IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

REVIEW PETITION (L) NO. 26021 OF 2024
IN
COMMERCIAL ARBITRATION APPLICATION (L) NO.6429 OF 2023

Global Zone Sanitory Infrastructure Pvt. Ltd.

Through its Director Mr. Prashant Singh Thakur
Having Regd. O/a 1/6, Vikrant Khand,
Gomti Nagar, Lucknow, Uttarpradesh, 226010
And having Branch Office at Flat No. 1401,
Roswalt Heights, Govandi Station Road,
Deonar, Mumbai- 400 088 ...**Petitioner (Original Respondent)**

Versus

Advent Infracon

Through Its Proprietor, Mr. Afzal Khan
Having Regd. Office at, C-47, G-Block
Opp. Reliance Jio World Gate No. 2
Bandra Kurla Complex, Mumbai- 400 051 ...**Respondent (Original Petitioner)**

Mr. Mangal Bhandari, *a/w Mangesh Deshmukh, for the Petitioner.*

Mr. Zia Rehman, *a/w Niket Harit, i/b Manoj Harit & Co., for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

RESERVED ON: AUGUST 28, 2024
PRONOUNCED ON: SEPTEMBER 13, 2024

JUDGEMENT:

1. This Application has been filed by the Original Respondent, asking for a review of an order passed by me under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("***the Act***") dated June 20, 2024, appointing a sole arbitrator, on the basis of the Original Respondent's own stance, demonstrated when the Original Applicant invoked arbitration in accordance with the admitted arbitration agreement between the parties.

Background and Context:

2. The flow of relevant events and the conduct of the Original Respondent calls for an iteration in the context of this Application – the same is set out below:-

    a. On May 25, 2022, the Original Applicant sought to invoke arbitration and proposed the name of an arbitrator. The Original Applicant called upon the Original Respondent to accept the identity of the arbitrator or to nominate the second arbitrator in terms of the arbitration agreement;

    b. The Original Respondent chose to reply only on December 19, 2022 (seven months later). The Original Respondent did not deny the existence of the arbitration agreement, but refused to either accept the arbitrator proposed, or to nominate an arbitrator to enable a three-member arbitral tribunal to be constituted;

c. Instead, the Original Respondent made it clear that it had no intent of going into a three-member arbitration. The Original Respondent also asserted that a three-member arbitral tribunal would be "*time-wise and cost-wise, mind-boggling*". The Original Respondent expressed its willingness in writing that it would agree to a sole arbitrator so long as such arbitrator was appointed either by mutual consent, or by the Court. The Original Respondent also proposed a meeting to discuss an amicable resolution;

d. On January 2, 2023, the Original Applicant's advocates wrote to the advocate for the Original Respondent calling for a meeting on January 9, 2023. According to the Original Respondent, the very fact that the Original Applicant chose the option of holding a meeting, would mean that the other option proposed by the Original Respondent, namely, of going into arbitration by a sole arbitrator appointed by mutual consent or by court, stood rejected and was not accepted or agreed upon by the Original Applicant;

e. On February 27, 2023, the Original Respondent filed an application, namely, Comm. Arbitration Application (L) No. 6429 of 2023 in this Court seeking the appointment of an arbitrator under Section 11(6) of the Act ("***Original Application***");

f. On April 26, 2023, a Learned Single Judge observed that an arguable case had been made out for grant of relief by way of

appointment of an arbitral tribunal, and called for the Original Respondent to be served with the Original Application to hear its say. The Learned Single Judge permitted private service, backed by a service affidavit with tangible evidence of service;

g. The Original Applicant demonstrated service on the Original Respondent, not only at the Original Respondent's known address in Gomati Nagar, Lucknow, Uttar Pradesh (on July 3, 2023) but also at its known address in Mumbai (on July 1, 2023);

h. The matter was listed on June 26, 2023, July 11, 2023, August 3, 2023, before it came to be listed before me on June 20, 2024. It was apparent from the record that the Original Respondent chose not to enter appearance throughout this journey of the proceedings, including when the matter was listed on June 20, 2024 before me. On that date, going by the material on record, I passed an order appointing a Learned Sole Arbitrator; and

i. Now, by this Application, the Original Respondent has sought to argue that the appointment of the Learned Sole Arbitrator is contrary to the arbitration agreement, and it matters not that the promise to participate in arbitration by a sole arbitrator, provided the arbitrator was appointed by consent or by the court, was held out in writing.

3. By the time the matter was listed before me on June 20, 2024, two years and one month had passed since the invocation of the

arbitration, without even the first step of having an arbitrator appointed, being taken. It is noteworthy that these arbitration proceedings are meant to adjudicate a commercial dispute.

4. Upon a review of the material on record, it was clear that the arbitration agreement entailed arbitration by a sole arbitrator, failing which, a three-member arbitral tribunal would adjudicate the issue. However, the Original Respondent refused to abide by the binding arbitration agreement by neither agreeing to the identity of the sole arbitrator nor nominating the second arbitrator. The Original Respondent also clearly demonstrated that it was the Original Respondent that wanted to engage in arbitration by a court-appointed sole arbitrator, instead of arbitration by a three-member arbitral tribunal, which was stated by the Original Respondent to be a mind-boggling time-consuming and expensive proposition. Today, the Original Respondent has taken a diametrically opposite stance – that only a three-member arbitral tribunal would be appropriate for adjudicating the disputes, and that the appointment of a sole arbitrator is in conflict with the arbitration agreement.

Party Autonomy vs. Forfeiture of Rights:

5. It is trite law that party autonomy is the backbone of arbitration. It is equally trite law that upon an application being filed under Section 11 of the Act because a party to the agreement refuses to comply with the binding provisions of the arbitration agreement, such refusing party forfeits the right to appoint an arbitrator[1]. The Supreme Court

[1] *Datar Switchgears Ltd. Vs. Tata Finance Ltd. – (2000) 8 SCC 151; Punj Lloyd Ltd. Vs. Petronet MHB Ltd. – (2006) 2 SCC 638; Union of India vs. Bharat Battery*

has time and again held that once the right to invoke the arbitration clause stands so forfeited, it cannot be asserted by the party that failed to act in terms of such clause. It has also been held repeatedly that such forfeiture is complete and the right to appoint an arbitrator does not revive when, say, an arbitrator vacates office. Despite such position, taking into account that it was the Original Respondent that had explicitly and in express terms expressed its willingness and that too in its advocate's written instructed response to the notice invoking arbitration, that the Original Respondent would arbitrate before a sole arbitrator appointed by this Court, I came to a view that it would be appropriate to appoint a sole arbitrator since this is precisely what the Original Respondent had explicitly and expressly committed to in writing.

6. It is clear that, even assuming that the Original Respondent's case is that its written commitment to participate in arbitration by a court-appointed sole arbitrator was not a bluff when it was made, and was a sincere offer that fell short of acceptance, it is clear that such offer was in writing and was communicated to the Original Applicant, and such offer was not withdrawn until after the Learned Sole Arbitrator came to be appointed by this Court, and after the arbitral tribunal convened the first preliminary hearing.

7. It is also clear from the Original Respondent's own written submissions in this Application that its stance is that it had proposed a twin-option, namely, of a meeting for an amicable resolution, and arbitration by a sole arbitrator appointed by consent or by court.

Manufacturing Co. (P) Ltd. – (2007) 7 SCC 684

From these very submissions it is also apparent that such a meeting was indeed scheduled on January 9, 2023 by the Original Applicant, but it did not take place. The Original Respondent simply did not participate in the meeting either. Therefore, the position taken by the Original Respondent is that the convening of the meeting resulted in a waiver of the offer to arbitrate with a court-appointed arbitrator, and it matters not that the meeting did not even take place and that too because the Original Respondent did not attend.

8. Even in the written submissions there is not a whisper or a hint that the Original Respondent had positively withdrawn its written commitment to submit to arbitration by a court-appointed sole arbitrator. The assertion instead, is that the Original Applicant did not accept the suggestion of arbitration by a sole arbitrator and therefore, there is no written arbitration agreement amending the earlier arbitration agreement. The assertion is mainly that by choosing to call for a meeting (which did not take place due the Original Respondent's absence), the Original Applicant had rejected the offer to arbitrate with a court-appointed sole arbitrator.

Inequitable Conduct:

9. Worse, arguing in support of the present Application, the Learned Counsel for the Original Respondent has now vehemently argued that an appointment of a sole arbitrator would be inappropriate and the matter requires adjudication by three arbitrators. The Learned Counsel would go so far as to now come up with a proposed name of an arbitrator, and seeks the constitution of a three-member arbitral

tribunal. The earlier stance of a three-member arbitral tribunal boggling the mind with its costs and time expenditure has been abandoned.

10. Indeed, the Section 11 Court must do its best, as far as reasonable and practicable, to generally follow the procedure agreed to by the parties. However, the Section 11 Court is not powerless to take necessary measures to ensure appointment of an arbitrator, when exercising jurisdiction under Section 11(6). The Section 11 Court must not delve into the merits of the case, and must only look to do what is within its jurisdiction. When it is evident from the written record between the parties, that one of the parties has no intention to honour the arbitration agreement by enabling the appointment of an arbitrator, and instead has every intention of frustrating and prolonging the appointment of an arbitral tribunal, the Section 11 Court must take such necessary measures as are as close as possible to the party's own expressed and written commitments, despite the forfeiture.

11. In the matter at hand, the Original Respondent has demonstrated its propensity to take any possible stance that would have the immediate effect of frustrating and delaying the commencement of arbitration proceeding. First, it claimed that a three-member arbitral tribunal would be mind-bogglingly time-consuming and expensive, and instead proposed a sole arbitrator so long as it was appointed by court. When the counterparty exercised its statutory protection under Section 11(6) of the Act and approached the court, the Original Respondent simply did not participate in the Section 11

proceedings, despite being served. When such conduct led to the appoointment of a sole arbitrator, ignoring that a party that frustrates formation of an arbitral tribunal forfeits its right to nominate an arbitrator, the Original Respondent has been advised to how resort to extolling the virtues of a three-member arbitral tribunal, and cynically proposing the name of an arbitrator for a three-member tribunal.

12. Once the jurisdiction of the Section 11 Court is invoked, the party frustrating the appointment of an arbitrator that forces the other party to move court to have an arbitrator appointed, forfeits its say in the appointment of the arbitrator. In the instant case, I have carefully considered if it is possible to adjust for the written expression of commitment by the Original Respondent to arbitrate with a sole arbitrator, and despite such forfeiture, appointed a sole arbitrator, consistent with the wishes expressed by the Original Respondent. In exercise of the jurisdiction under Section 11(6), I had in fact given careful weightage to the Original Respondent's own reasons and grounds in justifying its non-adherence to the arbitration agreement. Since it was the Original Respondent that proposed that it was willing to submit to arbitration so long as it was a court-appointed sole arbitrator, giving fullest weightage to the solemn wishes of the Original Respondent as discernible from the record, the arbitrator came to be appointed by the order dated June 20, 2024. I see no reason to review that order, or to recall that order. The conduct of the Original Respondent articulated above not only brings out the stark inequitable conduct of the Original Respondent but also underlines that the Original Respondent believes it can

merrily change its own committed position so long as it suits the immediate purpose of further frustrating the commencement of arbitration.

13. The legal argument of the Original Respondent that its suggestion or recommendation never met with a formal acceptance and therefore, there is no concluded agreement to amend the arbitration agreement, does not lend itself to acceptance. As a matter of law, it is for the offeror to communicate its revocation of the offer. There is not a whisper of revocation of the commitment to participate in arbitration by a court-appointed sole arbitrator, from the Original Respondent. It was only after the Learned Sole Arbitrator was actually appointed, that there was a change of heart.

14. When the Original Applicant approached this Court under Section 11(6) not only had the Original Respondent forfeited its right to have a say in the selection of the arbitrator but also its commitment to arbitrate before a sole arbitration was alive, without any sign of revocation. Besides, the Original Application, and the earlier orders of this Court had been served on the Original Respondent and that presented an opportunity for the Original Respondent to revoke its commitment to arbitrate before a sole arbitrator. That opportunity too was not taken and the Original Respondent simply did not participate in the Section 11 proceedings. That unrevoked position was relied upon to appoint the Learned Sole Arbitrator on June 20, 2024.

15. Courts would, as far as practicable, be mindful of party autonomy as the backbone of arbitration. However, where it becomes apparent that invocation of party autonomy is merely a ruse or a red herring to frustrate even the very commencement of the dispute resolution process, to which the party in full autonomy had committed, the Court is not powerless at all in taking necessary measures to have the arbitral tribunal appointed.

16. A somewhat similar situation emerged very recently in the case of *M/s Twenty-Four Secure Services Pvt Ltd. Vs. M/s Competent Automobiles Company Ltd.*[2] where a Learned Single Judge of the Delhi High Court overruled objections that an application under Section 11(6) was premature. The argument that unless two arbitrators are appointed by the respective parties and they had a disagreement, there was no occasion to approach the Section 11 Court, was repelled. The arbitration agreement in that case entailed arbitration by a sole arbitrator, but if the parties could not agree on an arbitrator, the arbitration would be conducted by a three-member arbitral tribunal. The Delhi High Court went on to appoint a sole arbitrator. The following extracts from the judgement are noteworthy:-

> *20. From the submissions made in the petition and the contentions of the respondent, **it is evident that they have not been able to agree on the name of the Arbitrators**. Therefore, it would be **incorrect to say that the present petition is premature or against the agreed procedure by the parties**.*
>
> *21. Because the parties have not been able to arrive at the name of an Arbitrator, the present petition is not premature and is maintainable under the law.*
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> *22. In Union of India (UOI) vs. Singh Builders Syndicate (2009) 4 SCC 523 the High Court **rejected the contention on behalf of the Government that the Court was not vested with any***

[2] *2024 SCC OnLine Del 4358*

powers to appoint a Sole Arbitrator in distinction to the Arbitration Agreement which provided for the Tribunal of three members. The Apex Court upheld the order of this Court appointing a Sole Arbitrator by observing that the appointment of the Sole Arbitrator was valid.

[Emphasis Supplied]

17. As stated earlier, in the matter at hand, one does not even need to go that far. It is but the written commitment of the Original Respondent to arbitrate before a court-appointed sole arbitrator that was given due credence when the Learned Sole Arbitrator was appointed. Till date, it is not the Original Respondent's case that it had at any time withdrawn this commitment. Instead, its argument is that by agreeing to a meeting (which is presented as an exclusive alternative to arbitration before a court-appointed sole arbitrator), this "option" stood rejected. While its other argument is that the Original Applicant is yet to accept this commitment, what is stark is that this commitment from the Original Respondent was never revoked.

18. It is evident that the Original Respondent has chosen to cynically play ducks and drakes with the arbitration process – making arguments and retracting arguments at will, in a bid to frustrate every attempt to commence the arbitration. Such an approach has been successful in frustrating the commencement of arbitration for more than two years and three months since invocation of the arbitration. Upon the Learned Sole Arbitrator being appointed by this Court, and upon the arbitrator calling upon the parties to appear for the preliminary meeting, the Original Respondent replied to the arbitrator stating that it had filed a review application.

19. It is in this light that the principle that once the jurisdiction of the Section 11 Court is invoked, the party frustrating the appointment of the arbitrator forfeits its say, gains significance. When despite such principle, the very wishes of the party attempting to frustrate the arbitration are taken into consideration to have an arbitrator appointed, the attempt by that very party to frustrate the process yet again, calls for judicial notice and action. In fact, it is this foundational first principle of forfeiture on which, in *SAP India Private Limited vs. Cox & Kings Limited*[3], a Learned Single Judge of this Court, ruled that a party that frustrated the appointment of an arbitral tribunal was not allowed to name a substitute arbitrator when the court-appointed arbitrator vacated the position as the arbitrator. The following extracts are worth noting:-

> *59. In regard to the submissions as urged on behalf of the respondent referring to the statement of object and reasons of the Act read with the provisions of Section 5 of the Act, that party autonomy is required to be respected in a judicial intervention under Section 15(2), in the facts of the case, cannot be accepted. The Supreme Court in Union of India v. Uttar Pradesh State Bridge Corporation Ltd. (supra) has held that the principles of party autonomy in the choice of procedure would stand deviated in those cases where one of the parties has committed default by not acting in accordance with the procedure prescribed. It was held that the principle of default procedure would stand extended in the cases where the question is of appointment of a substitute arbitral tribunal. The observations of the Supreme Court as made in the said decision are required to be noted which read thus:—*
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> > *"16) First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the*

[3] *2019 SCC OnLine Bom 722*

> *Arbitration Agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the Court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. (see Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd., (2006) 6 SCC 204. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in para 5 of Tripple Engineering Works (supra). We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under Section 11 of account of 'default procedure'. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in Singh Builders Syndicate, (2009) 4 SCC 523."*
>
> *[Emphasis Supplied]*

20. In the facts of the matter at hand too, the very conduct of the Original Respondent requires one to ensure that the recalcitrant party is not permitted to derail the arbitration, taking diametrically opposite stands to suit this objective of frustrating the arbitration. In these circumstances it would be necessary to harmoniously reconcile the primary legislative objective of effective dispute resolution in a fair, speedy and inexpensive manner, with the objective of upholding party autonomy. This is why, due regard that was given to the very same party's unrevoked consent to participate in an arbitration by a

court-appointed sole arbitrator, underlines that the deviation from the agreed process was only marginally deviated from, taking care to ensure that even the frustrating party's sovereign desire as then expressed, had been factored in.

21. In *Union of India vs. Besco Ltd.*[4], the Supreme Court cited with approval, earlier decisions of the Supreme Court[5], to hold that it is no longer *res integra* that the Section 11 Court could deviate from an arbitration clause and appoint an arbitrator. To avoid prolix iteration of the contents, the contents are not being reproduced here, but reference may be made to Paragraphs 5 to 8 of that judgement, and the extracts from the precedent judgements cited in it.

22. While many a time, deviations by courts from the arbitration agreements is resorted to when the arbitration agreements undermine the independence of the arbitrator, a fundamental premise of arbitration law is that the party frustrating the appointment of arbitrator forfeits its say in the appointment. In the matter at hand, it is pertinent note that whether there has been a deviation at all is moot, since it is the Original Respondent that committed in writing that if the arbitration were by a court-appointed sole arbitrator, it would participate in the arbitration. That unrevoked commitment formed the basis of the appointment of a sole arbitrator, which I see no cause to review or recall.

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[4] *(2017) 14 SCC 187*

[5] *Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd. – (2008) 10 SCC 240; North Eastern Railway and Ors. Vs. Tripple Engineering Works – (2014) 9 SCC 288; and Indian Oil Corporation and Ors. Vs. Raja Transport Pvt. Ltd. – (2009) 8 SCC 520*

23. In commercial communication, when a party to a contract suggests a course of action to resolve the disputes by engaging in a meeting or submitting to a court-appointed sole arbitrator, the only commercially commonsensical meaning would be that the recipient of the communication has accepted the offer to engage in a dialogue, and that the next step if the dialogue were to fail, would be a court-appointed sole arbitrator being put into place. It would defy common sense to treat the two steps as mutually exclusive "options", in the absence of any such specific agreement that pursuing one path would result in the revocation of the other. For example, even after the arbitration commences, the parties can engage and arrive at a settlement – it would defy logic to suggest that having commenced arbitration, the offer to engage in a potential settlement stands rejected. The only conclusion one can draw is that the Original Respondent has advisedly been taking any and every step possible to frustrate the commencement of arbitration.

Power to Review and Power to Recall:

24. In *Sarada Construction v. Bhupendra Pramanik and Ors.*[6], the Calcutta High Court has articulated that a review of Section 11 orders is not maintainable. Since the power to review has to be conferred by statute, and the Act does not confer such a power, it was held that the review application is not maintainable. The Calcutta High Court ruled thus:-

> ***It is an established principle that the Act is a complete code in itself, containing no provision or mechanism for permitting review. Naturally, being a holistic code, it is appropriate that no review should be entertained by the High Court in the absence of an***

[6] *(2003) SCC OnLine Cal 342*

***enabling provision**. The said rationale was recently affirmed by the Delhi High Court in Diamond Entertainment Technologies Private Limited v. Religare Finvest Limited through its Authorized Officer as reported in 2023/DHC/000156. The relevant paragraph is reproduced below as follows:*

> *"23. By way of the present review petition, the petitioner is seeking review of the Order vide which an application under Section 11 of the Arbitration & Conciliation Act, 1996 has been allowed. Since the Order made under Section 11 of the Act is in exercise of the statutory powers as defined under the Arbitration & Conciliation Act, any review of the same can be only within the parameters of the Statute. Since, there is no provision of review in the Arbitration & Conciliation Act, this Court finds itself without any jurisdiction to review the present Order."*

7. The situation, however, is different for the Supreme Court. In Nagireddy Srinivasa Rao v. Chinnari Suryanarayana as reported in AP No. 138 of 2017, the Andhra Pradesh High Court observed as follows:—

> *"11. In Jain Studios Ltd., v. Shin Satellite Public Co. Ltd., the Hon'ble Supreme Court was considering a case where a review application was moved against an order under Section 11 of the Act. While considering this issue, the Hon'ble Supreme Court had held that by virtue of Article 137 of the Constitution of India, a review is provided against any judicial order of the Hon'ble Supreme Court and as such a review would be maintainable. However, the Hon'ble Supreme Court did not go into the question, whether a review against an order under Section 11 of the Act would be available, de hors Article 137 of the Constitution of India.*
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> *12. The present application is before the High Court, which does not have the benefit of Article 137 of the Constitution of India. In such circumstances, it would have to be seen whether such review is permissible on the basis of any provision of law or judgment."*

8. Nagireddy v. Chinnari (supra) then proceeded to identify if there exists any power upon the High Courts to entertain a review. The Court thus, relied on numerous judicial precedents to identify that the power to review is a creature of the statute and unless a procedural irregularity exists, it cannot be permitted. Thus, as far as High Courts are concerned, they are without jurisdiction and have no power to review an application under section 11 of the Act. The Apex Court in M/s Diamond (supra) has comprehensively addressed this matter, upholding the ratio established in Ram Chandra Pillai v. Arunschalathammal as reported in (1971) 3 SCC 847, according to which the power to review is not inherent but must be conferred by law either specifically or by necessary implication. Of particular significance, the absence of an express provision precludes any exercise of review.

9. As aforementioned, the Act is a complete code which does not specifically confer any power upon this Court to review an application under the statute which is section 11 of the Act and consequently, a review in the instant case is not maintainable.

[Emphasis Supplied]

25. Faced with this situation, the Learned Counsel for the Original Respondent submitted that the appointment of a sole arbitrator, when the arbitration agreement entailed three arbitrators, is an error apparent on the face of the record, thereby invoking principles of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. I have already expressed my views on the import of the Original Respondent's own invitation of a court-appointed sole arbitrator, and the principle of error apparent, in my view, does not commend itself to acceptance.

26. I have also given consideration to whether I should *suo motu* recall the order on the premise that party autonomy has not been honoured. For the reasons articulated above, I am not convinced that this is a fit case for a recall. It was the autonomous and sovereign choice expressed by the Original Respondent to submit to a court-appointed sole arbitrator, and that was not revoked until the appointment. Such choice was factored into the decision to appoint the Learned Sole Arbitrator, despite the right to have a say about the arbitrator having been forfeited. The commitment to submit to arbitration by such a sole arbitrator was never withdrawn at the time the appointment was made. Therefore, I am of the view that in the facts and circumstances of the matter at hand, no case has been made out for recall of the order appointing the arbitral tribunal.

Commercial Dispute and Costs:

27. One must not lose sight of the fact that this is a commercial dispute. The imposition of costs is a necessary and relevant factor when considering commercial disputes. Therefore, I had called upon the

parties to file their statement of costs till date from the time the arbitration was sought to be invoked. The parties have filed their statements. The Original Applicant has submitted that it has so far incurred costs of Rs. 2,25,000/- while the Original Respondent has submitted that it has incurred costs of Rs. 85,000/-.

28. It is evident that to simply get the arbitration process going, the Original Applicant has had to run from pillar to post, incurring significantly higher costs. I am of the view that the case calls for imposition of reasonable costs to the Original Applicant. Discounting the costs incurred by the Original Applicant by a quantum close to what is also incurred by the Original Respondent, it would be appropriate, in my view, to award costs in the sum of Rs. 1,25,000/- to the Original Applicant. The Original Respondent shall pay such sum towards costs within a period of two weeks from today.

29. This review application is hereby ***finally disposed of*** in the aforesaid terms. Needless to clarify, the Arbitral Tribunal will determine all issues that are within its jurisdiction, uninfluenced by the contents and findings in this judgement.

30. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]