Antrix Corp.Ltd vs Devas Multimedia P.Ltd on 10 May, 2013

Equivalent citations: 2013 AIR SCW 2781, (2013) 121 ALLINDCAS 294 (ALL), 2013 (1) ALL LJ NOC 64, 2013 (4) ABR 176, 2014 (11) SCC 560, (2013) 3 RECCIVR 563, (2013) 7 SCALE 216, (2013) 99 ALL LR 507, (2013) 3 CURCC 42, (2013) 5 MAD LW 565, (2013) 2 ARBILR 226, (2013) 118 REVDEC 190, (2012) 3 ALL RENTCAS 706, (2013) 1 ALL WC 1079, (2013) 127 ALLINDCAS 229 (SC), (2013) 2 CLR 76 (SC), (2013) 5 ALL WC 5140, (2013) 5 CAL HN 65, (2013) 115 CORLA 1 SN, 2013 (4) KCCR SN 328 (SC)

Author: Altamas Kabir

Bench: Altamas Kabir

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 20 OF 2011

1 ANTRIX CORP. LTD. ...PETITIONER

Vs.

2 DEVAS MULTIMEDIA P. LTD. ...RESPONDENT

J U D G M E N T

ALTAMAS KABIR, CJI.

1. An application under Section 11(4) read with Section 11(10) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", has given rise to an important question of law relating to the scope and ambit of the powers of the Chief Justice under Section 11(6) of the said Act. In view of the importance of the question, which has arisen, the matter which was being heard by

the delegatee of the Chief Justice, has been referred to a larger Bench for determination thereof.

2. M/s. Antrix Corporation Limited, the Petitioner herein, a Government Company incorporated under the Companies Act, 1956, and engaged in the marketing and sale of products and services of the Indian Space Research Organization (ISRO), entered into an Agreement with the Respondent, Devas Multimedia P. Ltd., hereinafter referred to as "Devas" on 28th January, 2005, for the lease of Space Segment Capacity on ISRO/ Antrix S-Band Spacecraft. Article 19 of the Agreement empowered the Petitioner to terminate the Agreement in certain contingencies. It also provided that the Agreement and the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. In other words, the domestic law would be the governing law of the Agreement.

3. Article 20 of the Agreement deals specially with arbitration and provides that in the event any dispute or difference arises between the parties as to any clause or provision of the Agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, such disputes would be referred to the senior management of both the parties to resolve the same within 3 weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three Arbitrators. It was provided that the seat of arbitration would be New Delhi in India. It was also provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL.

4. On 25th February, 2011, the Petitioner Company terminated the Agreement with immediate effect in terms of Article 7(c) read with Article 11(b) of the Agreement in keeping with the directives of the Government, which it was bound to follow under Article 103 of its Articles of Association. By its letter dated 28th February, 2011, the Respondent objected to the termination. On 15th April, 2011, the Petitioner Company sent to the Respondent Company a cheque for Rs. 58.37 crores refunding the Upfront Capacity Reservation Fee received from Devas. The said cheque was, however, returned by Devas on 18th April, 2011, insisting that the Agreement was still subsisting.

5. In keeping with the provisions of Article 20 of the Arbitration Agreement, the Petitioner wrote to the Respondent Company on 15th June, 2011, nominating its senior management to discuss the matter and to try and resolve the dispute between the parties. However, without exhausting the mediation process, as contemplated under Article 20(a) of the Agreement, Devas unilaterally and without prior notice to the Petitioner, addressed a Request for Arbitration to the ICC International Court of Arbitration on 29th June, 2011, seeking resolution of the dispute arising under the Agreement. Through the unilateral Request for Arbitration, Devas sought the constitution of an Arbitral Tribunal in accordance with the ICC Rules of Arbitration, hereinafter referred to as "the ICC Rules", and nominated one Mr. V.V. Veedar, Queen's Counsel, as its nominee Arbitrator, in accordance with the ICC Rules.

6. According to the Petitioner, it is only on 5th July, 2011, that it came to learn that Devas had approached the ICC and had nominated Mr. V.V. Veedar, as its nominee Arbitrator, upon receipt of a copy of the Respondent's Request for Arbitration forwarded by the ICC. By the said letter, the Petitioner was also invited to nominate its nominee Arbitrator.

7. Instead of nominating its Arbitrator, the Petitioner, by its letter dated 11th July, 2011, once again requested Devas to convene the Senior Management Team meet on 27th July, 2011, in terms of the Agreement. Pursuant to such request, a meeting of the Senior Management Team was held, but Devas insisted that the parties should proceed to arbitration and did not discuss the issues in accordance with Article 20(a) of the Agreement. Despite the attempt to resolve the dispute through the Senior Management Team and despite the fact that Devas had already invoked the Arbitration Agreement by making a Request for Arbitration to the ICC and had also appointed its nominee Arbitrator under the ICC Rules, the Petitioner appointed Mrs. Justice Sujata V. Manohar, as its Arbitrator and called upon Devas to appoint its nominee Arbitrator within 30 days of receipt of the notice. Consequently, while Devas had invoked the jurisdiction of the ICC on 29th June, 2011, the Petitioner subsequently invoked the Arbitration Agreement in accordance with the UNCITRAL Rules on the ground that Devas had invoked ICC Rules unilaterally, without allowing the Petitioner to exercise its choice. Having invoked the Arbitration Agreement under the UNCITRAL Rules, the Petitioner called upon the Respondent to appoint its Arbitrator within 30 days of receipt of the notice.

8. On 5th August, 2011, the Petitioner wrote to the Secretariat of the ICC Court stating that it had appointed its Arbitrator, in accordance with the Agreement between the parties, asserting that in view of Article 20 of the Agreement, the arbitral proceedings would be governed by the Indian law, viz., the Arbitration and Conciliation Act, 1996.

9. The Respondent did not reply to the Petitioner's letter dated 30th July, 2011. However, the International Chamber of Commerce, by its letter dated 3rd August, 2011, responded to the Petitioner's letter dated 30th July, 2011, and indicated as follows :

> "We refer to our letter dated 18 July, 2011, and remind the parties that the issues raised regarding the arbitration clause would shortly be submitted to the Court for consideration. All comments submitted by the parties will be brought to the Court's attention. In this regard, any final comments from the parties may be submitted to us by 5 August, 2011.
>
> Should the Court decide that this arbitration shall proceed pursuant to Article 6(2) of the Rules, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself."

10. It is in such circumstances that the application under Section 11(4) read with Section 11(10) of the 1996 Act, being Arbitration Petition No. 20 of 2011, came to be filed by the Petitioner, inter alia, for a direction upon Devas to nominate its Arbitrator in accordance with the Agreement dated 28th January, 2005, and the UNCITRAL Rules, to adjudicate upon the disputes, which had arisen between the parties and to constitute the Arbitral Tribunal and to proceed with the Arbitration.

11. The said application came to be listed before one of us, Surinder Singh Nijjar, J., the Designate of the Chief Justice, who was of the view that the questions involved in the application were required to be heard by a larger Bench. The parties were requested to propose the questions of law to be

considered by the Larger Bench and the same are as follows:

> "i) Where the arbitration clause contemplates the application of either ICC Rules or UNCITRAL Rules after the constitution of the Tribunal, could a party unilaterally proceed to invoke ICC to constitute the Tribunal and proceed thereafter?
>
> ii) Whether the judgment of this Hon'ble Court in TDM Infrastructure v. UE Development reported in (2008) 14 SCC 271 lays down the correct law with reference to the definition of International Commercial Arbitration?
>
> iii) Whether the jurisdiction of the Court under Section 11 extends to declaring as invalid the constitution of an arbitral tribunal purportedly under an arbitration agreement, especi-ally, where the tribunal has been constituted by an Institution purportedly acting under the Arbitration agreement?
>
> iv) Whether the jurisdiction of an arbitral tribunal constituted by an institution purportedly acting under an arbitration agreement can be assailed only before the Tribunal and in proceedings arising from the decision or award of such Tribunal and not before the Court under Section 11 of the Act?
>
> v) Whether, once an arbitral tribunal has been constituted, the Court has jurisdiction under Section 11 of the Act to interfere and constitute another Tribunal?
>
> vi) Whether an arbitration between two Indian companies could be an international commercial arbi-tration within the meaning of Section 2(1)(f) of the Act if the management and control of one of the said companies is exercised in any country other than India?
>
> vii) Whether the petition is maintainable in light of the reliefs claimed and whether the conditions precedent for the exercise of jurisdiction under Section 11 of the Act are satisfied or not?"

12. While the matter was pending, most of the seven questions raised were resolved. However, the most important issue as to whether Section 11 of the 1996 Act could be invoked when the ICC Rules had already been invoked by one of the parties, remains to be decided.

13. On behalf of the Petitioner, reliance was sought to be placed on the decision of this Court in Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. & Ors. [(1998) 1 SCC 305], wherein different laws that could apply to an arbitral relationship had been explained, namely :

> (i) The proper law of the underlying contract is the law governing the contract which creates the substantive rights and obligations of the parties with regard to the contract.

(ii) The proper law of the arbitration agreement is the law governing the rights and obligations of the parties arising from the arbitration agreement.

(iii) The proper law of the reference is the law governing the contract which regulates the individual reference to arbitration.

(iv) The curial law is the law governing the arbitration proceedings and the manner in which the reference has to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

14. It was submitted that in the instant case, the proper law of the contract is the Indian law and the proper law of the Arbitration Agreement is the Arbitration and Conciliation Act, 1996. Accordingly, matters relating to the constitution of the Arbitral Tribunal would be governed by Sections 10 to 15 of the 1996 Act. It was pointed out by learned counsel that the parties had agreed that the arbitration proceedings could be conducted either in accordance with the rules and procedures of the ICC or UNCITRAL. The choice of the procedure to be adopted by the Arbitral Tribunal in conducting the arbitration was left to the determination of the parties under Section 19(2) of the 1996 Act. It was submitted that the choice of the applicable procedural law could be exercised only after the constitution of the Arbitral Tribunal and not at any stage prior thereto.

15. It was also submitted that in addition to the clear provision of Section 2(2) of the 1996 Act and the Agreement between the parties that the place of arbitration would be New Delhi, the Agreement would be expressly governed by Indian law under Article 19 of the Agreement. Accordingly, as was held in National Thermal Power Corporation Vs. Singer Company [(1992) 3 SCC 551], the proper law of the contract would be the Indian law which would govern the arbitration Agreement. It was submitted that the cardinal test, as suggested by Dicey in his "Conflict of Laws", stood fully satisfied and that the governing law of the arbitration would be the law chosen by the parties, or in the absence of any agreement, the law of the country in which the arbitration is held. Learned counsel submitted that according to Dicey, the proper law of the arbitration is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so, even where the proper law of the contract is expressly chosen by the parties.

16. However, as indicated hereinbefore, the question with which we are concerned is whether the Arbitration Agreement contemplates the application of Section 11 of the 1996 Act after the ICC Rules had been invoked by one of the parties which also appointed its nominee Arbitrator. Equally important is the question whether Section 11 of the 1996 Act empowers the Chief Justice to constitute a Tribunal in supersession of the Tribunal already in the stage of constitution under the ICC Rules, notwithstanding the fact that one of the parties had proceeded unilaterally in the matter. Learned counsel for the Petitioner urged that since the Arbitration Agreement contemplates the constitution of an Arbitral Tribunal without any reference to the ICC Rules or the ICC Court, the recourse taken by Devas to approach the ICC Court was without any basis and was contrary to the express agreement between the parties. Learned counsel also referred to the decision of this Court in SBP & Co. vs. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618], in this regard.

17. Learned counsel further urged that the issue as to whether once an Arbitral Tribunal has been constituted, the Chief Justice has jurisdiction under Section 11 of the 1996 Act to constitute another Tribunal, presupposes that an Arbitral Tribunal has been validly constituted and is not a Tribunal constituted by one party acting entirely in contravention of the Arbitration Agreement between the parties. It was contended that till such time as the question of jurisdiction was considered by the Court under Section 11, the question of a separate Tribunal being constituted by the International Chamber of Commerce did not arise. According to learned counsel, in fact, the constitution of the Arbitral Tribunal by the ICC Court amounted to usurpation of the exclusive jurisdiction of the Chief Justice under Section 11 of the 1996 Act. It was submitted that initially the Court would have to be moved under Section 11 of the 1996 Act and it would have to examine whether it would have the jurisdiction to entertain the request and whether the condition for exercise of its powers to take necessary measures to secure the appointment of the Arbitrator, at all existed. If the answer to both the issues was in the affirmative, the Court was duty bound to appoint the Arbitrator.

18. On the other hand, on behalf of Devas it was submitted that the choice of an institution under whose auspices the arbitration was to be held, would have to be made once the Arbitral Tribunal had been constituted. It was contended that what was intended by the Arbitration Agreement was the formation of an ad-hoc Tribunal which would have to follow one of the two procedures prescribed.

19. It was submitted that Devas had already invoked the Arbitration Agreement and had sought the constitution of an Arbitral Tribunal, after having chosen its nominee Arbitrator, in accordance with the ICC Rules of Arbitration. It was further submitted that since the Arbitral Tribunal had been constituted under the ICC Rules, any objection as to whether or not the Tribunal had been properly constituted would have to be raised before the Arbitral Tribunal itself. It is only in such objection that the Arbitral Tribunal would have to decide as to whether a Tribunal was required to be constituted before application of the ICC or UNCITRAL Rules, inasmuch as, according to the Agreement, the Claimant in the arbitration has the right to choose any of the two Rules when commencing the arbitration.

20. Reliance was placed on Section 16 of the 1996 Act which incorporates the Kompetenz Kompetenz principle within its scope. Since the arbitration was to be governed by Part I of the 1996 Act, the Tribunal would have complete authority over all issues, including the validity of its constitution.

21. Reference was also made to the decision of this Court in Gas Authority of India Ltd. vs. Keti Construction (I) Ltd. & Ors.[(2007) 5 SCC 38], wherein the aforesaid principle contained in Section 16 of the 1996 Act had been referred to. Learned counsel submitted that in arriving at the aforesaid decision, this Court had fully considered its decision in SBP & Co. (supra). It was submitted that the question regarding the validity of the constitution of the Arbitral Tribunal, upon a proper construction of Article 20 of the Agreement would, therefore, have to be left for decision to the said Tribunal.

22. On the question as to whether the Chief Justice or his Designate would be entitled in exercise of their jurisdiction under Section 11 of the 1996 Act, to question the validity of the appointment of an

Arbitral Tribunal, both the parties were ad idem that they could not. It was urged that the decision in SBP & Co. (supra) does not contemplate such a course of action. In this regard, reference was also made by learned counsel for the Respondent to the decision of this Court in Sudarsan Trading Co. vs. Government of Kerala & Anr. [(1989) 2 SCC 38], wherein it was held that once there is no dispute as to the contract, the interpretation thereof is for the Arbitrator and not the Courts, and the Court cannot substitute its own decision for that taken by the learned Arbitrator. It was urged that Section 5 of the 1996 Act also supports such construction as it bars any interference by the Court, except as provided in the Act. Learned counsel also submitted that as had been held by this Court in McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.[(2006) 11 SCC 181], after the 1996 Act came into force, it was for the party questioning the authority of the Arbitrator to raise such question at the earliest point of time after the commencement of the Arbitration proceedings, under Section 16 of the 1996 Act, and a decision thereupon could be challenged under Section 34 of the said Act.

23. On behalf of Devas, it was also contended that the issue raised relating to jurisdiction falls outside the first category of cases, on account of the fact that the Petitioner's claim that the Tribunal must be constituted first before application of either of the ICC Rules or the UNCITRAL Rules, essentially involves the question as to whether the Arbitration clause excludes the applicability of the Rules prior to the constitution of the Tribunal and that the constitution of the Tribunal is, therefore, reserved for a decision under Section 11 of the 1996 Act. Learned counsel for the Respondent submitted that in the facts of the case, the Chief Justice, in exercise of his power under Section 11(6) of the 1996 Act, was not entitled to question the validity of the appointment of the Arbitral Tribunal and the instant Arbitration Petition was liable to be dismissed.

24. As indicated hereinbefore, the question which we are called upon to decide is whether when one of the parties has invoked the jurisdiction of the International Chamber of Commerce and pursuant thereto an Arbitrator has already been appointed, the other party to the dispute would be entitled to proceed in terms of Section 11(6) of the 1996 Act.

25. In order to answer the said question, we will have to refer back to the provisions relating to arbitration in the agreement entered into between the Petitioner and the Respondent on 28th January, 2005. Article 19 in clear terms provides that the rights and responsibilities of the parties under the Agreement would be subject to and construed in accordance with the laws in India, which, in effect, means the Arbitration and Conciliation Act, 1996. Article 20 of the Agreement specifically deals with arbitration and provides that disputes between the parties regarding the provisions of the Agreement or the interpretation thereof, would be referred to the Senior Management of both the parties for resolution within three weeks, failing which the dispute would be referred to an Arbitral Tribunal comprising of three Arbitrators. It was also provided that the seat of arbitration would be New Delhi in India and the arbitration would be conducted in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL.

26. The Respondent has invoked the provisions of Article 20 of the Agreement and has approached the ICC for the appointment of an Arbitral Tribunal in accordance with the rules of arbitration and, pursuant thereto, the Respondent appointed its nominee Arbitrator. In fact, after the Respondent

had invoked the arbitration clause, the Petitioner came to know of the same from the Respondent's request for arbitration which was forwarded by the ICC to the Petitioner on 5th July, 2011. By the said letter, the Petitioner was also invited by the ICC to nominate its nominee Arbitrator, but, as mentioned hereinbefore, instead of nominating its Arbitrator, the Petitioner once again requested Devas to convene the Senior Management Meet on 27th July, 2011, in terms of the Agreement. Simultaneously, the Petitioner appointed a former Judge of this Court, Mrs. Sujata V. Manohar, as its Arbitrator and informed the ICC Court accordingly. However, disputes were also raised by the Petitioner with the ICC that since the Agreement clearly intended that the arbitration proceedings would be governed by the Indian law, which was based on the UNCITRAL model, it was not available to the Respondent to unilaterally decide which of the rules were to be followed. It was only thereafter that the Petitioner took recourse to the provisions of Section 11(4) of the 1996 Act, giving rise to the questions which have been set out hereinbefore in paragraph 11, of which only one has survived for our consideration.

27. Section 11 of the 1996 Act is very clear as to the circumstances in which parties to a dispute, and governed by an Arbitration Agreement, may apply for the appointment of an Arbitrator by the Chief Justice of the High Court or the Supreme Court. For the sake of reference, the relevant provisions of Section 11 are reproduced hereinbelow :-

> "11. Appointment of arbitrators.
>
> (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (4) If the appointment procedure in sub- section (3) applies and-
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
>
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be

made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-

section (5) or sub- section (6) to the Chief Justice or the person or institution designated by him is final."

28. As will be evident from the aforesaid provisions, when any of the parties to an Arbitration Agreement fails to act in terms thereof, on the application of the other party, the Chief Justice of the High Courts and the Supreme Court, in different situations, may appoint an Arbitrator.

29. In the instant case, Devas, without responding to the Petitioner's letter written in terms of Article 20 of the Arbitration Agreement, unilaterally addressed a Request for Arbitration to the ICC International Court of Arbitration for resolution of the disputes arising under the Agreement and also appointed its nominee Arbitrator. On the other hand, the Petitioner appointed its nominee Arbitrator with the caveat that the arbitration would be governed by the 1996 Act and called upon Devas to appoint its nominee Arbitrator under the said provisions. As Devas did not respond to the Petitioner's letter dated 30th July, 2011, the Petitioner filed the application under Section 11(6) of the 1996 Act.

30. In the instant case, the Arbitration Agreement provides that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL. Rightly or wrongly, Devas made a request for arbitration to the ICC International Court of Arbitration on 29th June, 2011, in accordance with the aforesaid Agreement and one Mr. V.V. Veedar was appointed by Devas as its nominee Arbitrator. By the letter written by the International Chamber of Commerce on 5th July, 2011, the Petitioner was required to appoint its nominee Arbitrator, but it chose not to do so and instead made an application under Section 11(6) of the 1996 Act and also indicated that it had appointed Mrs. Justice Sujata V. Manohar, as its Arbitrator in terms of Article 20(9) of the Agreement.

31. The matter is not as complex as it seems and in our view, once the Arbitration Agreement had been invoked by Devas and a nominee Arbitrator had also been appointed by it, the Arbitration Agreement could not have been invoked for a second time by the Petitioner, which was fully aware of the appointment made by the Respondent. It would lead to an anomalous state of affairs if the appointment of an Arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an Arbitrator. In our view, while the Petitioner was certainly entitled to challenge the appointment of the Arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an Arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one Arbitrator already appointed in exercise of the Arbitration Agreement. It may be noted that in case of Gesellschaft Fur Biotechnologische Forschun GMBH Vs. Kopran Laboratories Ltd. & Anr. [(2004) 13 SCC 630], a learned Single Judge of the Bombay High Court, while hearing an appeal under Section 8 of the 1996 Act, directed the claims/disputes of the parties to be referred to the sole arbitration of a retired Chief Justice with the venue at Bombay, despite the fact that under the Arbitration Agreement it had been indicated that any disputes, controversy or claim arising out of or in relation to the Agreement, would be settled by arbitration in accordance with the Rules of Reconciliation of the International Chamber of Commerce, Paris, with the venue of arbitration in Bombay, Maharashtra, India. This Court held that when there was a deviation from the methodology for appointment of an Arbitrator, it was incumbent on the part of the Chief Justice to assign reasons for such departure.

32. Sub-Section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

33. The law is well settled that where an Arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an Arbitrator is not maintainable. Once the power has been exercised under the Arbitration Agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In Som Datt Builders Pvt. Ltd. Vs. State of Punjab [2006 (3) RAJ 144 (P&H)], the Division Bench of the Punjab & Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the parties to the Arbitration Agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.

34. In view of the language of Article 20 of the Arbitration Agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, Devas was entitled to invoke the Rules of

Arbitration of the ICC for the conduct of the arbitration proceedings. Article 19 of the Agreement provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. There is, therefore, a clear distinction between the law which was to operate as the governing law of the Agreement and the law which was to govern the arbitration proceedings. Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms of the Arbitration Agreement and the said Rules. Arbitration Petition No.20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an Arbitrator must, therefore, fail and is rejected, but this will not prevent the Petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief.

35. The Arbitration Petition is, therefore, dismissed.

36. Having regard to the facts of the case, each party shall bear its own costs.

.....CJI.

(ALTAMAS KABIR) .....J. (SURINDER SINGH NIJJAR) New Delhi Dated: May 10, 2013.