
(2012) 08 DEL CK 0015
In the Delhi High Court
Case No : O.M.P. 194 of 2009

Shakti Bhog Foods Ltd.

APPELLANT

Vs

Kola Shipping Ltd and Another

RESPONDENT

Date of Decision : 21-08-2012

Acts Referred:

Arbitration Act, 1940 — Section 12, 12(1), 12(2), 12(3), 13(2)
Constitution of India, 1950 — Article 13

Citation : (2012) 3 ARBLR 372 : (2012) 193 DLT 421

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Neeraj Kaul and Mr. R.K. Sanghi, for the Appellant; Amitava Mazumdar with Mr. Arvind Kumar Gupta and Mr. Aditya Krishnamurthy, Advocates., for the Respondent

Judgement

Justice S. Muralidhar

1. The challenge in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") by the Petitioner, Shakti Bhog Foods Ltd., is to an Award dated 11th February 2009 passed by the sole Arbitrator (Respondent No. 2) in the dispute arising between the Petitioner and Kola Shipping Ltd., Respondent No. 1, arising out of a voyage Charter Party ("CP") (fixture note) dated 18th July 2005, claimed by Respondent No. 1 to have been executed between it and the Petitioner to load 13,500 metric tonnes ("MT") of bagged sorghum on board M.V. Kapitan Nazarev at the port of Kakinada, India. The Petitioner is engaged in the business of manufacturing and exporting food products, cereals, grains etc. It states that in the first week of July 2005 it was negotiating a deal with the Government of Niger for export of Sorghum (Jowar), which was to be shipped to the port of Cotonou in Benin in West Africa. The Petitioner states that it was looking for a ship and at that time the Respondent No. 1 contacted it and offered its services since it was already having a vessel under a time charter with the head owners N.B. Two Shipping Ltd. (hereafter referred to as "head owners"). According to the Petitioner, it informed the Respondent No. 1 that it might be in a

position to charter the vessel only if the deal with the Government of Niger came through. According to the Petitioner, the deal did not come through despite negotiations and it kept Respondent No. 1 apprised of the developments. According to the Petitioner since the Respondent No. 1 was nevertheless insisting upon a regular CP (to be executed between them) and since the deal with the Government of Niger did not come yet through, the Petitioner offered Respondent No. 1 in the alternative of export of Sorghum through the vessel for which the Respondent No. 1 had time charter, a consignment of maize for Colombo. The Petitioner maintains that there was no signed CP, and therefore no arbitration agreement between the parties.

2. The Respondent No. 1 maintains that there existed a concluded CP agreement between the Petitioner and Respondent No. 1. It further states that the question as to the existence of the CP between the parties has been examined in the earlier proceedings before this Court and the Supreme Court and similar contentions of the Petitioner have been negated by both Courts. Respondent No. 1 contends that it was not concerned with the Petitioner's deal with the Government of Niger. According to the Respondent No. 1 it signed CP on 22nd July 2005 and sent the original to the Petitioner. Respondent No. 1 claims that the Petitioner counter-signed the CP on 28th July 2005 and sent that copy by fax. Respondent No. 1 has produced before this Court a photocopy of the fax of the CP counter-signed by the Petitioner. Respondent No. 1 relies on the arbitration clause forming part of the said agreement.

3. In para 2.6 of the petition, the Petitioner states that the vessel arrived at Kakinada on 24th July 2005 and tendered Notice of Readiness ("NoR"). According to the Petitioner on 26th July 2005 Respondent No. 1 handed over to the Petitioner a back dated Bill of Lading ("B/L") dated 20th July 2005 and made repeated entreaties to give Respondent No. 1 "some business" in case the deal for cargo to Cotonou did not materialize. The Petitioner claims that despite the uncertainty of the ongoing negotiations with the Government of Niger, "the Petitioner decided to load some cargo in the vessel and loaded anticipating that in case the deal came through, the Petitioner would load the balance 12,400 MT, otherwise it would unload the 1100 MT". The Petitioner states that between 6th to 9th August 2005, it loaded 1100 MT of cargo worth Rs. 1,02,36,540 on the vessel. The Petitioner states that on 9th August 2005, the deal with the Government of Niger fell through. It telephonically informed Respondent No. 1 on 9th, 10th and 11th August 2005 that it would not be in a position to load any further cargo and offered Respondent No. 1 a lump-sum amount of US Dollars ("USD") 100,000 as a good business gesture and without admitting any liability, subject to Respondent No. 1 unloading the cargo. According to Respondent No. 1, the Petitioner stopped the loading of cargo claiming that the deal with the Government of Niger had not come through and agreed to pay Respondent No. 1 a compensation of USD 90,000. On 5th September 2005, the Petitioner sent an e-mail to Respondent No. 1 requesting it to unload the cargo from the vessel.

The Section 9 proceedings

4. Respondent No. 1 filed OMPNo. 331 of 2005 in this Court u/s 9 of the Act seeking interim measures for discharge of 1100 MT of Sorghum loaded by the Petitioner on board the vessel. Respondent No. 1 pointed out that the lay time had expired in terms of the CP on 6th August 2005 and the Petitioner was liable to pay demurrage at the rate of USD 8,000 per day. By the time the Petitioner sent a letter to Respondent No. 1 on 24th August 2005 stating that it was not in a position to provide any further cargo, the demurrage had gone up to USD 232,000. Respondent No. 1 stated that the compensation offered by the Petitioner was totally inadequate. Respondent No. 1 addressed a letter dated 1st September 2005 through their agents to the Port Authorities at Kakinada for permission to discharge the cargo under lien and to store the said cargo in a bonded warehouse stating that they would bear the cost of discharge and storage. However, the Customs Authority at Kakinada informed Respondent No. 1 by a letter dated 6th September 2005 that since the cargo had been loaded by the Petitioner, the request for discharge of cargo would have to come from the Petitioner only.

5. Meanwhile, the Petitioner sent a letter on 5th September 2005 to the Master of the vessel stating that it would make the necessary arrangement to discharge the cargo on board the vessel. Respondent No. 1 addressed a letter to the Customs Authority at Kakinada Port on 8th September 2005 stating that they had no objection to the discharge of the cargo by the Petitioner at its own risks and costs, subject to the Petitioner surrendering the Mate Receipts ("MR") and the original tally sheets to the Master of the vessel, since the cargo was not being carried by the vessel. It is stated by Respondent No. 1 that despite this, the Petitioner did not take any steps for unloading the cargo as a result the vessel continued to remain at Kakinada Port incurring demurrage which on the date of filing of the petition was in excess of USD 737,577.

6. The case of Respondent No. 1 is that the Petitioner did not permit it to discharge the cargo by making a written request to the Customs authorities at Kakinada for re-landing of the cargo to the port. The detention charges were increasing at the rate of USD 12,346.36 per day. In the circumstances, while expressing its readiness to refer the dispute for arbitration in London in respect of its claim for freight, dead-freight, demurrage and damages for detention, Respondent No. 1 sought interim direction to the Petitioner to forthwith discharge 1100 MT of Sorghum loaded on the vessel by the Respondent No. 1. Alternatively, a direction was sought to the Respondent No. 1 to request the port authorities at Kakinada in writing to grant permission for unloading the Petitioner's cargo on board at the risk and cost of the Petitioner.

7. In the said proceedings the Petitioner admitted to having loaded 1100 MT of cargo on board the vessel. The Petitioner also admitted to signing the fixture note but not the CP. The Petitioner also raised a preliminary objection as to the territorial jurisdiction of the Delhi High Court to entertain the petition.

8. This Court by its order dated 28th September 2005 disposed of the petition directing the Petitioner to forthwith unload the quantity of 1100 MT of bagged Sorghum loaded by them on board the vessel of Respondent No. 1 at Kakinada or in the alternative, send a request to the Customs Authority at Kakinada to grant permission for re-landing of the Petitioner's cargo on board the said vessel. The Petitioner was further directed to surrender the MR to the Master of the vessel for appropriate action within one week. This was without prejudice to the rights and contentions of either party. Significantly, in determining that a part of the cause of action arose in Delhi, and therefore it had territorial jurisdiction, the Court observed: "Respondent (i.e. the Petitioner herein) did not deny their signatures on the first page of charter party which shows that the agreement was signed at New Delhi and place of arbitration as London."

9. The Petitioner filed an appeal being FAO (OS)No. 324 of 2005 in this Court on 7th October 2005 against the order dated 28th September 2005 of the learned Single Judge allowing OMPNo. 331 of 2005. On 9th October 2005, the Petitioner discharged 1050 MT of cargo out of total 1100 MT. On 10th October 2005 it stopped discharging the balance of 50 MT.

10. On 19th October 2005, the Division Bench of this Court passed an order in FAO (OS)No. 324 of 2005 declining to stay the order dated 28th September 2005 of the learned Single Judge. Since the Petitioner had till then not complied with the said order, Respondent No. 1 filed a contempt petition being CCPNo. 113 of 2005 on 20th October 2005.

11. On 26th October 2005, an order was passed by this Court in CCPNo. 113 of 2005 ordering the Petitioner to unload the balance cargo of 50 MT by 28th October 2005, failing which the Respondent No. 1 would be authorized to discharge the balance cargo and store in the warehouse of custom thereof. Pursuant to the said order, discharge of the balance cargo of 50 MT was completed on 30th October 2005.

Appointment by Respondent No. 1 of Mr. Alan Oakley as Arbitrator

12. On 17th October 2005, counsel for Respondent No. 1 issued a notice appointing Mr. Alan P. Oakley as their Arbitrator. Mr. Oakley accepted his appointment as an Arbitrator on the same day. On 25th October 2005, the Petitioner wrote to Respondent No. 1 through counsel denying that the CP had been entered into and declined to appoint an Arbitrator.

13. On 21st February 2006, Respondent No. 1 through counsel requested the Petitioner to appoint an Arbitrator and further stated that if the Petitioner failed to appoint their Arbitrator within 14 days Mr. Alan P. Oakley would be the sole Arbitrator by default. On 9th March 2006, Respondent No. 1 wrote to Mr. Alan Oakley appointing him as sole Arbitrator on account of the failure by the Petitioner to appoint their Arbitrator within 14 days. On 9th March 2006 itself, Mr. Oakley confirmed his appointment as sole Arbitrator.

14. On 9th January 2007, the counsel for Respondent No. 1 sent another letter and e-mail to the Petitioner granting another 14 days for appointment of an Arbitrator in accordance with Clause 19 of the CP. This was followed by another letter and e-mail on 20th February 2007. A third letter was sent on 25th June 2007 giving the Petitioner a final opportunity till 25th July 2007 to appoint their Arbitrator. On 22nd August 2007, a letter was sent to Mr. Alan Oakley requesting him to act as sole Arbitrator as the Petitioner was not willing to appoint its Arbitrator even when notices were sent to it. Mr. Oakley was again willing to accept his appointment as sole Arbitrator.

Proceedings in the District Court in Kakinada

15. On 14th October 2005, the Petitioner filed OSNo. 44 of 2005 in the Court of III Additional District and Sessions Judge ("ADJ"), Kakinada against Respondent No. 1 for damages since according to the Petitioner at that time the cargo was retained by the Master of the vessel. It filed an application for interim injunction to restrain the vessel from leaving the Kakinada Port. The Petitioner also filed an application to attach the ship.

16. On 11th November 2005, the learned ADJ, Kakinada dismissed the Petitioner's application for attachment of the vessel. On 14th November 2005, the vessel sailed from Kakinada Port. On 12th December 2005, the High Court of Andhra Pradesh dismissed the Petitioner's appeals being CMA Nos.1079-1080 of 2005 filed against the order dated 11th November 2005 of the District Court on the ground that the appeals had become infructuous.

17. Meanwhile, Respondent No. 1 filed an application I.A.No. 3861 of 2005 in the Court of the ADJ, Kakinada u/s 45 of the Act, seeking reference of the disputes between the parties to arbitration in London under the provisions of the English Arbitration Act, 1996 ("EAA") and to stay all further proceedings.

18. By a detailed order dated 30th November 2006, the learned ADJ at Kakinada allowed I.A.No. 3861 of 2005 filed by Respondent No. 1 and referred the parties to arbitration in London under the provisions of the EAA. OSNo. 44 of 2005 was deferred till the disposal of the arbitration. In the said judgment a positive finding was rendered by the learned ADJ that "from the documents like Ex.P-1 wherein the annexures to the application in OMPNo. 331 of 2005 clearly go to show that there appears to be a CP between the parties to the petition". The operative portion of the order reads as under:

In the light of the discussion had above and also by relying on the decisions referred to by the learned counsel for the Petitioners, it is clear that there appears to be a charter party entered into between the 1st Petitioner and the Respondent/Plaintiff and that as per the provisions of Sec.45 of the Arbitration and Conciliation Act, 1996 this Court shall refer the parties to arbitration under the charter party. So, the point is answered accordingly in favour of the Petitioners.

19. Aggrieved by the above decision, the Petitioner filed Civil Revision Petition No .6618 of 2006 in the High Court of Andhra Pradesh. The High Court in its order dated 15th June 2007 dismissed the said civil revision petition taking note of the judgment of this Court dated 28th September 2005 in OMPNo. 331 of 2005 to the effect that "Respondent did not deny the signatures on the first page of charter party which shows that agreement was signed at New Delhi and place of arbitration at London." It further noticed that the appeal filed against the said order being FAO (OS)No. 324 of 2005 was disposed of on 22nd January 2007 as having become infructuous. It was accordingly held that "the Petitioner cannot be permitted to contend that there is no arbitration clause in the charter party agreement."

20. Against the aforementioned judgment of the Andhra Pradesh High Court, the Petitioner filed SLP ("SLP") (Civil)No. 16109 of 2007. On 17th September 2007, notice was issued to Respondent No. 1 in the SLP.

Proceedings before the Arbitrator

21. On 9th October 2007, the learned Arbitrator, Mr. Oakley, wrote to the Petitioner asking it to submit its defence submissions. On 10th October 2007, the Petitioner informed Respondent No. 1 that since notice had been issued by the Supreme Court in the SLP, Respondent No. 1 should not continue with the arbitration. On the same day, counsel for Respondent No. 1 informed the Petitioner that while notice was received in the SLP, there was no stay of the arbitration proceedings. By a letter dated 30th October 2007 one Mr. Ashvinder Kalra, Advocate for the Petitioner, wrote a letter to Mr. Oakley acknowledging receipt of the letter dated 22nd August 2007 from Respondent No. 1 and requesting for extension up to six weeks for the Petitioner to file its defence submissions.

22. Respondent No. 1 filed its statement of claim before Mr. Oakley on 3rd October 2007 under the London Maritime Arbitrators Association ("LMAA"), Rules against the Petitioner and another firm M/s. Shakti International. On 9th October 2007 Mr. Oakley informed the Petitioner that as was the normal practice in London maritime proceedings, he would allow the Petitioner 28 days to serve defence submissions and that, therefore, the defence submissions should be submitted by 5th November 2007.

23. On 30th October 2007 after receiving the letter from the Petitioner about the pendency of the SLP in the Supreme Court and requesting him not to proceed, Mr. Oakley wrote a letter to the Petitioner on 31st October 2007, reproducing the order passed by him on 9th October 2007 and stated:

As you should be aware, clause 74 of the Charterparty makes provision for any dispute between the parties to be settled by way of arbitration in London in accordance with English Law. Therefore, I am satisfied that I have jurisdiction on this matter regardless on the proceeding in the Indian court to which you refer.

Therefore, my order of service of defence by latest 5th November 2007 remains in force and must be complied with. In the event that the respondents fail to comply with the order, I shall, on the application of the claimants, make a final and preemptory order for the service of defence within 7 days thereafter. The order will carry severe sanctions in the event that the respondents fail to comply.

24. On 1st November 2007, the Petitioner wrote to Respondent No. 1 about the proceedings before the Supreme Court and requested that the arbitral proceedings may not be continued. On 6th November 2007, Respondent No. 1 wrote to Mr. Oakley as under:

We refer to the above matter. The Respondents have failed to serve a Defence.

Please be advised that the arbitration proceeding in London is being dealt with by this office albeit proceedings in the Supreme Court are being dealt with by our Bombay office.

Our Bombay office has forwarded copies of the recent exchanges.

It is correct that an application made by the Respondents is pending before our Supreme Court. The Supreme

Court did not grant a stay of the arbitration proceedings.

The Respondents have alleged in correspondence with our Bombay office that the Supreme Court had indicated that the arbitral tribunal in London would not be passing any adverse order and would be granting time. No such indication was given at the hearing on 26th October 2007.

The matter is listed for hearing before our Supreme Court on 16th November 2007.

Solely on the basis of respect for our Supreme Court, we hereby advise that our clients are agreeable to the extension requested by the Respondents of six weeks.

The Respondents requested an extension of six weeks in their letter of 30th October 2007. We calculate six weeks from 30th October 2007 expires on 11th December 2007, which allows the Respondents an exceedingly generous period of time in the context of an arbitration which is to be conducted in London on LMAA terms.

25. Thereafter the arbitral proceedings did not continue till the judgment of the Supreme Court.

The Supreme Court order

26. On 23rd September 2008, the Supreme Court dismissed Civil Appeal No .5796 of 2008 thereby affirming the judgment dated 15th June 2007 of the High Court of Andhra Pradesh dismissing the Petitioner's Civil Revision Petition No .6618 of 2006. The Supreme Court held that there did exist a CP between the parties. Paras 23 to 25 of the said judgment which are relevant for this purpose

read as under:

23. In the present case therefore, we conclude that there existed a charter party between the parties to the suit which can be identified from the correspondence between the parties to that effect as also from the fixture note and the bill of lading signed by the parties.

24. As per the provisions of the Section 45 of the Act, it is clear that at the request of one of the parties or any person claiming through or under him the court shall refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed. In the present case, there appears to be no such thing to say that the so called agreement entered into by the parties is in any way to be termed as null and void or inoperative or incapable of being performed. It is further observed by us that the claims raised by the appellant before us about the non-existence of the charter party agreement can also be raised by the same before the arbitral tribunal at London. Under the English Arbitration Act 1996, as per Sections 30 and 31 of the said Act, the arbitral tribunal may rule on its own jurisdiction and also can decide on the existence of a valid arbitration agreement. This is similar to the provisions u/s 16 of the Act, whereby the arbitral tribunal can decide on its jurisdiction as also on the existence or validity of the arbitration agreement.

25. In the light of the discussions above-mentioned, we are convinced that there is a charter party agreement existing between the parties and, that as per the provisions of Section 45 of the Act, the High Court as well as the trial court were fully justified in allowing the application preferred by the respondent and accordingly, impugned order must be affirmed.

Events following the Supreme Court order

27. Within two days of the judgment of the Supreme Court, the Petitioner, on 25th September 2008, wrote the following letter to Respondent No. 1:

Under instructions from and on behalf of our clients M/s

Shakti Bhog Food's Limited we address you as under:

1. Without prejudice to all our client's rights and contentions including but not limited to the contention that there is no valid contract, no valid arbitration clause and the arbitration clause as alleged is null, void, inoperative and incapable of being performed, our clients in order to protect its rights has nominated and appointed Justice K. Ramaswami, Retd. Judge of the Hon'ble High Court of Delhi. This may however, be not construed to mean submission of our clients to any arbitration/valid arbitration or acceptance to the alleged arbitration clause/agreement/contract. Needless to mention that competence, jurisdiction and the legal issues are to be decided first as a preliminary issue.

2. This is without prejudice to our client's rights and contentions and our client reserve all its rights and contentions.

28. On 15th October 2008, Respondent No. 1 filed a suit for damages and costs against the Petitioner in the South District Court of New York, USA and on the same day an ex-parte order of maritime attachment was passed. On 18th October 2008, Respondent No. 1 disputed the validity of the Petitioner nominating its Arbitrator and reiterated that Mr. Oakley's appointment as sole Arbitrator stands. Referring to Section 17 of the EAA, it was stated by the counsel for Respondent No. 1 in the said letter dated 18th October 2008 that it was not open to the Petitioner "to purport to appoint an Arbitrator at this stage".

29. On 20th October 2008, Respondent No. 1 wrote to Mr. Oakley asking him to reconfirm his appointment as sole Arbitrator and marked a copy of the said letter to the Petitioner. A copy of the Petitioner's letter dated 25th September 2008 and the reply of Respondent No. 1 thereto were enclosed with the said letter. Immediately on receipt of the said communication, Mr. Oakley sent a letter on 21st October 2008 to the Petitioner with a copy to counsel for Respondent No. 1 confirming that he had accepted his appointment as a sole Arbitrator. He ordered the Petitioner to submit its defence submissions on or before 17th November 2008, failing which a final and voluntary order would result which would carry severe sanctions.

30. On 4th November 2008, counsel for the Petitioner wrote a detailed letter to the counsel for Respondent No. 1 disputing the validity of the appointment of Mr. Oakley as sole Arbitrator. It pointed out that as per the arbitration clause in the CP, the parties were to agree on the appointment of the sole Arbitrator and thereafter to undertake the exercise of an Arbitrator being appointed by each party and the third Arbitrator being appointed by the two Arbitrators. In particular, the Petitioner pointed out as follows:

It may however be noted that your client's proposal to Mr. Alan P. Oakley to accept his appointment as sole Arbitrator was time and again revoked / abandoned / waived by Mr. Oakley irrespective of his earlier acceptance. As a matter of fact Mr. Alan P. Oakley never acted as sole Arbitrator and in fact agreed to await the judgment of the Hon'ble Supreme Court on the SLP filed by our client and thus proceeded to agree to act as the alleged sole Arbitrator vide communication dated 20th October 2008 after the decision of the Hon'ble Supreme Court on 23rd September 2008. Our client however, immediately after the judgment of the Hon'ble Supreme Court dated 23rd September 2008 and prior to Mr. Oakley's acceptance as sole Arbitrator on 20th October 2008, vide communication dated 25th September 2008 appointed Mr. Justice K. Ramamoorthy (Retired Judge of High Court of Delhi) (though wrongly and inadvertently typed in the letter dated 25th September 2008 as K. Ramaswamy). The acceptance of Mr. Alan P. Oakley as sole Arbitrator on 20th October 2008 after the appointment of Mr. Justice K. Ramamoorthy (Retd.) as Arbitrator by our clients vide their communication dated 25th September 2008 is bad in law, malafide and against the public policy.

It is also a matter of record that the parties by agreement (kindly refer to your

letter dated 6th November 2005) agreed to await the judgment of the Hon''ble Supreme Court before any action pursuant to the alleged arbitration agreement is undertaken and our client within two days of the judgment of the Hon''ble Supreme Court appointed Mr. Justice K. Ramamoorthy (Retd.) as their Arbitrator. It is noteworthy to mention that since validity of the alleged arbitration agreement itself was pending before the Courts, no proceedings were held by Mr. Alan P. Oakley either as your Arbitrator or as alleged sole Arbitrator." (emphasis supplied)

31. Thereafter the Petitioner raised the question of impartiality of Mr. Oakley to act as an Arbitrator. The Petitioner referred to the ex-parte communication between Mr. Oakley and Respondent No. 1 as raising disputes and doubts about his independence and impartiality. It stated that the unilateral appointment of Mr. Oakley as sole Arbitrator by Respondent No. 1 was "contrary to public policy requirement for the equality between the parties in designating Arbitrators of a three person Arbitral Tribunal". It concluded its letter as under:

This is however, without prejudice to all the rights and contentions of our clients including the objection that there exist no Charter Party, Arbitration agreement and an objection that the Arbitration Tribunal lacks substantive jurisdiction which are required to be decided at the outset of the proceedings by the properly constituted Arbitral Tribunal. The determination of this preliminary point of jurisdiction attains significance in all the facts and circumstances of the case. This communication shall not be treated as submission to the jurisdiction of Mr. Alan P. Oakley as sole Arbitrator.

32. Apart from marking a copy of the above letter to Mr. Oakley, the Petitioner separately wrote to him on the same day as under:

This is in response to your communication dated 20th October 2008. At the very outset we submit that neither copy of the email dated 20th October 2008 nor copy of the application filed by Bose & Mitra of which cognizance has been taken by you, has been sent to us or to our clients either by your goodself or by Bose & Mitra.

In view of the submissions made by us in our communication to Bose & Mitra copy whereof is forwarded to you and is also attached herewith, since the alleged Arbitral Tribunal of your good office to act as the sole Arbitrator is not properly constituted, our client reserve their right to seek appropriate legal remedy. We reiterate that your good office lacks the substantive jurisdiction. The properly constituted Arbitral Tribunal has to determine the preliminary point of jurisdiction including but not limited to existence and validity of the Charter Party and the alleged Arbitration agreement.

You will kindly appreciate that you ought to have forwarded to us copy of the email of Bose & Mitra dated 20th October 2008 as well as the application filed by Bose & Mitra which are referred in your communication dated 20th October 2008 before any date for submission of defence could have been fixed. This may

however, be not treated to be acceptance of your good office as a sole Arbitrator or this objection as any defence submission. We hereby reiterate our submission made in the attached communication of the date addressed to Bose & Mitra.

33. Mr. Oakley on 5th November 2008 wrote to the parties as under:

I refer to Sanghi & Company's faxes of earlier today. Whilst I note that they represent Shakti Bhog Food's Limited, I would ask whether they also represent Shakti International.

It would not be appropriate for me to comment on either of their faxes other than to say that I am satisfied that I have been properly appointed as sole Arbitrator in this reference in accordance with the terms of the arbitration clause in the Charterparty and the provisions of the Arbitration Act, 1996.

I maintain my order that the Respondents must serve their Defence Submissions (and Counterclaim submissions, if any) on or before 17th November 2008. In the event that the Respondents fail to comply with this order, the Claimants may apply for a final and peremptory order with appropriate sanctions.

34. On 17th November 2008, an application was sent by the Petitioner by e-mail to Mr. Oakley. This was a detailed application raising four distinct points as under:

- (i) Your good self lacks substantive jurisdiction; and
- (ii) The proceedings are being improperly conducted; and
- (iii) That there has been a failure to comply with the alleged arbitration agreement (the existence and /or validity thereof is being denied and disputed); and
- (iv) The Tribunal is not fully constituted as per the alleged arbitration agreement.

35. As regards the constitution of the Tribunal it was pointed out by the Petitioner in the above application that Respondent No. 1 had appointed Mr. Oakley as Arbitrator without first undertaking the exercise of appointment of the sole Arbitrator by consent. It was pointed out that "it is only after parties' failure to agree upon a sole Arbitrator next exercise of appointment of one Arbitrator by each party and the third Arbitrator appointed by the two Arbitrators ought to have been undertaken". A copy of the said application was sent to counsel for the Respondent No. 1. The Petitioner made it clear that the filing of the said application should not be construed as its submissions to the jurisdiction of Mr. Oakley. The Petitioner also requested for a personal/oral hearing.

36. In its reply dated 18th November 2008 to the above application, Respondent No. 1 took the stand that the Petitioner having failed to avail the opportunity of appointing its own Arbitrator, Mr. Oakley had become the sole Arbitrator. It was maintained that since by letter dated 30th October 2007, the Petitioner had sought time to file its defence submissions, it had submitted to the jurisdiction of the Arbitrator.

37. In response to the Petitioner's application, Mr. Oakley wrote as under:

I refer to Sanghi & Company's email of earlier today. However, my order of 4th November remains in force. Therefore, if the Respondents fail to comply with that order by today, the Claimants may make an application for me to proceed to my final arbitration Award, when I will also address any issues raised by the Respondents in Sanghi & Company's email of earlier today.

38. This was followed by a letter addressed to Mr. Oakley on 18th November 2008 by counsel for Respondent No. 1 requesting him to proceed to make "an order in final and peremptory terms in relation to service of defence and counterclaim, if any, submissions." It was suggested that the final date should be 8th December 2008.

39. The Petitioner then filed OMPNo. 604 of 2008 in this Court on 17th November 2008 u/s 14 of the Act read with Sections 17 (3) and 24 (1) of the EAA requesting for terminating the mandate of Mr. Oakley. Notice was issued in the said petition on 18th November 2008. On the same day, Respondent No. 1 wrote to Mr. Oakley withdrawing its application for the final and peremptory order referring to the pendency of the petition in this Court. On 18th November 2008, a statement was made by the Respondent No. 1 before this Court that it would not proceed with the arbitration. However, on the next date i.e. 26th November 2008, Respondent No. 1 informed this Court that it would not be able to continue the said statement. The petition was then fixed for 3rd December 2008.

40. On 27th November 2008, Respondent No. 1 informed Mr. Oakley that their application for peremptory order was renewed. On the other hand, the Petitioner requested Mr. Oakley to await the decision of this Court. However, on 27th November 2008 after referring to both the requests, Mr. Oakley passed a final and peremptory order that the Petitioner would serve Respondent No. 2 its defence submissions and counter-claims, if any, on or before 15th December 2008. In the meanwhile, on 17th December 2008 the hearing of OMPNo. 604 of 2008 was adjourned by this Court. On 17th December 2008, Mr. Oakley noted that he was proceeding to make his Award.

41. On 18th December 2008, an e-mail was sent by Mr. Oakley to counsel for the Respondent No. 1 as under:

I refer to your email earlier today. I reviewed the submissions/evidence yesterday and have already started drafting my Award which I expected to finish later today-and to publish my Award later today. Given your email I will delay any further action on this case. However, I refer you to Section 34(h) of the Arbitration Act, 1996 as regards the issue of an oral hearing.

Kindly let me know how you wish me to proceed.

42. Respondent No. 1 then informed Respondent No. 2 that they were still awaiting instructions as regards whether it applied to the hearing. On 19th December 2008, Respondent No. 1 wrote to Mr. Oakley *inter alia* stating as

under:

Having regard to the history of delay tactics and vexatious proceedings brought by the Respondents in India, and having regard to the fact that any enforcement proceedings would be in India, we would respectfully ask that there be an oral hearing with a view to putting an end to any such further delay tactics and vexatious proceedings in India.

We would respectfully ask that the hearing be fixed for one day and the Respondents be invited to attend.

43. On the same day, Mr. Oakley fixed the date for oral hearing in London on 28th January 2009 at the venue to be arranged by Respondent No. 1. In terms of the communication dated 16th January 2009 of Respondent No. 1 the date of hearing was fixed for 28th January 2009 at Essex Court Chambers, 24, Lincoln's Inn Fields, London. It appears that Respondent No. 1 filed its written submissions before Mr. Oakley on 28th January 2009. The Petitioner states that it was not served a copy of the written submissions filed by Respondent No. 1.

44. On 11th February 2009, the learned Arbitrator passed the impugned Award. It appears that on the same day, Respondent No. 1 also withdrew its claim against M/s. Shakti International by filing an application before Mr. Oakley without prior notice to the Petitioner. M/s. Shakti International in any event was not a party to the CP.

The impugned Award

45. The learned Arbitrator in paras 19 to 30 of the impugned Award concluded that there was a binding arbitration agreement between the parties. He referred to the fact that the fixture recap issued on 18th July 2005 by Brisk Marine Services ("BMS"), who were the brokers of the Petitioner, identified the Petitioner as the charterer. On 28th July 2005, MS sent an e-mail to Respondent No. 1 confirming that the Petitioner had signed the front page of the CP and thereafter a copy had been sent to Respondent No. 1. After referring to the judgment of this Court dated 28th September 2005, that of the District Court at Kakinada, the High Court of Andhra Pradesh and the Supreme Court, the learned Arbitrator held that there was a binding and valid arbitration agreement between the parties which provided for arbitration at London in accordance with English Law.

46 The learned Arbitrator then turned to the issue relating to proper constitution of the Tribunal. He referred to Part-II of the general conditions (GENCON) form which provided for the applicability of Clause 19 (a) of Part-II. In terms of the said clause, on receipt by one party of the nomination in writing of the other party's Arbitrator, that party shall appoint their Arbitrator within 14 days, failing which the decision of the single Arbitrator appointed shall be final. The learned Arbitrator referred to Sections 30 and 31 of the EAA which enabled him to rule on his own jurisdiction. In relation to the claim of the Petitioner that the Respondent No. 1 had itself revoked its earlier appointment of Mr. Oakley by its

subsequent request to him to re-confirm his appointment, it was observed in para 50 of the impugned Award as under:

50. The Charterers also contended that the Owners revoked and/or abandoned my appointment as sole Arbitrator on a number of occasions. However, I disagree since the arbitration clause i.e. Clause 19 (a) of Part II of the Charterparty, provides that in the event of the respondent's failure to appoint an Arbitrator within 14 days, the decision of the first Arbitrator shall be final. In other words, following the Charterers' failure to appoint an Arbitrator within 14 days of the first notice given by the Owners, i.e. on 17th October 2005, my decision was thereafter binding on the parties, unless the parties agreed otherwise. As it was, the Owners then offered the Charterers a number of opportunities to appoint their own Arbitrator within certain time limits, but they still chose not to do so. The fact that the Owners offered the Charterers further opportunities to appoint their Arbitrator does not negate my original appointment as sole Arbitrator. Any later agreement to allow the Charterers to appoint an Arbitrator would, in effect, lead to my earlier appointment as sole Arbitrator being varied by agreement of the parties.

47 As regards the charge of the Petitioner that he was neither independent nor impartial, the learned Arbitrator pointed out that he had sent copies of all correspondence to the Petitioner. As regards to the Petitioner's allegations that Mr. Oakley had not marked a copy of his acceptance of the invitation of Respondent No. 1 to become sole Arbitrator, he observed that "although my letter of 20th October 2008 refers to an e-mail received earlier that day from the Owners' legal representative, I note that copies of both letters were sent to the Charterers and their legal representatives." As regards to the Petitioner doubting his impartiality, the learned Arbitrator observed as under:

In any event, I refute any suggestion that I am not independent or impartial. By way of background, I am a full time Arbitrator and Full Member of the London Maritime Arbitrators Association and accept approximately 300 arbitration appointments annually. I have made more than 1,000 arbitration awards in the past 5 years. I am a Fellow of both the Institute of Chartered Shipbrokers and the Chartered Institute of Arbitrators. I am also a member of the Baltic Exchange in the City of London (where I was a Director for 10 years until 2005) and a Grain and Feed Trade Association (GAFTA) Arbitrator. In addition, I have been a Magistrate in England and Wales since 2006.

48. In paras 53 and 54, the learned Arbitrator concluded:

53. In conclusion, I am satisfied from the evidence before me that the Charterparty included an agreement to refer disputes to arbitration in London in accordance with English law. I am also satisfied that the Owners gave proper notices of arbitration to the Charterers and on numerous occasions invited them to appoint their own Arbitrator, all of which were ignored. I therefore accept that I was properly appointed as sole Arbitrator in the reference in accordance with

the terms of the arbitration agreement and therefore have substantive jurisdiction in the matter. The Charterers later attempted to appoint Mr. Justice K. Ramaswamy as their Arbitrator. However, his appointment was made too late and was invalid.

54. Therefore, pursuant to Section 30 of the Arbitration Act, 1996, I rule that there was a valid arbitration agreement and that the Tribunal was properly constituted with my appointment as sole Arbitrator. Since the Charterers have objected to my substantive jurisdiction and in circumstances where I have determined that I do have power to rule on my own jurisdiction, I have therefore dealt with the objection in this Award on merits pursuant to my powers u/s 31 of the Act.

49. The learned Arbitrator then proceeded to decide the merits of the matter and concluded that the Petitioner failed to perform its obligations under the CP. It had detained the vessel unnecessarily and avoided responsibility. The Petitioner's action led the vessel to be further detained and it was only through intervention of the Court that the vessel was allowed to sail from Kakinada Port. The Petitioner was held liable for the damages and losses suffered by Respondent No. 1. USD 1,635,772.88 along with interest on the said sum at a commercial rate from 15th October 2005 was awarded to Respondent No. 1.

Present proceedings

50. On 15th April 2009, the Petitioner filed the present petition in which notice was directed to be issued on 17th April 2009.

51. Although the arbitral record was requisitioned by the order dated 20th August 2010, it was noticed by the Court that even on 2nd August 2011 the arbitral record had not been received. A reminder was directed to be sent for the next date. On 29th September 2011, it was again ordered that the Registry shall summon the arbitral record from Respondent No. 2 by sending an international courier letter. The Petitioner filed I.A.No. 4902 of 2012 requesting compliance with the order dated 29th September 2011. On 19th March 2012, following order was passed by this Court:

1. At the outset Mr. Majumdar, learned counsel for Respondent No. 1 states that Respondent No. 1 has no objection as regards the applicability of Part-I of the Arbitration and Conciliation Act, 1996 to the Award under challenge in this petition. He also stated that the arbitral record has been filed by the Respondent under DiaryNo. 1587630. Although the office noting acknowledges that the filing of the said documents, they are not part of the Court record. The Registry is directed to immediately trace the same out and place them on record.

2. Mr. R.K. Sanghi, learned counsel for the Petitioner acknowledged receipt of the copy of the documents filed by the Respondent.

3. Mr. Majumdar produces a copy of the email dated 20th November 2011 sent by the learned Arbitrator to the Petitioner with a copy marked to learned counsel

for Respondent No. 1 where inter alia the learned Arbitrator has stated that "since the Award was not appealed in the English High Court within the statutory time limit, my files have been destroyed". Mr. Majumdar further points out that a copy of the Award was already served on the Petitioner on the basis of which the present petition has been filed. Mr. Sanghi disputed this submission. He insisted that the Award was not served on the Petitioner in accordance with law. This issue will be considered on the next date.

4. List for hearing on 17th May 2012 at 2.15 pm.

52. Arguments on behalf of the Petitioner were begun by Mr. N.K. Kaul, learned Senior Advocate and continued by Mr. R.K. Sanghi, learned Advocate. Mr. Amitava Mazumdar, learned Advocate, made submissions on behalf of the Respondent No. 1. Written submissions were filed by both parties.

Existence and validity of the CP

53 The Petitioner submits that the impugned Award is liable to be set aside u/s 34 (2) (a) (ii) of the Act as there was no valid arbitration agreement between the parties. The Petitioner questions the existence and validity of the CP dated 18th July 2005 and thereby the arbitration clause in the CP. It is in particular pointed out that the original of the CP has not been produced by Respondent No. 1 at any time either in the arbitral proceedings or this Court.

54. As noticed earlier, in the previous rounds of litigation between the parties, the concurrent opinion of this Court, of the learned ADJ at Kakinada, of the High Court of Andhra Pradesh and of the Supreme Court was that there did exist a valid CP, and therefore an arbitration agreement, between the parties. However, the Petitioner contends that the observations of the Supreme Court were only a prima facie view as explained in *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another*, . In para 24 of its judgment dated 23rd September 2008, the Supreme Court granted the Petitioner the liberty of raising the issue about the non-existence of the CP before the arbitral Tribunal at London. It was observed that the said Tribunal could under Sections 30 and 31 of the EAA also decide the question of validity of the arbitration agreement.

55. The copy of the fixture note/CP signed by the Petitioner on the cover page as faxed to Respondent No. 1 formed part of the record of the proceedings u/s 9 of the Act in this Court. The inability of Respondent No. 1 to produce the original of the CP is consistent with its case that the original signed CP was not returned to it by the Petitioner. The signature on the front page of the fixture note was, as noted by this Court in the order dated 28th September 2005, not denied by the petitioner .Further, the e-mail dated 28th July 2005 from the Petitioner's broker BMS to Respondent No. 1, as noted by the learned Arbitrator, confirmed that the Petitioner had indeed signed the front page of the fixture note. Notwithstanding the decisions of the courts in this regard in the earlier rounds of litigation, the learned Arbitrator has examined this issue and concluded that there did exist a valid CP between the parties. This was a plausible view to take. This Court

therefore rejects the plea of the Petitioner that, in terms of Section 34 (2) (a) (ii) of the Act, there was no valid CP, and therefore no valid arbitration agreement, between the parties.

Constitution of the arbitral Tribunal

56 The next objection of the Petitioner, that the impugned Award should be set aside u/s 34 (2) (a) (v), concerns the proper constitution of the arbitral Tribunal. It is contended that even if one were to assume that there was a valid CP agreement, then Clause 19 (c) of the GENCON form would apply since the word "London" was filled in Box 25. It is submitted that consequently the procedure under Sections 15, 16 and 18 EAA would then apply and not Clause 19 (a) read with Section 17 as contended by Respondent No. 1. The Petitioner submits that in the first place no effort was made by Respondent No. 1 to get the Petitioner to agree to a sole Arbitrator. Respondent No. 1 straightaway nominated its Arbitrator and called upon the Petitioner to nominate its Arbitrator within fourteen days. The failure by the Petitioner to do so would require Respondent No. 1 to apply to the Court u/s 18 EAA for the appointment of an Arbitrator. It is submitted that Section 17 EAA had no application because the parties had not agreed that in the event of default of the Petitioner nominating its Arbitrator, the one appointed by Respondent No. 1 would be the sole Arbitrator. Since Respondent No. 1 did not u/s 18 EAA approach the Court in London for the appointment of an arbitral Tribunal, the declaration by Mr. Oakley that he had become the sole Arbitrator was invalid.

57. Alternatively it is submitted by the Petitioner that even in terms of Clause 19 (a) read with Section 17 EAA, the Petitioner had not failed to nominate its Arbitrator. With Respondent No. 1 seeking confirmation from Mr. Oakley even as late as 20th October 2008 that he was the sole Arbitrator it was plain that Respondent No. 1 was not relying on his earlier confirmations to that effect. As far as the Petitioner was concerned, it waited for the conclusion of the proceedings in the Supreme Court. No sooner the position u/s 45 of the Act became final with the judgment of the Supreme Court on 23rd September 2008, the Petitioner on 25th September 2008 nominated Justice Ramamoorthy as its Arbitrator. With Respondent No. 1 having sought confirmation of Mr. Oakley's appointment only thereafter on 20th October 2008, there was no failure on the part of the Petitioner to nominate its Arbitrator.

58. On the other hand, it is submitted by the counsel for Respondent No. 1 that since no figure was filled in Box 25 of the GENCON form, the default Clause 19 (a) would apply. Both under the said clause and section 17 of the EAA unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an Arbitrator and one party refuses to do so, or fails to do so within the time specified, the other party, having duly appointed its Arbitrator, may give notice in writing to the party in default that it proposes to appoint its Arbitrator to act as sole Arbitrator. The contention of Respondent No. 1 is that it had repeatedly granted extension of time to the Petitioner to appoint its Arbitrator.

Reference is made to the letters dated 21st February 2006, 9th January 2007, 27th February 2007 and 25th June 2007. Since the Petitioner failed to nominate its arbitrator, Mr. Oakley became the sole Arbitrator by default. He confirmed his appointment as sole Arbitrator on 22nd August 2007.

59 The Court proceeds to consider the above submissions by beginning with an examination of the copy of the fixture note/CP as produced by Respondent No. 1. The relevant portion is BoxNo. 25 of Part I of the GENCON Form and it reads thus:

25. Law and Arbitration (state 19 (a), 19 (b) or 19 (c) of Cl. 19; if 19

(c) agreed also state Place of Arbitration) (if not filled in 19 (a) shall apply) (Cl. 19)" (emphasis supplied)

The space below the above lines is not left blank. The word "London" has been typed in that space. Going by the highlighted portion of the instruction, even if the number 19 (c) was not stated it is obvious since the place of arbitration i.e. London was stated it was Clause 19 (c) that applied and not 19 (a). Yet from the copy of the CP that has been produced it is seen that Clauses 19 (b) and 19 (c) have been scored out, and this was perhaps not correct considering the choice of place as "London" was indeed indicated in Box 25. Clause 19 (c) reads: "Any dispute arising out this Charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this charter party" (emphasis supplied). Consequently it appears that the Petitioner is right in its contention that with the parties having agreed to be governed by Clause 19 (c) it would be Sections 15, 16 and 18 EAA which would be the law governing the arbitration and not Clause 19 (a) and Section 17 EAA. u/s 15 (3) EAA, "if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator". u/s 16 (3) EAA, where the tribunal is to consist of a sole arbitrator "the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so." Upon failure to so appoint a sole Arbitrator then u/s 18 (2) EAA "any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section." However the learned Arbitrator missed noticing the purport of the filling up BoxNo. 25 with the name of the place as "London" and simply accepted the case of Respondent No. 1 that it was Clause 19 (a) read with Section 17 EAA that applied. Therefore, there was a basic error in the constitution of the arbitral Tribunal by resorting to Clause 19 (a) and not Clause 19 (c).

60. Even if one were to accept the case of Respondent No. 1 that it was Clause 19 (a) read with Section 17 that applied, the constitution of the arbitral Tribunal with Mr. Oakley as sole Arbitrator was, for the reasons explained hereafter, legally flawed. Clause 19 (a) of the CP reads as under:

19. Law and Arbitration

(a) This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.

61. Clause 19 (a) is similarly worded as Section 17 of the EAA which reads as under:

17. Power in case of default to appoint sole arbitrator.

(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(2) If the party in default does not within 7 clear days of that notice being given

(a) make the required appointment, and

(b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

62. Under Clause 19 (a), where the parties failed to agree upon a sole Arbitrator, one Arbitrator was to be appointed by each party. There had to be a letter in the first instance from Respondent No. 1 to the Petitioner suggesting the name of the sole Arbitrator. There appears to be no such letter by Respondent No. 1 to the Petitioner regarding the appointment of a sole Arbitrator. The first letter from Respondent No. 1 to the Petitioner was on 17th October 2005 by which it issued notice of appointment of Mr. Alan P. Oakley as sole Arbitrator. The relevant portions of the said letter read as under:

Dear Sirs,

Re: M.V. Kapitan Nazarev C/P dated 18th July 2005

We act on behalf of Kola Shipping Limited, Cyprus the disponent owners of the

above vessel with whom you entered into the aforesaid Charterparty. Pursuant to disputes and differences which have arisen under the said Charterparty, we hereby advise that we on behalf of our clients have appointed Mr. Alan Oakley as arbitrator in respect of all disputes arising out of the said Charter party. Mr. Alan Oakley has confirmed acceptance of this appointment.

We call upon you to appoint your arbitrator within fourteen (14) days from receipt of this message, failing which as per the Charterparty Arbitration Clause the decision of the single arbitrator appointed shall be final and binding on both parties.

63. Clearly Respondent No. 1 appears to have proceeded with the procedure contemplated by the second part of Clause 19 (a) perhaps on the presumption that there might be no agreement between the parties on the appointment of a sole Arbitrator. The letter dated 17th October 2005 of Mr. Oakley was also not an acceptance of his appointment strictly in terms of Clause 19 (a), since he states that he is accepting the appointment in accordance with current LMAA terms. As already noticed, on 25th October 2005 the Petitioner refused to recognise the above appointment and denied that there was an arbitration clause.

64. On 21st February 2006, Respondent No. 1 again asked the Petitioner to appoint its Arbitrator within 14 days. On 9th March 2006, it again wrote to Mr. Oakley appointing him as sole Arbitrator and asked for his confirmation. Mr. Oakley on 9th March 2006 confirmed that he had been properly appointed as sole Arbitrator in accordance with the arbitration clause and the EAA. For a third time Respondent No. 1 wrote to the Petitioner on 20th February 2007 again referring to Clause 19 (a) and asked the Petitioner to appoint its Arbitrator within 14 days. This appears to have been repeated on 25th June 2007. There was no sanctity attached even by Respondent No. 1 to the time limit under Clause 19 (a). This cannot but be construed as a waiver by Respondent No. 1 of the said time limit. Also by its own conduct Respondent No. 1 gave up its earlier appointment of Mr. Oakley as Arbitrator since by its letter dated 22nd August 2007 it asked him to "again accept appointment as sole Arbitrator". On the same day, Mr. Oakley again accepted his appointment as sole Arbitrator. As will be presently seen, even this appointment was not final. What was also missed in this process both by Respondent No. 1 and also by the learned Arbitrator is that Clause 19 (a) of the CP required the parties to first fail to agree on the sole Arbitrator and then commence the process of appointing an Arbitrator each. By repeatedly seeking the confirmation of the appointment of Mr. Oakley as sole Arbitrator, Respondent No. 1 on its own failed to adhere to the time limits in terms of Clause 19 (a) read with Section 17 EAA. It adopted a procedure not consistent with either provision.

65. Between 22nd August 2007 and 23rd September 2008 when the matter was pending in the Supreme Court of India, no arbitral proceedings took place. It appears that both Respondent No. 1 and Mr. Oakley decided to await the outcome of those proceedings, as did the Petitioner, despite there being no stay

as such of the arbitral proceedings. Within two days of the judgment of the Supreme Court, the Petitioner by its letter dated 25th September 2008 appointed Mr. Justice K. Ramamoorthy (Retd.) as its Arbitrator. A copy of this letter was sent to Mr. Oakley. In response to the said letter, Respondent No. 1 on 20th October 2008 wrote a detailed e-mail to Mr. Oakley seeking "re confirmation of his appointment as sole Arbitrator, albeit we appreciate that this will be for the third time". Respondent No. 1 offered the following explanation for doing so:

You will find from your file that you first accepted appointment as sole Arbitrator on 9th March 2006. Thereafter, the Respondents engaged in making various applications to the Indian Courts. The applications were dismissed by the High Court of Andhra Pradesh by an order dated 15th June 2007 (a copy of which is at pages 105 to 114 of the documents enclosed with the Claim Submissions). There has been no "stay" of the arbitration proceedings as from the date of that order.

Following the above order the Respondents were given a final opportunity to appoint their Arbitrator in our letter dated 25th June 2007. That letter stated that no further opportunity would be given. You will see from your file that you reconfirmed your appointment as sole Arbitrator on 22nd August 2007.

Thereafter the Respondents filed an appeal in the Supreme Court of India and in the appellate proceedings before the Supreme Court the Respondents did not obtain any stay of the arbitration proceedings in London. It is now the case that the Supreme Court has dismissed the entirety of the Respondents' applications and affirmed the decision of the Andhra Pradesh High Court referred to above.

In light of the enclosed exchanges between the parties' solicitors, we suggest it would be helpful if you were to reconfirm your appointment as sole Arbitrator, albeit we appreciate that this will be for the third time.

66. On 21st October 2008, Mr. Oakley simply obliged Respondent No. 1 by stating as under:

I refer to Bose & Mitra's email of earlier today and confirm that I have accepted the appointment as sole Arbitrator in the above reference.

In accordance with Bose & Mitra's application I now order the Respondents to serve defence submissions (and counterclaim submissions, if any) on or before 17th November 2008.

Given the length of time that has elapsed since claim submissions were served, I expect the Respondents to comply with this order. Failure to do so will, on the application of the Respondents, most likely result in a final and peremptory order which will carry severe sanctions in the event of non-compliance.

I now await the Respondents' service of defence submissions as ordered.

67. The above decision of Mr. Oakley was strange given the fact that he did not react to the fact that the Petitioner had in the meantime appointed its Arbitrator. He was certainly obliged to do so as it concerned his jurisdiction to proceed to

act as sole Arbitrator. The fact that even as on 20th October 2008 Respondent No. 1 was seeking confirmation that he was sole Arbitrator shows that the said position was not "final" as on that date even according to Respondent No. 1. It can be seen from the above exchange of correspondence that the learned Arbitrator was fully aware of the nomination by the Petitioner of its Arbitrator and yet did not choose to acknowledge the consequences of such nomination. If indeed even as of 20th October 2008 the position regarding Mr. Oakley having become the sole Arbitrator by default was admittedly not final, then it could not be said that the Petitioner had by then not nominated or had failed to nominate its Arbitrator. It did so on 25th September 2008, thereby satisfying the requirement of Clause 19 (a) of the CP read with Section 17 EAA. In accepting his appointment as sole Arbitrator for the fourth time on 21st October 2008, and not referring to the nomination made almost a month earlier by the Petitioner of its Arbitrator, Mr. Oakley acted contrary to both Clause 19 (a) of the CP and Section 17 EAA.

68. The manner in which Mr. Oakley rejected the objections raised by the Petitioner in its letter dated 4th November 2008 to his jurisdiction was unsatisfactory. He simply stated: "It would not be appropriate for me to comment on either of their faxes other than to say that I am satisfied that I have been properly appointed as sole arbitrator..." For a second time when by letter dated 17th November 2008 the Petitioner raised detailed objections, Mr. Oakley said in his e-mail of 17th November 2008 that his "order dated 4.11.2008 remains in force" and that if the Petitioner failed to comply with the order by that day Respondent No. 1 could make an application before him to proceed to pass the final arbitration Award. In failing to give any reasons for rejecting the Petitioner's objections as to his jurisdiction, Mr. Oakley failed to act reasonably.

69. In the impugned Award, the learned Arbitrator rejected the objections to his appointment and concluded that "I was properly appointed as sole arbitrator in the reference in accordance with the terms of the arbitration agreement and therefore have substantive jurisdiction in the matter." He held that the fact that Respondent No. 1 offered the Petitioner further opportunities to appoint an Arbitrator did "not negate my original appointment as sole Arbitrator". He however added that "any later agreement to allow the charterers to appoint an Arbitrator would, in fact, lead to my earlier appointment as sole Arbitrator being varied by the agreement of parties". He held that the failure by Petitioner to appoint an Arbitrator within 14 days of the first notice given by Respondent No. 1 on 17th October 2005, led to a decision thereafter given by him being binding on the parties, "unless the parties agree otherwise". What was overlooked by Mr. Oakley was that Respondent No. 1 actually asked him to repeatedly re-confirm his appointment as sole Arbitrator and continued to do that even on 20th October 2008. He failed to acknowledge that Respondent No. 1 had on its own abandoned the procedure envisaged under Clause 19 (a) of the CP and Section 17 EAA. Clearly till 20th October 2008, even according to Respondent No. 1, there was no finality to Mr. Oakley having become a sole Arbitrator by default.

70. Mr. Oakley's holding that the appointment by the Petitioner of Justice K Ramamoorthy as its Arbitrator being "too late" and "invalid" was also untenable. Having decided to await the judgment of the Supreme Court before proceeding with the arbitration, and confirming his appointment as sole Arbitrator nearly a month thereafter, the explanation given by Mr. Oakley that the nomination of Justice Ramamoorthy by the Petitioner as its Arbitrator was "too late" and, therefore, "invalid" is to say that least both unconvincing and unjustified. In the background of the facts narrated, when the arbitral proceedings had not even begun, and with Respondent No. 1 still seeking confirmation that Mr. Oakley was the sole Arbitrator, the question of such nomination by the Petitioner being "too late" did not arise. This also shows that Mr. Oakley did not apply his mind independently. He simply accepted whatever request was made by Respondent No. 1. The mere fact that in one solitary instance Mr. Kalra acting on behalf of the Petitioner sought time to file a statement of defence did not mean that the Petitioner had waived its right to object to the Arbitrator's appointment or his jurisdiction. The correspondence between the Petitioner and the learned Arbitrator shows that at every stage it made it clear that it was not accepting the validity of his appointment or his jurisdiction to act as such.

71. Apart from raising objections before the learned Arbitrator as regards the validity of his appointment, the Petitioner challenged it by filing OMPNo. 604 of 2008 in this Court. Without awaiting the decision in the said petition, Mr. Oakley proceeded to pass the final Award. However, in the final Award, he dealt with the challenge to his appointment and jurisdiction unsatisfactorily. Mr. Oakley failed to deal with the substantive legal objections of the Petitioner as to the applicability of Clause 19 (a) of the CP and Section 17 EAA. He failed to address the submission that even in terms of the said provisions his appointment as Arbitrator was not lawful. He merely set out his "conclusions" without supporting reasons.

72. In the circumstances, the Court concludes that the learned Arbitrator erred in rejecting the Petitioner's objections as to the validity of his appointment. The assertion by Mr. Oakley that he had become the sole Arbitrator, on account of the failure by the Petitioner to nominate its Arbitrator, was for the reasons explained factually and legally flawed. The constitution of the arbitral Tribunal with Mr. Oakley as sole Arbitrator is held to be invalid. The impugned Award is liable to be set aside u/s 34 (2) (a) (v) of the Act.

Failure by the Arbitrator to disclose interest

73. Another factor, and a fairly serious one, that vitiates the impugned Award is the failure by Mr. Oakley to make a disclosure, at the time of his acceptance of his appointment as Arbitrator, and thereafter, that he had acted as Arbitrator, on behalf of Respondent No. 1, in a related dispute between the head owners and Respondent No. 1.

74. Both at the time of arguments and in its written submissions the Petitioner

pointed out that Mr. Oakley failed to disclose that he had acted as co-Arbitrator of Respondent No. 1 in a related dispute between Respondent No. 1 and the head owners of the same vessel involved in this very transaction and passed an Award on 5th October 2006. A copy of the said Award co-signed by Mr. Oakley has also been produced. It is pointed out that Mr. Oakley failed to disclose this fact (a) when he accepted appointment as Arbitrator, (b) when he confirmed his appointment as sole arbitrator, and (c) in para 17 of the impugned Award where he mentions that an Award was earlier passed in the related dispute between Respondent No. 1 and the head owners.

75. Respondent No. 1 has not denied that Mr. Oakley acted as co-Arbitrator in the related dispute between it and the head owners and that he failed to disclose this fact at any time prior to or during the arbitral proceedings. The stand taken in its written submissions by Respondent No. 1 is as follows:

The arbitral proceeding between the Respondent No. 1 and the Head Owners was not relevant for adjudication of the disputes between the Petitioner and the Respondent No. 1. The Respondent No. 2 was not required to disclose to the Petitioner that he had acted as an Arbitrator in the proceeding between the Respondent No. 1 and the Head Owners. The Petitioner has not suffered any prejudice by reason of non disclosure by the Respondent No. 2. There was no conflict of interest in Respondent No. 2 accepting appointment as sole arbitrator in the arbitration between Respondent No. 1 and the Head Owner and the arbitration between Respondent No. 1 and the Petitioner. The Respondent No. 2 - Mr. Alan Oakley passed an award dated 5 October 2006 against the Respondent No. 1 directing them to remit a sum of USD 740,000/- to the Head Owners.

76. Reliance is placed by Respondent No. 1 on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. It is stated that Mr. Alan Oakley "is a professional arbitrator and a full Member of the London Maritime Arbitrators Association. He accepts approximately 300 arbitration appointments annually. He has till date passed over 1,000 arbitral awards over the past 15 years. He has over 42 years experience as a practicing shipbroker. He was a Director of The Baltic Exchange between 1993 and 2005. He has also been a Magistrate in England and Wales since 2006. This clearly demonstrates that Mr. Alan Oakley has an impeccable record and that it would be inconceivable that Mr. Alan Oakley would act in connivance and/or tacit understanding with the Respondent No. 1 and pass a favourable award to Respondent No. 1." It is submitted that Mr. Oakley did not have any financial interest or personal interest in the outcome of the arbitration and had no personal relationship with Respondent No. 1 or their legal representatives.

77. The above admission by Respondent No. 1 that Mr. Oakley failed to disclose his having acted as an arbitrator nominated by it in the arbitration proceedings between Respondent No. 1 and the head owners of the vessel involved in this case has serious repercussions.

78. The requirement of an Arbitrator having to disclose his interest is statutorily mandated in Section 12 (1) of the Act which states: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality." u/s 12 (2) of the Act, there is a mandatory obligation on the Arbitrator "from the time of his appointment and throughout the arbitral proceedings" to disclose to the parties "without delay" "any circumstances" that are likely to give rise to justifiable doubts as to his independence or impartiality. The Arbitrator can be challenged on the above ground u/s 13 (3). If a party has participated in the arbitration, he may challenge the Arbitrator "only for reasons of which he becomes aware after the appointment has been made." u/s 13 (2) of the Act, a party can within fifteen days after becoming aware of the above ground challenge the Arbitrator. Where the challenge fails, the Arbitrator has to u/s 13 (4) of the Act proceed to make the Award. The party failing in the challenge can u/s 13 (5) of the Act "make an application for setting aside such arbitral award in accordance with Section 34."

79. In *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.* 2008 (1) Arb. LR 393 (Del), this Court explained:

40. Section 12 of the Act casts a duty on the Arbitrator to disclose in writing at the outset, such facts which may give rise to justifiable doubts as to his independence or impartiality. This obligation continues throughout the arbitral proceedings i.e. whenever such facts come into being during the arbitral proceedings. Therefore, what the law stipulates as a disqualification to become or remain an Arbitrator in a given dispute, is not the existence of actual bias, but the existence of such facts and circumstances as are "likely to give rise to justifiable doubts as to his independence and impartiality". An Arbitrator may be challenged only on limited grounds i.e. if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or that he does not possess the qualifications agreed to by the parties.

80. In *Satyendra Kumar Vs. Hind Constructions Ltd.*, it was observed:

4. Now, in order to decide this question, we must try and lay down clear principles which should apply to the conduct of arbitrators. There can be no doubt that an arbitrator must show uberrima fides to the parties whose disputes he is going to arbitrate and who have constituted him their domestic forum. In a sense the position of an arbitrator is different from that of a Judge. If a party goes to a Court, he has got to submit to a decision of the Judge. He has no choice in the appointment of the Judge. But when parties go to a domestic forum and want their matters to be determined by arbitration; they have every choice as to the person whom they should select as their arbitrator, and therefore it is clear that highest faith should be shown by the arbitrator. It also follows that the arbitrator must disclose to the parties all facts which are likely or calculated to bias him in any way in favour of one or the other party. A circumstance or a fact may in fact not bias the decision of the arbitrator. The arbitrator may have too

strong a character, too deep a sense of justice to be influenced by any consideration extraneous to or foreign to the evidence which he has got to consider. But the Question is not what is likely in fact to happen, but what is likely to tend or is calculated to tend to a particular result. Therefore, if the Court comes to the conclusion that there are any facts or any circumstances which are likely to affect the decision of the arbitrator which are likely to bias him, it would be incumbent upon the arbitrator to disclose those facts to the parties. If he fails to disclose those facts, then his award would be liable to be successfully challenged.

81. In *Neaman v. Kaiser Foundation Hospital* (1992) 9 Cal. App. 4th 1170, 11 Cal. Rptr. 2d 879 in a situation where the arbitrator (Drummond) disclosed that he had acted earlier as an Arbitrator in disputes involving one of the parties (Kaiser) but not that he was their party Arbitrator, the Court observed:

In our case, although Drummond disclosed he previously had acted as an arbitrator in Kaiser matters, he failed to disclose that on five of those prior occasions, he was Kaiser's party arbitrator. While he had served in all capacities in his experience as an arbitrator in Kaiser matters and may well, as he claims, enjoy a reputation for fairness, his relationship with Kaiser was a substantial business relationship, and should have been fully disclosed to the Neamans.

82. The requirement of disclosure in Section 12 (1) and 12 (2) of the Act is consistent with Article 13 of the UNCITRAL Model Law. The scope of the said provision can be further understood by referring to General Standard 2 of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration which describes "Conflicts of interest" situations as follows:

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard

(c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in

the matter at stake.

83. General Standard 3 deals with "Disclosure by the Arbitrator". Clause (a) states: "If facts or circumstances exist that may, in the eyes of the parties give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstance to the parties...prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them." Part II of the above Guidelines is titled: "Practical Application of the General Standards" and sets out, inter alia, an "Orange List" which "reflects situations that would fall under General Standard 3 (a), so that the arbitrator has a duty to disclose such situations." Under the heading "Previous service for one of the parties or other involvement in the case", is Clause 3.1.5 which talks of a situation where "the Arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties." This brooks no exception and is applicable in the present situation where Mr. Oakley acted as the nominated Arbitrator of Respondent No. 1 in a "related issue" concerning the head owners of the vessel and Respondent No. 1.

84. The fact that the Award of the three member Tribunal of which Mr. Oakley was a member, gave an Award against Respondent No. 1 and in favour of the head owners is not as relevant as the fact that Mr. Oakley in that arbitration acted as a nominated Arbitrator of Respondent No. 1. The disclosure of this fact was mandatory and his failure to do so has the inevitable result of vitiating the impugned Award. In terms of Section 12 (3) of the Act, it is not the existence of actual bias, but the existence of such facts and circumstances as are "likely to give rise to justifiable doubts as to his independence and impartiality", that should decide the question of impartiality and independence of the Arbitrator and whether the Award rendered by such Arbitrator is thereby vitiated in law. The fact that Mr. Oakley was a seasoned veteran Arbitrator should subject him to a higher degree of rectitude. It makes it even more inexcusable that he overlooked this fundamental requirement in law.

85. The Court is of the view that Mr. Oakley's failure to disclose the material fact concerning his having been an Arbitrator on behalf of Respondent No. 1 in the arbitration involving it and the head owners gives rise to justifiable doubts as to his independence and impartiality. There was an express violation of the mandatory requirement of Section 12 (1) and Section 12 (2) of the Act. Inasmuch as the Petitioner was not aware of this violation till after the making of the Award, it could not have challenged the Arbitrator earlier. However, it is plain that an Award rendered by an Arbitrator about whose independence and impartiality there are justifiable doubts is opposed to the public policy of India on a collective reading of Sections 12 (3), 13 (5) and 34 of the Act. The impugned Award is thus liable to be set aside u/s 34 (2) (b) (ii) as being opposed to the public policy of India.

Other grounds of challenge

86. There are many other grounds of challenge to the impugned Award. One is that the learned Arbitrator ought to have decided the preliminary objection awaiting the outcome of the petition (O.M.P.No. 604 of 2008) filed by the Petitioner u/s 14 of the Act before proceeding with the arbitration. This objection is without merit for two reasons. One is that after Respondent No. 1 did not continue its statement that it would not proceed with the arbitration, this Court did not pass any order restraining the said proceedings. There was therefore no legal restraint on the learned Arbitrator. Secondly, the said petition was itself as withdrawn after the impugned Award was passed permitting the Petitioner to raise the objections urged in the said petition.

87. The objection that the learned Arbitrator ought to have decided the objections as to his jurisdiction as a preliminary issue before deciding the merits is also without merit. The decision in *Maharshi Dayanand University and Another Vs. Anand Coop. L/C Society Ltd. and Another*, supports the submission of the Respondent No. 1 that the Arbitrator could decide the issue "before proceeding to finally pronounce his award" and not necessarily by way of a separate Award. There was no doubt a confusion created in the correspondence between the learned Arbitrator and the parties as to the applicability of the LMAA terms. In fact in one of its letters, Respondent No. 1 also referred to it. However, it was plain that the LMAA terms were not applicable. The reference by the learned Arbitrator in his letter dated 31st October 2007 to the Petitioner to "clause 74 of the Charterparty" was also an obvious mistake. However, these errors by themselves were not so serious as to affect the validity of the impugned Award.

88. The Petitioner submitted that with Respondent No. 1 having "elected" to file petitions in India under Sections 9 and 45 of the Act, in view of Section 42 of the Act, it is only the Act which should apply to the arbitral proceedings and not the EAA. It is further submitted that Respondent No. 1 should have taken all further steps in the proceedings, including the appointment of the Arbitrator, only under the Act. Further it is submitted that with Respondent No. 1 having filed a suit in the court in the U.S.A it has abandoned the arbitration clause. The Court is unable to accept this submission. The CP makes it clear that English law would be the law governing both the contract and the arbitral proceedings. Even if Respondent No. 1 had at the pre-Award stage invoked the jurisdiction of the courts in India for the purposes of Section 9 and Section 45 of the Act, the conduct of the arbitral proceedings thereafter had to be under the laws of the United Kingdom. This position finds support from the observations of the Supreme Court in *Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Company Limited* (2012) 3 SCC 425. The proceedings in the U.S.A were for attachment of funds of the Petitioner held by garnishee banks and do not affect the right of Respondent No. 1 to proceed with the arbitration for its substantive claims against the Petitioner.

89. The Petitioner contends that no valid service of a copy of the impugned Award was made on it in terms of the Hague Convention 1965. The contention of Respondent No. 1 that the Hague Convention does not apply to arbitral

proceedings may not be correct, since the Convention applies to service of both judicial and extra-judicial documents. Also, it does appear that India has made a reservation to the Convention objecting to the service of documents by e-mail. However, as far as this aspect is concerned, the Court does not view the service of a copy of the impugned Award on the Petitioner as per se constituting a ground to invalidate it. The Petitioner has after all received a copy of the impugned Award and has not been precluded from challenging it in accordance with law.

90. The Petitioner has made a legitimate grievance about the learned Arbitrator failing to preserve the arbitral record. Mr. Oakley informed the Petitioner that he had destroyed the record soon after the expiry of the 90 day period available to an aggrieved party under the English law to challenge an Award. It will be recalled that by repeated orders in the present petition the Court had requested Mr. Oakley to transmit the arbitral record. The Court is constrained to express its disappointment that the learned Arbitrator has presented it with a *fait accompli*. For an Arbitrator as seasoned as Mr. Oakley it would not have been difficult for him to expect that in international arbitration proceedings, where the Petitioner has been repeatedly raising a challenge to his jurisdiction, and in fact had sought termination of his mandate by filing O.M.P.No. 604 of 2008 in this Court even before he pronounced the Award, there would be a challenge by the Petitioner to the final Award. Despite this, the Court is willing to give Mr. Oakley the benefit of doubt as there is no requirement as such under the EAA that he should preserve the original record. Also, Respondent No. 1 filed in the Court in the present proceedings a copy of the entire record. As a result, the challenge to the impugned Award by the Petitioner has not been seriously prejudiced. Consequently, I.A.No. 17935 of 2011 (for summoning the arbitral record), I.A.No. 4902 of 2011 (for directions to Mr. Oakley to comply with orders of the Court), CCP (O)No. 120 of 2011 by the Petitioner seeking orders against Respondent No. 2 for disobedience of the orders of the Court and IANo. 9466 of 2012 for a direction to Respondent No. 1 to produce the original documents including the CP are disposed of in the above terms.

91. However, there are certain other grounds, which though not individually but collectively, give rise to serious doubts as to the legality of the impugned Award. The correspondence between Mr. Oakley and the parties at various stages reflect that he did not independently apply his mind and was easily persuaded to accept what was suggested by Respondent No. 1. This is also reflected in his decision on some of the claims of Respondent No. 1. For instance, he awarded legal costs without noticing that the bills produced by Respondent No. 1 included those for proceedings involving the head owners. The total of the bills produced did not add up to the sum awarded by him. Also, it is surprising that he awarded interest on such sum from a period prior to the arbitral proceedings. It is highly doubtful that the learned Arbitrator could have awarded Respondent No. 1 the costs of the proceedings in the Courts in India. The awarding of interest at 7%, which is higher than the LIBOR or the prevailing commercial rate of interest, does not

appear to be justified. It is possible that the learned Arbitrator may have decided these issues differently had the Petitioner participated in the proceedings. But, for the reasons explained earlier, the Petitioner was within its rights to refuse to submit to the jurisdiction of the sole Arbitrator.

Summary of Conclusions

92. To summarise the conclusions:

(a) The contention of the Petitioner that in terms of Section 34 (2) (a) (ii) of the Act, there was no valid CP, and therefore no valid arbitration agreement, between the parties is rejected.

(b) The constitution of the arbitral Tribunal with Mr. Alan Oakley, Respondent No. 2, as sole Arbitrator was invalid. The Award rendered by such Tribunal is liable to be set aside u/s 34 (2) (a) (v) of the Act.

(c) The failure by Mr. Alan Oakley to disclose the material fact concerning his having been an Arbitrator on behalf of Respondent No. 1 in the arbitration on a related issue involving it and the head owners gives rise to justifiable doubts as to his independence and impartiality. The impugned Award is opposed to the public policy of India on a collective reading of Sections 12 (3), 13 (5) and 34 (2) (b) (ii) of the Act and is required to be set aside on this ground.

(d) The grounds mentioned in para 92 above when viewed collectively also give rise to serious doubts as to the validity of the impugned Award.

The impugned Award dated 11th February 2009 is set aside. The petition is allowed with costs of Rs. 50,000 which will be paid by Respondent No. 1 to the Petitioner within four weeks from today. The pending applications are disposed of.