Arasmeta Captive Power Co. Pvt. Ltd & An vs Lafarge India P. Ltd on 12 December, 2013

Equivalent citations: AIR 2014 SUPREME COURT 525, 2013 (15) SCC 414, 2014 AIR SCW 39, (2014) 1 CLR 157 (SC), (2014) 2 CURCC 26, (2014) 1 SIM LC 539, (2014) 2 ICC 443, (2014) 2 ALL WC 1441, (2014) 2 ANDHLD 89, (2014) 1 KCCR 29, (2014) 2 KER LT 1053, (2014) 134 ALLINDCAS 213 (SC), 2014 (134) ALLINDCAS 213, 2013 (4) ARBILR 439, 2013 (15) SCALE 209, AIR 2014 SC (CIVIL) 418, (2014) 1 CIVILCOURTC 730, (2013) 4 ARBILR 439, (2013) 15 SCALE 209, (2014) 1 WLC(SC)CVL 214, (2014) 102 ALL LR 680

Author: Dipak Misra

Bench: Dipak Misra, Anil R. Dave

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.11003 OF 2013
(Arising out of SLP (Civil) No. 29651 of 2013)

Arasmeta Captive Power Company Private Limited and another ... Appellants

Versus

Lafarge India Private Limited ...Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. In Government of Andra Pradesh and others v. A. P. Jaiswal and others[1] a three-Judge Bench has observed thus:-

> "Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principle are based on public policy..."

3. We have commenced our opinion with the aforesaid exposition of law as arguments have been canvassed by Mr. Ranjit Kumar, learned senior counsel for the appellants, with innovative intellectual animation how a three-Judge Bench in Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. and others[2] has inappositely and incorrectly understood the principles stated in the major part of the decision rendered by a larger Bench in SBP & Company v. Patel Engineering Ltd. and another[3] and, in resistance, Mr. Harish Salve and Dr. A.M. Singhvi, learned senior counsel for the respondent, while defending the view expressed later by the three-Judge Bench, have laid immense emphasis on consistency and certainty of law that garner public confidence, especially in the field of arbitration, regard being had to the globalization of economy and stability of the jurisprudential concepts and pragmatic process of arbitration that sparkles the soul of commercial progress. We make it clear that we are not writing the grammar of arbitration but indubitably we intend, and we shall, in course of our delineation, endeavour to clear the maze, so that certainty remains "A Definite" and finality is 'Final'.

4. The present appeal, by special leave, is directed against the judgment and order dated 22.7.2013 passed by the learned Judge, the designate of the Chief Justice of the High Court of Chhattisgarh at Bilaspur, in Arbitration Application No. 24 of 2012 whereby and whereunder, while dealing with an application preferred under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for brevity "the Act"), has repelled the submission of the appellant herein, the respondent in the original proceedings, that the disputes raised by the applicant, being excepted matters, were squarely covered within the ambit of clause 9.3 of the agreement and hence, it was only to be referred to an expert for resolution and not to an arbitrator and, further addressing the issue on merits, opined that as the disputes are not covered under the subject-matter of billing disputes that find place in clause 9.3 of the agreement, the parties are not under obligation to refer the matter to the expert, and, accordingly, called for the names from both the parties and taking note of the inability expressed by the counsel for the respondents therein, appointed an arbitrator to adjudicate the disputes that have arisen between the parties.

5. Regard being had to the narrow compass of the controversy that has emanated for consideration before this Court, we need not dwell upon the factual matrix in extenso. Suffice it to state that the appellant No. 1 is a company carrying on business in generation of power. The respondent owns 49% equity of the appellant No. 1 company and the appellant No. 2 owns 51% equity of the appellant No. 1 company. The appellant-company had entered into two agreements with the respondent for supply of power to the respondent. The first agreement, namely, a Power Purchase Agreement (PPA) was entered into on 10.2.2005 and the second agreement of similar nature was entered into on 1.11.2007 for supply of power. In course of subsistence of the agreements dispute arose between the parties relating to amounts that is due and payable. The appellants treated the dispute raised to be a "billing dispute" and sought to appoint an expert in accordance with clause 16.2 of the

agreements and, accordingly, communicated with the respondent vide letter dated 4.5.2012 proposing for appointment of one of the three persons of expertise and repute for appointment as an expert in respect of both the PPAs. The appellant No.1 requested the Confederation of Indian Industry vide letter dated 30.5.2012 to appoint a suitable expert. As put forth by the appellant, the respondent did not accede to resolve the dispute by way of appointing an expert instead, it moved the High Court for appointment of an arbitrator.

6. In support of the application for appointment of arbitrator, it was contended before the learned designated Judge that as the claims for recovery of arrears had not been settled and the respondents therein had communicated that the claims came within the ambit of sub-clause

(a) of clause 9.3 of the agreement and required the matter to be dealt with by an expert and an expert should be appointed in terms of clause 16.2 and 16.4 of the agreement and declined to take recourse to arbitration, it had become incumbent to move the court for appointment of an arbitrator.

7. The said stand and stance put forth by the respondent before the High Court was resisted by the present appellants that disputes would come within clause 16.2 of the agreement that deals with "Dispute Resolution" which provides a specific mechanism and not arbitration, for it has been clearly postulated therein that where any dispute is not resolved as provided for in clause 16.2 then only the matter shall be submitted to arbitration at the request of either of the parties by written notice in accordance with the provisions contained in the Act.

8. The High Court adverted to the meanings of "billing date", "billing period", "billing year, "clarification notice" and various terms used in the agreement, scanned the anatomy of clause 9.3 of the agreement that deals with "billing disputes" and arrived at the conclusion that disputes raised do not come within the purview of sub-clause (a) of clause 9.3 and, accordingly, appointed an arbitrator, as has been stated hereinbefore.

9. Mr. Ranjit Kumar, learned senior counsel appearing for the appellants, criticizing the view expressed by the designated Judge, has submitted that the dispute raised by the respondent being a "billing dispute" which is an excepted matter, it was obligatory on the contracting parties to resolve the dispute through an expert committee by the mechanism provided in the agreement itself and the same could not have been referred to an arbitrator to be arbitrated upon. Pyramiding the said proponement, learned senior counsel would submit that once a dispute falls in the realm of an excepted matter, as stipulated in the agreement, it is a non-arbitrable claim and hence, the court alone has the jurisdiction to decide the issue of arbitrability and it cannot be left to be adjudicated by an arbitrator and as in the present case the learned Judge has erroneously decided that it is not a "billing dispute" and thereby not an excepted matter, the same warrants interference. In essence, the submission is that advertence to the spectrum of arbitrability or to the sphere of excepted matter to decide the issue of jurisdiction as contemplated under Section 11(6) of the Act is justified but the analysis and the conclusion as regards the nature of dispute is indefensible. To buttress his submissions he has commended us to the decisions in SBP & Co. (supra) and APS Kushwaha (SSI Unit) v. Municipal Corporation, Gwalior and others[4].

10. Mr. Harish N. Salve and Dr. A.M. Singhvi, learned senior counsel appearing for the respondent, in oppugnation, have submitted that the principles stated in SBP's case have been appositely understood by a two-Judge Bench in the decision in National Insurance Company Limited v. Boghara Polyfab Private Limited[5] and the analysis therein has been accepted and approved by a three-Judge Bench in Chloro Controls India Private Limited (supra) and, therefore, whether it is an excepted matter or not, despite strenuous urging of the same by the appellants, is required to be left to be adjudicated in the arbitral proceedings. The learned senior counsel would further submit that what has been opined in the SBP's case has already been reflected upon and that being the settled position of law, certainty in the realm of adjudication should be allowed to stay. That apart, it is urged by Mr. Salve and Dr. Singhvi that the designated Judge has fallen into error by delving into the merits of the matter, i.e., whether the disputes are "billing disputes" or not, for it should have been left to be adjudicated upon by the learned arbitrator. It is submitted that if any interference is warranted the said findings should be set aside and the matter should be allowed to be arbitrated upon by the learned arbitrator as other conditions precedent for invocation of the arbitration clause have been accepted and are not under assail.

11. In reply to the submissions of learned senior counsel for the respondent, Mr. Ranjit Kumar, learned senior counsel for the appellants, would contend that the analysis made in the case of Boghara Polyfab Private Limited (supra) by the two-Judge Bench is contrary to what has been stated in SBP's case and similarly the seal of concurrence given by the three-Judge Bench in Chloro Controls India Private Limited (supra) is neither justified nor correct, and in fact, on a studied scrutiny, the lis deserves to be referred to a larger Bench. The learned senior counsel would further submit that certainty of law in its fundamental conceptuality has to be in consonance with the principles stated in larger Bench decisions and not to be allowed to exist despite striking a note of discordance.

12. To appreciate the controversy it is pertinent to refer to certain provisions, namely, Sections 8, 9, 11 and 16 of the Act. Section 8 deals with power to refer parties to arbitration where there is an arbitration agreement. The said power is conferred on a judicial authority before which an action is brought in a matter which is the subject-matter of agreement. Certain conditions precedent have been incorporated in sub-sections (1) and (2) of the said provision. Section 9 provides for grant of interim measures by court. Section 11 deals with appointment of arbitrators. Section 11(2) stipulates that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-sections (3) to (5) deal with requisite procedure to be followed in certain circumstances for appointment of arbitrator. Sub-sections (6) and (8) of the said provision, which are relevant for the present purpose, read as follows: -

> "(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 appointer 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 measures, unless

> the agreement on the appointment procedure provides other means for securing the appointment.
>
> xxx xxx xxx (8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to -
>
> (a) any qualifications required of the arbitrator by the agreement of the parties; and
>
> (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator." Section 16 provides for competence of arbitral tribunal to rule on its own jurisdiction. It stipulates that 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.

13. Regard being had to the anatomy of the Act and the contours of the aforesaid provisions, a Bench of seven Judges in SBP & Co. (supra) by majority has stated about the functions to be performed by the Chief Justice or his designate to do. Or, to put it differently, what are required to be determined by the Chief Justice or his designate, have been exposited thus: -

> "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

14. In the said case, in paragraph 47 the majority has summed up the conclusions in seriatim. Conclusion (iv), as summed in the said paragraph, reads as follows: -

> "(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicate in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge."

15. On a careful reading of the paragraph 39 and conclusion No. (iv), as set out in paragraph 47, it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection.

16. At this stage we may notice the opinion expressed by a two-Judge Bench in Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.[6], pertaining to the issues which are to be dealt with by the Chief Justice or his designate. The two-Judge Bench, after referring to paragraph 39 in SBP & Co. (supra), opined that the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining the said aspect if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is further observed therein that in the said context the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. That apart, as observed, it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue had not become dead by the lapse of time or that any party to the agreement has not slept over its right beyond the time permitted by law to agitate those issues covered by the agreement. The Chief Justice or his designate is required to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, whether the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding

that the respective claims of the parties have not become barred by limitation.

17. In Boghara Polyfab Private Limited (supra) a two-Judge Bench, while understanding and explaining the duty of the Chief Justice or his designate, as defined in SBP & Co. (supra), has ruled thus: -

> "22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
>
> 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
>
> 22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
>
> (a) Whether claim is a dead (long-barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
>
> 22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:
>
> (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
>
> (ii) Merits or any claim involved in the arbitration."
>
> 18. In the said case, it has been further held that in regard to the issues falling in second category, if raised in an application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence.

> Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. In case the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-

examine the same issue. The learned Judges have observed by placing reliance on SBP & Co. (supra) that Chief Justice/his designate would, in choosing whether he would decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act, i.e., expediting the arbitration process with minimum judicial intervention.

19. Recently in Chloro Controls India Private Limited (supra) a three- Judge Bench considered the issue whether there is any variance between the Shree Ram Mills Ltd. (supra) and Boghara Polyfab Private Limited (supra) and observed that both the judgments are free from contradiction and capable of being read in harmony in order to bring them in line with the statutory law declared by the larger Bench in SBP & Co. (supra). The Court observed that where the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law and on such an issue the Arbitral Tribunal will have no jurisdiction to re-determine the issue. The three-Judge Bench reproduced paragraph 27 of Shree Ram Mills Ltd. (supra) and we think that we should quote the relevant part on which an opinion has been expressed:-

> "If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we mush state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above paragraph that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation." Thereafter, the three-Judge Bench explained the decision in following terms:-
>
> "Thus, the Bench while explaining the judgment of this Court in SBP & Co. has state that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the Arbitral Tribunal to decide."

20. Thereafter, the three-Judge Bench referred to paragraph 20 of SBP & Co. (supra) and stated that in Shree Ram Mills Ltd. (supra) clearly the Bench did not intend to lay down any law in direct conflict with seven-Judge Bench in SBP & Co. (supra).

21. At that juncture, dealing with the classification carved out by the Court in Boghara Polyfab Private Limited (supra), the three-Judge Bench observed that it draws its origin from para 39 of the judgment in SBP & Co. (supra) and thereafter proceeded to state thus: -

> "124. The foundation for Category (2) in para 22.2 of National Insurance Co. Ltd. is directly relatable to para 39 of the judgment of this Court in SBP & Co. and matters falling in that category are those which, depending on the facts and circumstances of a given case, could be decided by the Chief Justice or his designate or even may be left for the decision of the arbitrator, provided there exists a binding arbitration agreement between the parties. Similar is the approach of the Bench in Shree Ram Mills and that is why in para 27 thereof, the Court has recorded that it would be appropriate sometimes to leave the question regarding the claim being alive to be decided by the Arbitral Tribunal and the Chief Justice may record his satisfaction that parties have not closed their rights and the matter has not been barred by limitation.
>
> 125. As already notice, the observations made by the Court have to be construed and read to support the ratio decidendi of the judgment. Observations in a judgment which are stared upon by the judgment of a larger Bench would not constitute valid precedent as it will be hit by the doctrine of stare decisis.

In Shree Ram Mills surely the bench did not intend to lay down the law or state a proposition which is directly in conflict with the judgment of the Constitution Bench of this Court in SBP & Co..

126. We have no reason to differ with the classification carved out in National Insurance Co. as it is very much in conformity with the judgment of the Constitution Bench in SBP." [Emphasis added]

22. Mr. Ranjit Kumar, learned senior counsel appearing for the appellants, has drawn our attention to various paragraphs of the decision in SBP & Co. (supra) to highlight that excepted matters as per the agreement have to be decided by the Chief Justice or his designate. Drawing our attention to paragraph 9 of the said judgment learned senior counsel has submitted that the larger Bench has clearly observed that while functioning under Section 11(6) of the Act, a Chief Justice or the person or the institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provisions and the condition for exercise of power is dependent upon the nature of the agreement and the arbitration clause and in its sweep it commands that there should be an adjudication in respect of excepted matters and once it is found that they are excepted matters, an arbitrator should not be appointed in respect of such matters or the disputes should not be referred to arbitration.

23. The learned senior counsel has also drawn immense inspiration from paragraph 25 of the judgment of the said case wherein, while discussing about the jurisdiction of the Chief Justice, it has been stated that he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only being satisfied in that behalf could he appoint an arbitrator or an Arbitral Tribunal on the basis of the request. It further observed that it is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Thereafter the seven-Judge Bench stated thus: -

> "Can he constitute an Arbitral Tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of power under Section 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an Arbitral Tribunal the rights of the parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal."

24. Mr. Ranjit Kumar, learned senior counsel, has placed heavy emphasis on the words "when there existed no arbitral dispute" to spiral the submission that the Chief Justice or his designate is under the legal obligation to decide the said facet when the issue is raised and it cannot be left to the arbitrator or an Arbitral Tribunal for adjudication.

25. Before we comment on this, we may also refer to observations made in paragraph 38 of the judgment in SBP & Co. (supra) as the same has also been repeatedly commended to us by Mr. Ranjit Kumar. For understanding of the ratio decidendi we think it apt to reproduce the relevant portion which has intellectually stimulated the learned senior counsel for the appellants: -

> "... the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the application before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the State concerned. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitral dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the

> requirements of sub-section (4), sub-section (5) or sub-section(6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator."

26. The aforesaid passage is pressed into service for the Simon pure reason that the seven-Judge Bench has used the phraseology "subsistence of an arbitral dispute required to be decided". It is emphatically submitted that it has to be read in harmony with the words used in paragraph 25, namely, "when there existed no arbitral dispute". In this backdrop it is propounded that the decisions in Boghara Polyfab Private Limited (supra) and Chloro Controls India Private Limited (supra) require reconsideration.

27. Mr. Salve and Dr. Singhvi, learned counsel for the respondent, in their turn, have submitted that paragraph 39 in SBP & Co. (supra) speaks about the role of the Chief Justice in definitive exactitude and the same has been emphatically stated in sub-para (iv) of para 47 where there is summation of the conclusions. Quite apart from the above, it is contended that in Chloro Controls India Private Limited (supra) the three-Judge Bench has correctly understood the decision in SBP & Co. (supra) and, accordingly, did not differ with the classification carved out in Boghara Polyfab Private Limited (supra).

28. At this juncture, we think it condign to refer to certain authorities which lay down the principle for understanding the ratio decidendi of a judgment. Such a deliberation, we are disposed to think, is necessary as we notice that contentions are raised that certain observations in some paragraphs in SPB & Co. (supra) have been relied upon to build the edifice that latter judgments have not referred to them.

29. In Ambica Quarry Works v. State of Gujarat and others[7], it has been stated that the ratio of any decision must be understood in the background of the facts of that case. Relying on Quinn v. Leathem[8] it has been held that the case is only an authority for what it actually decides, and not what logically follows from it.

30. Lord Halsbury in the case of Quinn (supra) has ruled thus: -

> "...there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." [Emphasis supplied]

31. In Krishena Kumar v. Union of India and others[9], the Constitution Bench, while dealing with the concept of ratio decidendi, has referred to Caledonian Railway Co. v. Walker's Trustees[10] and

Quinn (supra) and the observations made by Sir Frederick Pollock and thereafter proceeded to state as follows: -

> "The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para 573) "The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi." [Emphasis added]

32. In State of Orissa v. Mohd. Illiyas[11], it has been stated thus: -

> "12. ... According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts;
>
> (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."

33. In Islamic Academy of Education v. State of Karnataka[12], the Court has made the following observations: -

> "2. ... The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment." [Underlining is by us]

34. The said authorities have been relied upon in Natural Resources Allocation, In Re, Special Reference No. 1 of 2012[13].

35. At this stage, we may also profitably refer to another principle which is of assistance to understand and appreciate the ratio decidendi of a judgment. The judgments rendered by a court are not to be read as statutes. In Union of India v. Amrit Lal Manchanda and another[14], it has been stated that observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be red in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

36. In Som Mittal v. Government of Karnataka[15], it has been observed that judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasizing a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation.

37. From the aforesaid authorities it is luculent that the larger Bench in SBP & Co. (supra), after deliberating at length with regard to the role of the Chief Justice or his designate, while dealing with an application under Section 11(6) of the Act, has thought it appropriate to define what it precisely meant in paragraph 39 of the judgment. The majority, if we allow ourselves to say so, was absolutely conscious that it required to be so stated and hence, it did so. The deliberation was required to be made as the decision in Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.[16] where the Constitution Bench had held that an order passed by the Chief Justice under Section 11(6) is an administrative order and not a judicial one and, in that context, the Bench in many a paragraph proceeded to state about the role of the Chief Justice or his designate. The phrases which have been emphasized by Mr. Ranjit Kumar, it can be irrefragably stated, they cannot be brought to the eminence of ratio decidendi of the judgment. The stress laid thereon may be innovative but when the learned Judges themselves have culled out the ratio decidendi in paragraph 39, it is extremely difficult to state that the principle stated in SBP & Co. (supra) requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of "the ratio decidendi". That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in SBP & Co. (supra), in our opinion, have been correctly understood by the two-Judge Bench in Boghara Polyfab Private Limited (supra) and the same have been appositely approved by the three-Judge Bench in Chloro Controls India Private Limited (supra) and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in SBP & Co. (supra), were not noticed. We may hasten to add that the three-Judge Bench has

been satisfied that the ratio decidendi of the judgment in SBP & Co. (supra) is really inhered in paragraph 39 of the judgment.

38. Before parting with this part of our ratiocination we may profitably reproduce the following words of Lord Denning which have become locus classicus: -

> "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

39. The aforesaid passage has been referred to in Amrit Lal Machanda and another (supra).

40. We will be failing in our duty if we do not take note of another decision in Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others[17] on which Mr. Ranjit Kumar has heavily relied upon. He has drawn our attention to paragraph 34 where the Court has dealt with the meaning of the term "arbitrability" and stated that arbitrability has different meanings in different contexts. The Court enumerated three facets which relate to the jurisdiction of the Arbitral Tribunal. In sub-para (ii) of the said paragraph it has been stated that one facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement. On a careful reading of the said judgment we find that the learned Judges have referred to paragraph 19 of SBP & Co. (supra) and thereafter referred to Section 8 of the Act and opined what the judicial authority should decide. Thereafter the Court proceeded to deal with nature and scope of the issues arising for consideration in an application under Section 11 of the Act for appointment of the arbitrator and, in that context, it opined thus: -

> "While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section."

41. The said ruling is absolutely in consonance with the principle laid down in SBP & Co. (supra). The meaning given to arbitrability thereafter has been restricted to the adjudication under Section 8 and not under Section 11 of the Act. Thus, the reliance on the said decision further reflects how the court has consistently understood the principles laid down in SBP & Co. (supra).

42. In view of our foregoing analysis we sum up our conclusions as follows: -

i) The decisions rendered in Boghara Polyfab Private Limited (supra) and Chloro Controls India Private Limited (supra) are in accord with the principles of law stated in SBP & Co. (supra).

ii) The designated Judge, as perceived from the impugned order, while dealing with an application under Section 11(6) of the Act, on an issue raised with regard to the excepted matters, was not justified in addressing the same on merits whether it is a dispute relating to excepted matters under the agreement in question or not.

iii) The designated Judge has fallen into error by opining that the disputes raised are not "billing disputes", for the same should have been left to be adjudicated by the learned Arbitrator.

iv) The part of the order impugned that reflects the expression of opinion by the designate of the Chief Justice on the merits of the disputes, being pregnable, deserves to be set aside and is hereby set aside.

43. In course of hearing we have been apprised that the learned Arbitrator has adjourned the matter to 13.12.2013 for filing counter affidavit/claim by the appellants and it has been submitted by Mr. Ranjit Kumar that it would not be possible for the appellants to file the counter affidavit/claim or objections to the claim by that date. Mr. Harish Salve, learned senior counsel appearing for the respondent, fairly stated that this Court may take note of the concession given by him that the learned Arbitrator should grant six weeks' time commencing 13.12.2013 for filing the counter affidavit/counter claim/objections. In view of the concession given, the time stands extended. We have also been told that the learned Arbitrator has fixed the schedule for adjudication of the disputes. We would request the learned Arbitrator to re-schedule the dates as we have extended the time for filing of counter affidavit/claim by the appellants.

44. Ex consequenti, the appeal is allowed in part to the extent as has been stated in our conclusions. There shall be no order as to costs.

.....J. [Anil R. Dave] .....J. [Dipak Misra] New Delhi;

December 12, 2013.

ITEM NO.1B COURT NO.10 SECTION IVA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).29651/2013 (From the judgement and order dated 22/07/2013 in AA No.24/2012 of The HIGH COURT OF CHHATTISGARH AT BILASPUR) ARASMETA CAPTIVE POWER CO. PVT. LTD & AN Petitioner(s) VERSUS LAFARGE INDIA P.

LTD Respondent(s) Date: 12/12/2013 This Petition was called on for Judgment today.

For Petitioner(s) Ms. Bina Gupta, Adv.

For Respondent(s) M/S Suresh A. Shroff & Co.

Hon'ble Mr. Justice Dipak Misra pronounced the Judgment of the Bench comprising Hon'ble Mr. Justice Anil R. Dave and His Lordship.

Leave granted.

The Civil Appeal is allowed in part.

|(Jayant Kumar Arora) | |(Sneh Bala Mehra) |
|Sr. P.A. | |Assistant Registrar |

(Signed reportable Judgment is placed on the file)

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[1] AIR 2001 SC 499
[2] (2013) 1 SCC 641
[3] (2005) 8 SCC 618
[4] (2011) 13 SCC 258
[5] (2009) 1 SCC 267
[6] (2007) 4 SCC 599
[7] (1987) 1 SCC 213
[8] (1901) AC 495
[9] (1990) 4 SCC 207
[10] (1882) 7 App Cas 259 : 46 LT 826 (HL)
[11] (2006) 1 SCC 275
[12] (2003) 6 SCC 697
[13] (2012) 10 SCC 1
[14] (2004) 3 SCC 75
[15] (2008) 3 SCC 574
[16] (2002) 2 SCC 388
[17] (2011) 5 SCC 532
