has held that "There is no question of Arbitration and Conciliation Act, 1996 being unconstitutional or in any way offending the basic structure of the Constitution of India". The Hon'ble Supreme Court has held that only because the question of jurisdiction of the Arbitrator is required to be considered after the award is passed and not at penultimate stage by the appropriate court, it cannot be a ground for submitting that such an order is not subject to any judicial scrutiny. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by the Parliament".

11.7. The Full Bench of this Court in the case of New India Assurance Co. Ltd. Vs. Hanjer Fibres Ltd., - AIR 2003 Guj. 311 has held as under;

"Since the Arbitral Tribunal is competent to rule on its own jurisdiction including ruling of any objection with regard to existence or validity of the arbitration agreement, the order of the Chief Justice with regard to preliminary objection as to whether dispute is arbitrable or not in view of passing of receipt of followed final settlement by petitioner company under insurance policy and direction that the preliminary objection to be decided by the Arbitral Tribunal under Section 16 without expressing any final opinion on the said question and leaving it open to the parties to raise that question before the Arbitrator or Arbitrators could not be said to be vulnerable or in any way unjust, unreasonable, arbitrary or invalid requiring interference in exercise of constitutional writ jurisdiction. The parties aggrieved by an arbitral award, after rejection of such plea of jurisdiction or validity or existence of the arbitration agreement can challenge the same by invocation of the provisions of Section 34 of the Act."

11.8. The Division Bench of this Court in the case of Nirma Ltd. Vs. Lurgi Energie Und Entsorgung GMBH, Germany and Others reported in AIR 2003 Guj. 145, has held that "the scheme of Section 16 and 37 is such that the Arbitral Tribunal is empowered to rule on its own jurisdiction. The plea that the Arbitral Tribunal does not have jurisdiction or a plea that the Arbitral Tribunal is exceeding the scope of its authority, has to be decided by the Arbitral Tribunal, if it takes a decision rejecting that plea, it is duty bound to continue with the arbitral proceedings and make an arbitral award, and the party aggrieved by such arbitral award is permitted to make such an application for setting aside the arbitral award in accordance with Section 34."

11.9 Now, in backdrop of the above decisions of the Hon'ble Supreme Court as well as this Court and the other High Courts and considering provisions of the Arbitration Act 1996 more particularly Section 16 of the Act, it

clearly emerges that once the Arbitral Tribunal in an application under Section 16 of the Act holds that it has jurisdiction and decides to proceed further with the arbitration proceedings, then the Arbitral Tribunal is duty bound to continue with the arbitral proceedings and make an arbitral award. Section 16 of the Act reads as under;

16. Competence of arbitral tribunal to rule on its jurisdiction.____(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,____

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

As per Section 16(5) of the Act, the Arbitral Tribunal shall decide on a plea referred to in sub-section (2) i.e., a plea that the Arbitral Tribunal does not have jurisdiction or a plea that the Arbitral Tribunal is exceeding the scope of its authority and where the Arbitral Tribunal takes a decision rejecting the plea, the Arbitral Tribunal shall continue with arbitral proceedings and make an arbitral award. As per sub-section (6) of Section 16, a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34 of the Act. Under the circumstances, considering the statement and object and in particular sub-section (5) of Section 16 and sub-section (6) of Section 16 of the Arbitration Act of 1996, the aforesaid decisions of the Hon'ble Supreme Court and of the other High Courts, when the Arbitral Tribunal, in the present case, has dismissed the application submitted by the SCL and Birla VXL with regard to the arbitration and refused to stay the proceedings and the application under Section 20 with regard to the venue of the arbitral proceedings, and it has been decided to proceed further with the arbitration proceedings, the only remedy available to the petitioners is to wait till the Arbitral Tribunal makes an arbitral award to move an application for setting aside the same in accordance with Section 34 of the Act. Under the circumstances, while holding question No.1 in affirmative to the effect that against the order passed by the Arbitral Tribunal under Section 16 of the Act, writ petition under Article 226/227 of the Constitution of India is maintainable, at the same time, considering the scope and ambit of Section 16 of the Act read with the statement of object of the Arbitration Act, a petition under Article 226 of the Constitution of India is not required to be entertained, and the only remedy is to wait till the Arbitral Tribunal makes an arbitral award and thereafter to make an appropriate application under Section 34 of the Act for setting aside such an arbitral award. Thus, the question No.2 is answered accordingly.

12. Now, the third and most important question, which is required to be decided is, whether in view of the Notification issued under the provisions of the Bombay Relief Undertakings (Special Provisions) Act, 1958,

declaring 'SCL' as a 'Relief Undertaking', the arbitration proceedings between the SCL and Birla VXL Ltd, and the arbitration proceedings between SCL and Krupp Industries (I) Ltd., are required to be stayed ?.

12.1. However, before answering the said question, the statement and object and the legislative intent of the BRU Act and the Arbitration Act of 1996 are required to be considered. The main object of the BRU Act is to make temporary provision for industrial relations, to conduct or to provide loan, guarantee or financial assistance for the conduct of certain industrial undertakings and thereby to prevent unemployment or to provide for unemployment relief. As per Section 3 of the BRU Act, if at any time it appears to the State Government necessary to do so, the State Government may by notification in the official gazette declare that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government, and carried on or proposed to be carried on by itself or under its authority, or to which any loan guarantee or other financial assistance has been provided by the State Government shall with effect from the dates specified for the purpose in the notification to serve as a measure of preventing unemployment or of unemployment relief and the undertaking shall accordingly be deemed to be a relief undertaking for the purposes of the BRU Act. Section 4 of the BRU is with regard to consequences of issuance of the notification and declaring an undertaking as a relief undertaking. The main object and legislative intent of the Arbitration Act of 1996 is to achieve the sole objective of resolving the dispute as expeditiously as possible so that trade and commerce are not affected on account of litigation. The statement of objects and reasons of the Act clearly envisages that the main intention of the Legislature is to minimise the supervisory role of the courts in the arbitral process. With this object and reasons, the Arbitration Act of 1996 was enacted. With this background, let us proceed to consider the contentions and submissions made on behalf of the parties.

12.2. Shri Mihir Thakore, learned Senior Advocate appearing on behalf of SCL, has vehemently submitted that in view of the Notification issued by the State Government, declaring the SCL as a 'Relief Undertaking' under the provisions of the BRU Act, the arbitration proceedings are required to be stayed and by not staying the arbitration proceedings by the Arbitral Tribunal the Arbitral Tribunal has committed a grave error. It is also further submitted that Section 4 of the BRU Act

suspends any proceeding relating to enforcement of liability and proceedings before the learned Arbitration could not be carried any further. It is also further submitted that the object of Section 4(1)(a)(iv) of the BRU Act is to declare a moratorium on actions against the undertaking during the period of notification declaring to be a 'relief undertaking' and by such clause any liability against the relief undertaking is suspended and proceedings which are already commenced are to be stayed including the proceedings for the enforcement of an obligation, during the operation of the notification, and therefore the Arbitral Tribunal has materially erred in holding that only the proceedings which are in the matter of enforcement of any liabilities against the relief undertaking are required to be stayed and not the proceedings for adjudication of liability against the relief undertaking. Relying upon Section 4 of the Act, it is submitted by the learned counsel appearing for the petitioner SCL that on issuance of a Notification under Section 4 any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a Relief Undertaking and any remedy for the enforcement thereof, shall be suspended and all proceedings relating thereto pending before any Court, Tribunal, Officer or Authority shall be stayed. It is also further submitted that thus by virtue of the notification any remedy for the enforcement of any right shall be suspended and therefore when the arbitration proceeding is initiated for the enforcement of their right under the agreement, the same is required to be stayed during the operation of the said notification by which SCL is declared as a 'Relief Undertaking'. In support of his above submission, Shri Thakore has relied upon Section 4(a)(iv)(b) of the BRU Act and submitted that the right, privilege, obligation or liability referred to in clause (a)(iv) shall on the notification ceasing to have force revive and be enforceable and the proceedings referred to therein shall be continued provided that in computing the period of limitation for enforcement of such right the period during which it was suspended under clause (a)(iv) shall be excluded notwithstanding anything contained in any law for the time being in force. Therefore it is submitted that if the time limit for the purpose of filing of the suit will be over during the operation of the said notification then that period should be excluded. Therefore it is submitted that the arbitration proceedings during the operation of the notification which is valid upto 4th June 2005 at present are required to be stayed. Shri Thakore has further submitted that Section 4 of the BRU Act is in three parts, the first part is with regard to suspension of rights, the second

part is with regard to suspension of remedy for enforcement of rights, and the third party is with regard to staying of proceedings relating to the rights. It is further submitted that if DLF could not have filed the suit they could not even be permitted to proceed further with the arbitration proceedings. According to Shri Thakore, 'enforcement of rights' starts with the arbitration proceedings and not with the execution proceedings. It is further submitted that provision of suit and arbitration are pari materia and therefore arbitration proceedings have to be stayed and not the execution proceedings only. Shri Thakore has also further submitted that Section 22 of the Sick Industrial Undertakings Act is different from Section 34 of the BRU Act. According to him, under Section 22 of the SICA Act, there may not be a bar for the arbitration proceedings as only suit is barred. However, so far as Section 4 of the BRU Act is concerned, enforcement of right itself is suspended, and, according to him, obtaining an award itself is enforcement of a right. He has further submitted that if second part of Section 4(iv) applies to arbitration proceedings certainly the third part with regard to stay will also be made applicable and so the arbitration proceedings are required to be stayed. Relying upon the Division Bench judgment of this Court in the case of M/s. D.S. Patel & Co. Vs. The Gujarat State Textile Corporation Limited And Ors., reported in 1972 GLR Page 33 = 1971 (41) CC Page 1098, Shri Thakore has submitted that even winding up proceedings cannot proceed further as the same are for enforcement of rights. He has relied upon paragraphs 35, 36, 37 and 38 of the said Judgment. Relying upon the judgment of the Rajasthan High Court in the case of M/s. Jaysynth Dyechem etc.etc. vs. Mewar Textile Mills Ltd., reported in AIR 1988 Rajasthan Page 17, it is submitted that winding up proceedings are also required to be stayed and therefore it is requested to allow the present Special Civil Application by quashing and setting aside the order passed by the Arbitral Tribunal rejecting the application submitted by the petitioner SCL under Section 16 of the Arbitration Act of 1996 by which the petitioner SCL has prayed to stay the arbitration proceedings during the operation of the notification issued under the BRU Act.

12.3 PER CONTRA :- Learned Counsel appearing on behalf of the respondent DLF has submitted that the present Special Civil Application at this stage is premature as there is no award declared by the Arbitral Tribunal and only at the stage of execution of the award Section 4 of the BRU Act will come into play and at that

stage the execution proceedings can be stayed. He has submitted that what is contemplated under Section 4(a)(iv) of the BRU Act is suspension of any remedy for enforcement and the proceedings relating thereto are required to be stayed. According to him, remedy for enforcement would be 'enforcement of any decree and/or the award. Under the circumstances it is requested to dismiss the present Special Civil Application. He has further submitted that so far as the present arbitral proceedings are concerned they are not with regard to recovery of any dues from the petitioner SCL but it is with regard to damages and what amount DLF is entitled to by way of damages is yet to be ascertained and therefore the arbitral proceeding for the purpose of ascertainment of amount towards damages is not required to be stayed and only after the amount of damages is determined and the exact amount is ascertained and the award is declared by the Arbitral Tribunal at the stage of execution of the said award the proceedings can be stayed. Under the circumstances it is requested to dismiss the present Special Civil Applications. So far as the reliance placed upon the judgment of the Rajasthan High Court in the case of M/s. Jaysynth Dyechem etc. etc. (supra), the learned counsel appearing on behalf of the respondent DLF has submitted that the wordings in the Rajasthan Act are different from the words in Section 4 of the BRU Act and therefore the said judgment is not applicable at all. So far as the reliance placed upon the judgment of the Division Bench of this Court in the case of M/s. D.S. Patel & Co. vs. The Gujarat State Textile Corporation Limited And Ors.(supra), is concerned, the learned advocate appearing on behalf of the respondent DLF has submitted that the very Division Bench in Para 38 of the Judgment has held that when the sub-clause speaks about "suspension" of a right, it only means suspension of its execution or enforcement and the incidents of a right except its executability are therefore not suspended by sub-clause (iv) of Section 4 of the BRU Act. Therefore, it is submitted that on the contrary the Division Bench Judgment helps the respondent DLF rather than the petitioners and therefore it is requested to dismiss the present Special Civil Applications. It is submitted that the learned Arbitral Tribunal has rightly held that "the right, privilege, obligation or liability accrued or incurred" can be adjudicated upon and the question of enforcement would arise only thereafter. Therefore also it is requested to dismiss the present Special Civil Applications.

12.4. Sections 3 and 4 of the BRU Act read as under:-

3. Declaration of relief undertaking.____

(1) If at any time it appears to the State Government necessary to do so, the State Government may, by notification in the Official Gazette, declare that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government, and carried on or proposed to be taken over by the State Government, and carried on or proposed to be carried on by itself or under its authority, [or to which any loan guarantee or other financial assistance has been provided by the State Government] shall, with effect from the date specified for the purpose in the notification [be conducted] to serve as a measure [of preventing unemployment of] of unemployment relief and the undertaking shall accordingly be deemed to be a relief undertaking for the purposes of this Act.

(2) A notification under sub-section (1) shall have effect for such period not exceeding twelve months as may be specified in the notification; but it shall be renewable by like notifications from time to time for further periods not exceeding [twelve months] at a time, so however that all the periods in the aggregate do not exceed [ten years]."

4. Power to prescribe industrial relations

and other facilities temporarily for relief undertakings____(1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, order or other provision whatsoever, the State Government may, by notification in the Official Gazette, direct that____

(a) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under sub-section (2) of section 3____

(i) all or any of the laws in the Schedule to this Act or any provisions thereof shall not apply (and such relief undertaking shall be except therefrom), or shall, if so directed by the State Government, be applied with such modifications (which do

not however affect the policy the said laws) as may be specified in the notification;

(ii) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government [or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of the State Government] for being run as a relief undertaking, shall be suspended in operation, or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification;

(iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (i) and (ii) and the notification;

(iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement, thereof shall be suspended and all proceedings relative thereto pending before any court, Tribunal, officer or authority shall be stayed;

(b) the right, privilege, obligation or liability referred to in clause (a)(iv) shall, on the notification ceasing to have force, revive and be enforceable and the proceedings referred to therein shall be continued :

Provided that in computing the period of limitation for the enforcement of such right, privilege, obligation or liability, the period during which it was suspended under clause (a)(iv) shall be excluded notwithstanding anything contained in any law for the time being in force.

(2) A notification under sub-section (1) shall have effect from such date, not being earlier than the date referred to in sub-section

3, as may be specified therein and the provisions of section 21 of the Bombay General Clauses Act, 1904 (Bom. I of 1904), shall apply to the power to issue such notification."

There is a notification in favour of the petitioner SCL issued under the provisions of the BRU Act declaring SCL as a Relief Undertaking. It is the contention on behalf of the petitioners that by virtue of the notification issued under Section 4 of the Act declaring the SCL as a 'Relief Undertaking', any remedy for enforcement of any right is required to be stayed meaning thereby the arbitration proceeding which is for enforcement of the right under the agreement is required to be stayed. Now, let us see what is the meaning of word "Enforcement". Lord Denim in Overseas Engineering (Gb) Ltd., reported in (1962), 3 All England Reports, Page 12, as attributed meaning to word "execution" as the process for enforcing or giving effect to Judgment of the Court. So, any remedy for the enforcement of any right is to be construed as 'enforcement' of right to execute a decree/award. In the present case, the arbitration proceedings are for ascertainment of the amount which is required to be paid and/or the respondent DLF is entitled to if any and the adjudication has yet to take place. Only after adjudication and ascertainment of particular amount, if any, the question of enforcement of that right to recover the amount under the award may arise, i.e., at the time of initiating the execution proceedings under Section 36 of the Arbitration Act of 1996. Now, the main object of the BRU Act is to prevent unemployment and to make temporary provision for industrial relations, to conduct or to provide loan, guarantee, or financial assistance for the conduct of certain industrial undertakings and thereby to prevent unemployment. By proceeding further with the arbitration proceedings and adjudicating the claim only and to allow for ascertaining the amount which the respondent DLF is entitled to, if any, the industrial undertaking is not likely to be closed and/or the same will not render unemployment. Even the Division Bench of this Court, in the case of M/s. D.S. Patel & Co. vs. The Gujarat State Textile Corporation Limited And Ors.(supra), in which vires of Section 4 of the BRU Act was challenged, in Para 38, while upholding the vires of Section 4 has held, that the Legislature has advisedly used the word "suspended" and "stayed" in sub-clause (iv) with reference to rights, remedies and proceedings. "Suspension" is not tantamount to "destruction" or annihilation". Therefore, when the sub-clause speak about "suspension" of a right, it only

means suspension of its execution or enforcement. The incidents of a right, excepts its executability, are therefore, not suspended by the sub-clause." Under the circumstances, what is required to be stayed is the "execution" and Section 4 of the BRU Act will come into play when the award is to be executed.

13. If statement and object of the Arbitration Act of 1996 and the BRU Act are read conjointly, it will appear that the main statement and object of the Arbitration Act of 1996 is enacted for speedy resolution of disputes without intervention of the Courts. If the arbitration proceedings for ascertainment of the amount and the adjudication itself is stayed during the operation of the notification under Section 4 of the Act, in that case the same will be contrary to the statement and object and the legislative intent of enacting the Arbitration Act of 1996. On the other hand, if the adjudication is permitted to go on in an arbitration proceeding and the meaning of the words "remedy for enforcement of right" is given to the extent that the proceedings at the time of execution of the award, if any, is required to be stayed if the Notification under Section 4 of the Act is in operation, then in that case it is not likely to affect the undertaking which is declared as a 'Relief Undertaking' under the BRU Act as no prejudice will be caused to the such Undertaking, meaning thereby by allowing the arbitration proceedings to go on and adjudication and ascertainment of amount, if any, is permitted, it is not likely to render any unemployment and/or closure of the undertaking. Under the circumstances, the learned Arbitral Tribunal has rightly held that the provisions of Section 4 of the BRU Act only helps the concerned Undertaking with reference to enforcement of liability and "right", privilege, obligation or liability, accrued or incurred can be adjudicated upon and the question of enforcement would arise only thereafter and the object of statute on a proper construction is that in respect of an Undertaking if those things are established the enforcement shall remain suspended. It is also further rightly held by the Arbitral Tribunal that after adjudication the SCL may succeed on merits and the claims may be rejected and in that event there will be no need for the SCL to project the notification in defence, and if the claim may be partly allowed and in the event of enforcement and if at that time the notification continues to be in force, the SCL may avail the benefit and the Court concerned with the execution of enforcement may consider this aspect.

14. Some what identical question came to be

considered by the Hon'ble Supreme Court in the case of Eagle Flask Industries Ltd. Vs. Talegaon Dabhade Municipal Council And Others, reported in (2004) 8 SCC 640. While dealing with Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 in a case where the company was before BIFR and the Municipal Corporation was trying to recover the octroi and the assessment was being done by the Corporation and an objection was raised by the company before the BIFR that the municipal authority cannot levy the octroi and/or no recovery in respect of the amount concerned can be directed, the Hon'ble Supreme Court has held, "that the effect of Section 22 is to be considered only when there is a demand for recovery and the question of recovery would arise only when there is a quantified demand on assessment and admittedly that stage has not reached," and ultimately the Hon'ble Supreme Court has held that "it is open to the Municipal Council to make an assessment and quantification of the octroi duty payable, if not already done and only after the quantification is done and the assessment made as provided in law, the question of recovery would arise and at that stage the effect of Section 22 can be considered." Applying the same analogy to the present proceedings and Section 4 of the BRU Act, the arbitration proceeding for the adjudication and ascertainment of any amount may go on but the effect of Section 4 can be considered at the time of execution of the award which may be declared by the Arbitral Tribunal, and if such an interpretation would be there it will be in consonance with the provisions of the BRU Act as well as the Arbitration Act of 1996. Under the circumstances, the request on the part of the petitioner SCL to stay the arbitration proceedings before the Arbitral Tribunal during the operation of the notification under Section 4 of the BRU Act cannot be accepted and the same is rightly rejected by the Arbitral Tribunal in an application under Section 16 of the Act.

15. Conclusions:-

- (1) Against the order passed by the Arbitral Tribunal under the provisions of the Arbitration Act of 1996 the petition under Articles 226 and 227 of the Constitution is maintainable;
- (2) However, considering the statement and object of the Arbitration Act of 1996 and Section 16 of the Arbitration Act of 1996 when the Arbitral Tribunal has decided about its own jurisdiction in an application under Section 16 of the Act, in that case the Arbitral Tribunal has to proceed

further with the arbitral proceedings and to declare the award which can be challenged only at the stage of Section 34 of the Arbitration Act of 1996, and therefore the petition under Article 226 of the Constitution of India against the order passed by the Arbitral Tribunal under Section 16 of the Act is not required to be entertained and the party has to wait upto conclusion of proceedings under Section 34 of the Arbitration Act;

- (3) Considering the statement and object of the BRU Act as well as Section 16 of the Arbitration Act of 1996 read with Section 4 of the BRU Act, an proceeding for ascertainment of any amount and/or adjudication between the parties may go on and the effect of Section 4, i.e., with regard to suspension of proceedings is required to be considered at the stage of execution of the award, if any, and the arbitration proceedings, during the operation of the BRU Notification may go on till the actual stage of execution of the award, if any.

16. For the reasons stated hereinabove, all the three Special Civil Applications are required to be rejected and are accordingly dismissed. Rule, in each of the matter, stands discharged. Ad-interim relief, if any, shall stand vacated forthwith. There will be no order as to costs. However, it is ordered that the arbitration proceedings, from the stage of execution, should not be proceeded further during the operation of the notification under the Bombay Relief Undertakings (Special Provisions) Act, 1958. If the petitioners are aggrieved by Arbitral Award, they may make application for setting aside such arbitral award in accordance with Section 34 of the Act and the plea to suspend/stay the proceedings can be considered at the time of execution of the Award.

[M.R. Shah, J.]

rmr.

At this stage, the learned advocate, Mr. Singhi, appearing for the petitioners, requests to stay the judgment of this Court. Considering the facts and circumstances of the case, operation and implementation of this Judgment and Order shall remain stayed upto 17th

June 2005 in case if the Notification under the BRU Act is extended, otherwise this Judgment shall remain stayed till 4th June 2005 only.

[M.R. Shah, J.]

rmr.