

(2014) 10 DEL CK 0042

In the Delhi High Court

Case No : Writ Petition (Civil) 7887, 7898/2011 and CM Nos. 17851, 17870/2011 and 70 and 83/2013

Kandla Port Trust

APPELLANT

Vs

PEC Limited

RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 36, 5
Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 23, 28
Major Port Trusts Act, 1963 — Section 53

Citation : (2014) 10 DEL CK 0042

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Pravin N. Parekh, Sr. Advocate, Sumit Goel, Ritika Sethi, Faisal Lherwani and Abhinay, Advocate for the Appellant; Jayant Bhushan, Sr. Advocate, Rajdipa Behera and Monica Gupta, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—These writ petitions have been filed by M/s. Kandla Port Trust, which is an authority constituted under the Major Port Trust Act, 1963 against two Central Public Sector Enterprises of Government of India. The principal controversy raised in the present petition is with regard to the legality and validity of the Permanent Machinery of Arbitrators which has been constituted by the executive orders of the Government of India. The principal issues being common, the petitions have been heard together.

2. Writ petition, W.P.(C) 7887/2011, has been filed by the petitioner impugning an appellate award dated 04.03.2011 passed by the Secretary and Appellate Authority dismissing the appeal filed by the petitioner impugning an award dated 10.05.2010 passed by a sole arbitrator, under the Permanent Machinery of Arbitrators, with respect to disputes between the petitioner and PEC Limited (hereinafter referred to as "PEC"). The writ petition, W.P.(C) 7898/2011 impugns

an appellate award dated 03.03.2011 passed by the Secretary and Appellate Authority rejecting the challenge to the award dated 14.05.2010 passed by a sole Arbitrator, under the Permanent Machinery of Arbitrators, with respect to disputes between the petitioner and State Trading Corporation of India Limited (hereinafter referred to as "STC"). The said appellate awards dated 04.03.2011 and 03.03.2011 are collectively hereinafter referred to as the "impugned orders". PEC and STC are collectively hereinafter referred to as "respondents".

3. An application in writ petition W.P.(C) 7887/2011 was allowed to, inter alia, seek the following additional prayers:-

"d1) to declare that the Permanent Machinery of Arbitration established under Office Memorandum dated 22.1.2004 issued by Department of Public Enterprises, Government of India as null and void as it violates basic feature of constitution;

d2) to declare that the Permanent Machinery of Arbitration established under Office Memorandum dated 22.1.2004 that excluded the jurisdiction of all the courts with respect to disputes between two government departments inter alia port trusts as violative of Article 14 of Constitution of India;

d3) in the alternative, to declare that all the proceedings pending before Permanent Machinery of Arbitration abate as on 17.2.2011 by virtue of the decision of Hon'ble Supreme Court in the matter of Electronics Corporation of India Ltd. Vs. Union of India (UOI) and Others, ;

d4) in the alternative, to set aside the appellate award dated 4.3.2011 passed by the Learned Secretary cum Appellate Authority and award dated 10.5.2010 passed by the Ld. Sole Arbitrator as nullity in the eyes of law;"

4. Similar amendment was also made to W.P.(C) 7898/2011, whereas prayers (d1), (d2) and (d3) are identically worded as above, prayer (d4) reads as under:-

"d4) in the alternative, to set aside the appellate award dated 3.3.2011 passed by the Learned Secretary cum Appellate Authority and award dated 14.5.2010 passed by the Ld. Sole Arbitrator as nullity in the eyes of law;"

5. Essentially, the substratal controversy to be addressed in the present petition is whether the Permanent Machinery of Arbitrators (hereinafter referred to as the "PMA") is null and void as being unconstitutional. And, whether it would be open for the petitioner to challenge the PMA after having agreed to refer the disputes to PMA and after having participated in those proceedings.

6. Briefly stated, the relevant facts necessary to appreciate the controversy are as under:

6.1. PEC and STC approached M/s. Kandla Port Trust (hereafter "KPT") through an agent for storing wheat inside the port area on transit terms for the purposes of export. PEC and STC were incurring demurrage charges as the stock of wheat was lying beyond the 15 days of free period. The request of PEC and STC for

shifting the stock from transit area to rental area was rejected by KPT. Thereafter, PEC and STC had requested KPT for full waiver of the demurrage charges. The Board of Trustees of KPT passed a resolution in its meeting held on 11.10.2002 thereby rejecting the said requests of PEC and STC while exercising its powers under Section 53 of Major Port Trusts Act, 1963.

6.2. Subsequently, PEC and STC filed separate writ petitions (being SCA No. 10501/2002 & SCA No. 10502/2002 respectively) in the Gujarat High Court inter alia praying for directions to KPT to charge the rates applicable to rental area and not to transit area with regard to storage of goods and to grant 50% rebate on demurrage charges incurred on the stock. By an order dated 18.11.2002, the said writ petitions were disposed of by the Court with a direction to PEC and STC to make representations raising all their contentions and grounds before Secretary, Government of India, who in turn was directed to place the representations before the High Power Committee, which was directed to decide the representations after giving KPT an opportunity of being heard. The Appeals (LPA Nos. 1137 and 1138 of 2002) filed by KPT challenging the order dated 18.11.2002 before Division Bench of Gujarat High Court were dismissed on 07.04.2003. The review petitions (Misc. Civil Application Nos. 1052/2003 and 1054/2003) filed by KPT against the order dated 07.04.2003 were also dismissed by the Division Bench on 02.05.2003.

7. The High Power Committee heard the parties at length and as the parties agreed to enter into an arbitration agreement, the committee decided that the disputes be resolved through arbitration under the PMA.

8. Thereafter, an arbitration agreement dated 10.06.2005 was entered into between PEC and KPT. A similar arbitration agreement was also entered into between KPT and STC on 10.06.2005.

9. Subsequently, the Special Leave Petition (SLP (C) Nos. 19932-35 of 2003) filed by KPT before the Supreme Court challenging the orders dated 07.04.2003 and 02.05.2003 were also dismissed by the Supreme Court on 28.10.2005 in view of the subsequent developments, namely, decision of the High Power Committee and the Arbitration Agreement.

10. In terms of the arbitration agreement, the proceedings under the PMA were initiated. The Sole Arbitrator passed an award dated 10.05.2010 and held that PEC was entitled to remission of 50% of demurrage charges instead of 80%, however, the prayer of PEC for charging demurrage on cargo on rental area rates and not transit area rates, was rejected. The Arbitrator directed PEC to pay 50% of the demurrage charges along with interest @ 10% from May, 2001 till the date of realization and KPT was directed to release the bank guarantee in favour of PEC. The Sole Arbitrator passed a similar award dated 14.05.2010 in case of STC.

11. KPT preferred an appeal challenging the award dated 10.05.2010 before the Secretary and Appellate Authority, in accordance with the scheme of PMA, inter alia praying as under:

"(a) setting aside the Award dated 10.05.2010 of the Ld. Sole Arbitrator;

(b) direct the Respondent No. 1 (PEC) to pay a sum of Rs. 4,08,93,648/- alongwith applicable interest;"

PEC preferred counter claims praying as under:

"(a) To hold that the PEC is entitled to remission of 30% (80%-50%) under Section 53 of the Act and read with the Government of India guidelines issued from time to time;

(b) To direct the present Appellant to recover the storage charges from the Respondent with regard to the cargo stored in the rental area at the rates applicable at the relevant time to rental area in the scale of rates and not at the rates applicable to transit area, i.e., on the basis of actual place of storage as per "Scale of Rates";

(c) To hold that the Respondent hereinabove is entitled to rebate/remission of 50% in respect of cargo stored in transit area because the cargo was "export cargo";

(d) To award damages/compensation to the Respondent-PEC for the loss suffered by the Respondent-PEC in view of the damages suffered while the cargo was in the custody of the Appellant-KPT."

12. KPT preferred similar appeal challenging the award dated 14.05.2010, inter alia praying as under:

"(a) setting aside the Award dated 14.05.2010 of the Ld. Sole Arbitrator;

(b) direct the Respondent No. 1 to pay a sum of Rs. 2,96,54,017/- alongwith applicable interest;"

STC preferred counter claims praying as under:

"(a) To hold that the Respondent no. 1 is entitled to remission of 30% (80%-50%) under Section 53 of the Act and read with the Government of India guidelines issued from time to time;

(b) To direct the present Appellant to recover the storage charges from the Respondent with regard to the cargo stored in the rental area at the rates applicable at the relevant time to rental area in the scale of rates and not at the rates applicable to transit area, i.e., on the basis of actual place of storage as per "Scale of Rates";

(c) To hold that the Respondent is entitled to rebate/remission of 50% in respect of cargo stored in transit area because the cargo was "export cargo";

(d) To award damages/compensation to the Respondent for the loss suffered by the Respondent in view of the damages suffered while the cargo was in the custody of the Appellant."

13. The counter claims filed by STC and PEC were partly allowed to the extent of granting the benefit of 80% remission on demurrage charges to STC and PEC under the guidelines dated 24.01.1992 and 01.08.1995 read with Section 53 of the Major Port Trusts Act, 1963. However, other claims including the claims pertaining to recovery of storage charges as per the actual place of storage, rebate of 50% in respect of Cargo actually exported and application of charging demurrage on the basis of rates for rental area were rejected.

14. KPT filed the present petitions, in October 2011, assailing the impugned orders on several grounds, most of which contained an express reference to Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "A&C Act"). Thereafter, KPT filed an additional affidavit and for the first time took a plea that the appellate award was liable to be set aside as the same was made after the decision of the Supreme Court in Electronics Corporation of India Ltd. Vs. Union of India (UOI) and Others, . Thereafter, in January 2013, KPT filed applications to urge additional facts and grounds and seek additional prayers. It was now urged for the first time that the PMA was void as being violative of the basic structure of the constitution of India.

15. The learned counsel for KPT contended:

15.1 That the arbitration agreement dated 10.06.2005 was not consensual as KPT was coerced to grant its consent;

15.2 That PMA has lost its legal basis in view of the decision of the Supreme Court in Electronics Corporation of India (supra) whereby the orders passed by the Supreme Court in Oil and Natural Gas Commission Vs. Collector of Central Excise, ; Oil and Natural Gas Commission Vs. Collector of Central Excise, ; and Oil and Natural Gas Corporation Ltd. Vs. City and Indust. Dev. Corpn., Maharashtra and Others, (hereafter referred to as "ONGC Cases") constituting the mechanism of Committee on Disputes (hereafter "CoD") were recalled;

15.3 That reference to disputes cannot be said to be consensual as the consent given for PMA was in conformity with the orders passed by the Supreme Court in ONGC cases and the said consent cannot be said to be a free consent. It was submitted that KPT had not challenged the mechanism of PMA as KPT was referred to PMA pursuant to Supreme Court orders in ONGC cases. That the mechanism of PMA is unconstitutional as it entrusts the jurisdiction of courts provided under the Constitution of India to the authorities established by an executive order. It was further contended that mechanism of PMA was constituted by an executive order and a judicial or quasi-judicial authority cannot be constituted by an executive order;

15.4 That the impugned orders are only recommendatory and not binding upon the parties as the PMA has no legal status and therefore, the impugned orders are liable to be set aside;

15.5 That the Office Memorandum dated 22.01.2004 providing the mechanism of

PMA is unenforceable in law as it is contravening to Section 28 of the Indian Contract Act, 1872 and Section 9 of the Code of Civil Procedure, 1908;

15.6 That the parties by their private agreements can neither confer jurisdiction on a body which it does not possess under the law nor can they divest a jurisdiction of court which it possesses under the law. In support of this contention, the counsel relied upon the decision in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, . It was contended that in case of patent lack of jurisdiction neither consent nor acquiescence can confer validity to the order which is a nullity having been passed by an authority or body which lacked jurisdiction and in such case no question of estoppel or acquiescence would apply. In support of this contention, the counsel relied upon the decision in Nar Singh Pal Vs. Union of India and Others, , The United Commercial Bank Ltd. Vs. Their Workmen, and S. Sethuraman Vs. R. Venkataraman and Others, ;

15.7 That the judicial functions are required to be performed by the judiciary and even where the Tribunals have been created under a valid statute, the same are required to discharge their duties in adherence to judicial principles. In support of this contention, the counsel relied upon the decision in Union of India (UOI) Vs. R. Gandhi, President, Madras Bar Association, and S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, ;

15.8 That the demurrage charges are statutory dues and the same cannot be disputed or dispensed with by way of PMA as it would defeat the provisions of the law. It was submitted that agreements which have been entered to nullify the statutory order of a statutory authority would be hit by Section 23 of the Indian Contract Act, 1872.

16. The learned counsel for the respondents contended:

16.1 That present writ petition is not maintainable as a separate specific remedy has been provided under Section 34 of the A&C Act for challenging an award on the grounds mentioned under that section. It was submitted that the applicability of the A&C Act cannot be excluded by the parties by contract. In support of this contention, the counsel relied upon the decision of this court in Ircon International Ltd. v. National Building Construction Corporation Limited: EFA(OS) No. 22/2006, decided on 28.11.2008;

16.2 That KPT cannot challenge the PMA after entering into an arbitration agreement and referring all disputes to the PMA and having participated in the PMA proceedings. It was submitted that after exhausting or availing its opportunities under PMA, KPT is now estopped from challenging the PMA;

16.3 That the parties are not entitled to approbate and reprobate. In support of this contention, the counsel relied upon the decision in Nagubai Ammal and Others Vs. B. Shama Rao and Others, ;

16.4 That the procedure and mechanism of the PMA was provided in the arbitration clause of the arbitration agreement entered into between the parties

and was independent of CoD that was established by the Office Memorandum dated 22.01.2004. Therefore, the jurisdiction of PMA could not be challenged by KPT on account of dissolution of CoD. In support of this contention, the counsel relied upon the decision of this court in UP Rajya Vidyut Utpadan Nigam Ltd. v. Union of India & Ors: W.P. (C) 7328/2012, decided on 21.08.2014.;

16.5 That the claim of the respondents for remission of charges was fully covered by the guidelines issued by the Central Government by letters dated 24.01.1992 and 01.08.1995 read with Section 53 of Major Port Trust Act, 1963;

16.6 That a dispute with respect to demurrages could be agitated as a civil dispute. KPT had the power, though to be exercised by its Board to waive demurrages and thus a dispute with regard to the same could be raised. The learned counsel relied upon the decision of Supreme Court in Luga Bay Shipping Corporation and another Vs. Board of Trustees of the Port of Cochin and another, and contended that said decision was an authority for the proposition that the law did not preclude the filing of a civil suit wherein the quantum of damages was worked out by the Board. And therefore, a claim before an arbitral tribunal would also be maintainable.

17. I have heard the learned counsel for KPT at length. After the opening arguments on behalf of KPT were concluded, the learned counsel for the respondents was heard. Thereafter, the learned counsel for KPT reargued the petitions once more. He further handed over supplementary submissions, which, however, were not alluded to during the course of arguments. A perusal of the said submissions indicate that it includes an assertion that the learned counsel for KPT had been heard only for an aggregate 43 minutes and that he deserved a proper hearing. Considering that the learned counsel for KPT was granted full opportunity to present his arguments, the supplementary submissions handed over in Court are not only inaccurate in as much as the suggestion made but also completely unfair. The practice of surreptitiously introducing assertions by handing over a note at the rejoinder stage without referring to the same, is a practice that must be deprecated.

18. Apart from the substantive arguments made on behalf of KPT as noted before, the learned counsel for KPT also emphasized that the petition was required to be heard by a Larger Bench since it involved important constitutional issues. At first, it was suggested that the Delhi High Court Rules provided that challenge to the vires of statutory enactments be heard by a Bench of two Judges and, therefore, the petition ought to be referred to a Larger Bench. However, the learned Senior Counsel could not point out any statutory enactments which were challenged by way of this petition. Subsequently, at the stage of rejoinder, the Senior Counsel submitted that the matter was required to be referred to a Full Bench of this Court since the issues raised related to the basic structure of the Constitution of India and the amount involved in the matter was large (i.e. approximately Rs. 5 crores). The notions as to the pecuniary jurisdiction of this court, exercising jurisdiction under Article 226 of the

Constitution of India are bereft of any basis. The contention that matters relating to basic structure of the constitution of India should be heard by a bench of two judges or more is at best the learned Senior Counsel's opinion, which I find difficult to share. Lastly, it was contended that the matter be referred to a Division Bench to "interpret and consider the effect of the judgment" of the Division Bench in *Ircon* (supra). As obvious, this submission is also without merit as it is not necessary to refer matters to a bench of an equivalent or a larger strength to interpret and apply a judgment.

19. The learned counsel for KPT has emphatically submitted that KPT had been coerced to refer the disputes with the respondents under the PMA and its consent to refer disputes was not free consent at all. He submitted that the fact that KPT had preferred a Special Leave Petition against the order of the Gujarat High Court directing the representation of the respondents to CoD is indicative of the fact that KPT was not agreeable to refer the disputes to the PMA. It is KPT's stand that its consent was pursuant to the orders of the Supreme Court in ONGC cases and the arbitration agreement was also entered into by KPT pursuant to the order passed by the Supreme Court in the ONGC cases. It was contended that KPT was not in a position to challenge the orders passed by the Supreme Court and thus had no alternative but to accept arbitration under the PMA.

20. I am unable to accept these contentions for several reasons: First of all, this contention is completely outside the pleadings and, apparently, has been conjured up at the stage of oral arguments. The contention that KPT was coerced does not find mention even in the written submissions submitted by the learned counsel for KPT. Secondly, the idea that a statutory corporation could be coerced or compelled to give its consent and execute a written agreement, is difficult to accept. Thus, KPT's contention that it was coerced into signing the arbitration agreement is only stated to be rejected. Thirdly, the contention is belied by the facts and the documents on record. By an order dated 18.11.2002, the Gujarat High Court directed that the matter be placed before the High Power Committee who would decide the representation of the respondents after giving KPT an opportunity of being heard. Pursuant to this order the representations of PEC and STC were considered by the CoD in a meeting held on 12.02.2004. At this meeting, KPT, PEC and STC agreed to sign the arbitration clause/agreement and this was recorded in the minutes of the said meeting. The relevant extract of which is quoted below:-

"1. The Committee heard at length all the three PSU's i.e. the State Trading Corporation of India Limited, the PEC Limited and the Kandla Port Trust. As all the three PSU's agreed to sign the arbitration Clause/Agreement within 15 days the Committee directed that the disputes be referred by them to the permanent machinery of Arbitration for a resolution under intimation to the Cabinet Secretariat.

2. The committee also directed that the two respective Bank Guarantees would be got extended by the STC & PEC from time to time, but the same would not be

encashed by the Kandla Port Trust."

21. Concededly, KPT entered into an arbitration agreement on 10.06.2005. The relevant extract of which is quoted below:-

"AND WHEREAS subsequently, a meeting of the Committee on Disputes was held on 01.02.2004 where it was agreed to refer the disputes for arbitration.

NOW, therefore this agreement witnesseth and it is hereby agreed by and between PEC and KPT that:

All the respective claims of the parties and all disputes and/or differences between the parties in connection with the aspects relating to demurrage, remission of rates, rebate, scale of rates, rental, encashment of Bank Guarantee etc. as well as other claims or right of the parties shall be referred to "permanent machinery of arbitration" in the Department of Public Enterprises/Department of Law Company Affairs for Arbitration and/or resolution of all such claims, disputes, differences etc. The provisions of Arbitration and Conciliation Act shall not be applicable to the Arbitration under this agreement.....The award of the Arbitrator shall be binding to the parties to the disputes, provided, however, any party who feels aggrieved by such an award, may make further reference for setting aside or for revision of the award to the Law Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary or seek any remedy as available in law."

22. Even at this stage, KPT did not challenge the PMA but on the contrary accepted to proceed with the same. Thereafter, the Special Leave Petitions filed by KPT against the orders passed by the Gujarat High Court were taken up by the Supreme Court and the same were dismissed by an order dated 28.10.2005 which reads as under:-

"In view of the subsequent developments which have taken place, namely, the reference to the High Power committee, the decision of the High Power Committee and also the arbitration agreement between the parties, these special leave petitions are dismissed."

23. Although, the Special Leave Petitions filed by KPT have not been placed on record, it is apparent from this order that KPT had not challenged the arbitration agreement or the PMA before the Supreme Court and, if so, the challenge was not accepted.

24. There is also no material to indicate that the KPT had raised any objection as to the jurisdiction of the PMA before the arbitrator. The arbitration award passed by the Arbitrator also does not indicate that any contention challenging the PMA had been canvassed before him. Thereafter, KPT had availed the remedy of an appeal provided under the arbitration agreement. The Memorandum of Appeal also does not refer to any ground relating to the jurisdiction of the Arbitrator.

25. There was no compulsion at any stage for KPT to have accepted arbitration

as a mode for resolution of its disputes. In *Oil and Natural Gas Commission and Another Vs. Collector of Central Excise*, , the Supreme Court had directed the Government of India to set up a High Power Committee for examining the disputes before clearing them for being litigated. The relevant extract of the said judgment is quoted below:-

"3. We direct that the Government of India shall set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

4. It shall be the obligation of every court and every tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with."

26. CoD was constituted pursuant to the above directions of the Supreme Court. The PMA on the other hand had been established by an Office Memorandum dated 30.03.1989. The provisions for resolution of disputes through the PMA was retained in the Office Memorandum dated 22.01.2004 and provision for clearance from CoD was added. The contention of KPT that both CoD and the PMA were inexplicably interlinked cannot be accepted as the PMA was set up independent of and prior to the directions in the ONGC cases. The Supreme Court in *Oil and Natural Gas Commission Vs. Collector of Central Excise*, had clarified that "If the High Power Committee is unable to resolve the matter for reasons to be recorded by it. It shall grant clearance for the litigation." And, this precisely was what was done by the CoD in the present case; After hearing the parties, the CoD had recorded that the parties had agreed to enter into arbitration agreement for resolution of their disputes under the PMA and had granted clearance for the same.

27. This court in *UP Rajya Vidyut Utpadan Nigam Ltd. (supra)* had concluded that recall of the orders passed in ONGC Cases did not affect the PMA. After the decision of the Supreme Court in *Electronics Corporation of India (supra)*, the Office Memorandum dated 22.01.2004 was superseded by Office Memorandum dated 12.06.2013. This Office Memorandum was similar to Office Memorandum dated 22.01.2004 in all material aspect except reference to CoD had been deleted. This also clearly indicate that the provisions of the PMA and CoD were completely independent. While CoD was constituted to ensure that government departments and agencies do not unnecessarily litigate in courts and their

disputes are placed before the CoD for obtaining of prior clearance before any litigation is instituted, the PMA on the other hand is the mechanism for resolving disputes through arbitration. The dissolution of CoD by the Supreme Court by virtue of the decision in Electronics Corporation of India (supra), does not dismantle the PMA. Further in any event the contention that recall of the orders passed in ONGC cases automatically rendered the proceedings under the PMA void can most charitably be described as ill-informed.

28. In any view of the matter, KPT's contention that it was compelled to participate in the PMA pursuant to the directions of the Supreme Court in ONGC cases is patently erroneous and cannot be accepted. After having exhausted contractual remedy, KPT cannot now be permitted to contend that the arbitration agreement was without its consent. In the given circumstances, it is clear that the said stand canvassed on behalf of KPT is an afterthought and clearly less than honest.

29. The learned senior counsel for KPT laid great stress on his contention that the PMA violated the basic structure of the Constitution of India in as much as it amounted to outsourcing the judicial function to the executive. The PMA was established to resolve disputes inter se the Government Departments/organizations/agencies. It is, thus, essentially to ensure that disputes and differences inter se government organizations/departments/agencies do not consume valuable resources including limited judicial time. The contention that a mechanism evolved for resolution of intra government disputes would constitute usurpation of judicial functions and, thus, frustrate basic structure of the Constitution of India is bereft of any merit. An internal dispute resolution mechanism could never be considered as usurpation of judicial functions and thus the arguments raised by KPT are fundamentally flawed. The PMA is essentially an arbitration and as held in Ircon (supra) so far as it excludes application of A&C Act, it is void. Thus, judicial review is available, albeit, to the limited extent as provided under the A&C Act.

30. Further, KPT had voluntarily entered into arbitration agreement for resolution of its disputes with the respondents. It is open for the parties to enter into a contract for providing an alternative dispute resolution mechanism. Arbitrations are a well accepted method to resolve commercial disputes. However, the parties cannot contract out of a statute. In this view, the arbitration agreement insofar as it excludes the applicability of the A&C Act is concerned has been held to be void. In Ircon (supra), a Division Bench of this Court had examined the scheme of the PMA and held that every scheme of jural relationship has to be governed by some law of the land and the parties cannot contract out of a statute. The Court further held that insofar as the arbitration clause excluded the applicability of the A&C Act, it was void. The relevant extract of the said judgment is quoted below:-

"28. So far as the part in the arbitration clause in the said agreement regarding the non-applicability of the Act of 1996 is concerned, we consider that it is void

and the parties cannot by themselves exclude the statute itself which is being drafted by the Legislature to look after the arbitration matters."

31. Thus, it was open for parties to take recourse to the Courts, albeit, to the extent as provided under the A&C Act. In this view, the contention that the PMA itself is void because the recourse to Courts is barred is no longer available to KPT in view of the decision of the Division Bench of this Court in Ircon (supra) and, therefore, cannot be accepted. It is further noted that KPT's contention is premised on the assessment that the PMA is mandatory and it was not open for KPT to have rejected the same. As indicated above, this underlying assumption itself is erroneous. Once having agreed to resolve disputes to arbitration it is no longer further open for KPT to contend that the PMA is invalid.

32. The reference made by learned counsel for KPT to the decision of the Supreme Court in Union of India (UOI) Vs. R. Gandhi, President, Madras Bar Association, and S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, is misplaced. The subject matter of disputes in those proceedings involved the constitution of Tribunals, which was formed under a statute and certain functions and the jurisdiction to adjudicate disputes, which were otherwise adjudicated by Courts, were vested with the Tribunals. The question as to the independence of the Tribunals was in issue in those matters. In the present case, the disputes have been referred to arbitration by consent of parties, the Arbitral Tribunal is constituted not by a statute but by consent of parties. The A&C Act governs the role of Courts where parties have agreed to resolve their disputes before the Contractual Forum. The decisions referred to by the learned counsel for KPT are not an authority for the proposition that all dispute resolution mechanisms must involve judicial intervention and be subject to judicial review.

33. The principle that jurisdiction can neither be vested nor excluded by private agreement, has no application in the present case. Arbitration is an alternative dispute resolution mechanism that is premised on agreement between parties. An arbitrator derives his jurisdiction on the basis of an arbitration agreement. The interference of courts is restricted by virtue of section 5 of the A&C Act and not by private agreement.

34. The learned counsel for KPT further argued that the decision in the case of Ircon (supra) was erroneous and the entire the PMA ought to have been held as null and void and not only the part of the arbitration clause that excludes the applicability of the A&C Act. However, in the supplementary written submissions submitted by KPT, KPT sought to distinguish the said case by contending that in Ircon (supra) the issue involved was with respect to execution of the arbitration award and the role of Courts to execute the awards under Section 36 of the A&C Act. It was contended that in the present case, KPT had not challenged the award under Section 34 of the A&C Act because the same had been excluded under the agreement. It is further submitted that in Ircon (supra) the validity of the PMA and the Office Memorandum dated 22.01.2004 was not challenged. KPT

has further sought to distinguish the present case from that of Ircon (supra) by contending that whereas in Ircon (supra) the parties had agreed for their disputes to be resolved through the PMA, in the present case, KPT had been forced to do so. In my view, the aforesaid contentions are also without merit. First of all, it is incorrect to contend that reference to the PMA was not consensual. In the present case, also, KPT had consented to arbitration under the PMA. Secondly, the principal argument of KPT that the PMA is void as it excludes recourse to Courts is erroneous as this Court in Ircon (supra) had found that the part of the clause excluding the applicability of A&C Act was void. The ratio of the said decision would be equally applicable in the present case and exclusion of applicability of A&C Act would be void and this stipulation would not come in the way of the parties to challenge the award in terms of Section 34 of the A&C Act.

35. The contention that the provisions of A&C Act were not followed inasmuch as KPT did not have the option of appointing the arbitrators of their choice or to determine the procedure of the arbitration is also erroneous. KPT had willingly accepted the procedure under the PMA and thus, the conduct of the arbitration as well as the appointment of the arbitrator under the PMA is, clearly, with their consent. The contention that the provision for an appeal is contrary to A&C Act is also not acceptable. The mechanism of arbitration is a consensual mechanism and can contain provisions for resolution of the disputes as agreed by the parties. There is nothing in the A&C Act that would prohibit mechanism of an appellate award.

36. The Appellate Authority had examined the matter and found that the requests of STC and PEC for remission of demurrages were squarely covered within the guidelines issued by the Government of India. The Appellate Authority found that wheat in question could not be exported due to ban on shipment by the Government of India and the problem was further precipitated by cyclonic rains that hit Kandla Port at the relevant time. In view of these facts, the Appellate Authority concluded that a remission of 80% of demurrage charges was warranted under the guidelines issued by the Government of India. The merits of the decision of the Appellate Authority cannot be subject to judicial review in these proceedings as the decision is neither perverse nor based on no material at all. In this view, the finding of the Appellate Authority cannot be interfered with in these proceedings. The contention that the arbitrators had no jurisdiction to pass an award with regard to waiver of demurrages as the same was subject matter of statutory provisions is wholly without substance. It is not disputed that KPT had the power to waive demurrages in certain cases. It is also not disputed that the Government of India had issued guidelines to ensure that such power is not exercised arbitrarily but in accordance with stated principles. This, clearly, indicates that the decision of KPT could, in certain circumstances, be impugned in civil proceedings and an arbitrator or a Civil Court would have had jurisdiction to entertain proceedings in relation to waiver of demurrages in the event such waiver was not granted by KPT.

37. The contention that the award is liable to be set aside as it has in effect granted the respondents relief much greater than what they had prayed for is also not sustainable. After the disputes had been referred to the PMA, the respondents had submitted the statement of claim which included a prayer for remission of 80% demurrages. The respondents had earlier sought remission of demurrages to the extent of 50% from KPT but this would not preclude the respondents from making a statement of claim before the arbitrator for remission in accordance with the relevant guidelines. In this view, the argument that the respondents have been granted a relief greater than what they had prayed for is not correct. The decision of the Appellate Authority, thus, cannot be faulted on this ground.

38. In my view, the present petitions are liable to be dismissed for the reasons as stated above. I am further of the view that this is a fit case where costs ought to be imposed as the conduct of KPT in conducting these proceedings has been less than fair. These petitions were filed in October 2011, that is, after the period of limitation for assailing an award under Section 34 of the A&C Act had expired. Most of the grounds urged in the petitions were with express reference to Section 34 of the A&C Act. At the initial stage, there was no assertion that the PMA was void or that reference to the PMA was without the consent of KPT. Subsequently, KPT evolved a new argument that Electronics Corporation of India (supra) had in effect dissolved the PMA. This was urged by KPT by filing an additional affidavit in December 2011. Even at that stage, KPT had not asserted that the PMA itself was void or contrary to the basic structure of the Constitution of India as was subsequently argued. Thereafter, in January 2013, KPT filed applications and for the first time now urged that the PMA itself was void. The course of proceedings indicates that KPT has been evolving its arguments with the passage of time and adopting stands as convenient.

39. It was strongly urged by the learned counsel for KPT that the arbitration agreement for reference of disputes to the PMA was without KPT's consent and KPT was coerced into giving its consent; As pointed out earlier this contention was not supported by any pleadings and, obviously, was evolved subsequently, as a matter of convenience. Even the written submissions filed by the learned counsel for KPT did not mention that KPT was coerced in any manner.

40. In addition, considerable time was spent by the learned counsel for KPT to urge that the matter not be heard by this Court and be referred to a larger Bench. As discussed above, these contentions were also bereft of any basis. It appears that the only reason why such contentions were pressed at length was to somehow avoid the conclusion of the present matter.

41. Lastly, it cannot be ignored that the disputes involved are amongst a statutory body controlled by the government of India and Government Corporations. The Supreme Court in several decisions including the ONGC Cases had expressed that such disputes should be resolved without litigation. The orders passed in ONGC Cases were recalled in Electronics Corporation of India

(supra), not because the intention of avoiding litigation through CoD was not laudatory but because the mechanism of CoD had not worked effectively. Viewed in this perspective, KPT's stand to avoid the PMA by contending that it was without its consent or that it was coerced clearly indicates KPT's propensity for litigating unfairly, which must be discouraged.

42. In the given circumstances, the present petitions and all pending applications are dismissed with costs, which are quantified at Rs. 50,000/- for each petition.