

(2008) 10 DEL CK 0031
In the Delhi High Court
Case No : OMP 419 and 468 of 2006

Siel Ltd. and Another

APPELLANT

Vs

Prime Industries Ltd.
 Prime Industries Ltd. Vs Sri Ram
Foods and Fertiliser

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10(1), 11(6), 13(2), 16, 2(1)
Council of Arbitration Rules — Rule 14, 17, 18, 2, 20
General Clauses Act, 1897 — Section 13(2)

Citation : (2008) 4 ARBLR 124 : (2008) 155 DLT 250 : (2008) 106 DRJ 741

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : S. Ganesh and D.K. Malhotra and Rajesh Malhotra, in OMP 419/2005 and Rajeev Nayar and Arvind Kumar, Mahesh Agarwal, Rishi Aggarwal, B.S. Shukla, Akshay Ringe and Rajeev Kumar, in OMP 468/200, for the Appellant; Rajeev Nayar and Arvind Kumar, Mahesh Agarwal, Rishi Aggarwal, B.S. Shukla, Akshay Ringe and Rajeev Kumar, in OMP 419/2005 and S. Ganesh and D.K. Malhotra and Rajesh Malhotra, in OMP 468/2006, for the Respondent

Judgement

S. Ravindra Bhat, J.—This common order would dispose of two petitions u/s 34 of the Arbitration and Conciliation Act, 1996 (hereafter called the Act) preferred by M/s. SIEL Ltd. and Anr. (hereafter referred to as SIEL or as the petitioner) being OMP No. 419/2005 and M/s. Prime Industries Ltd. (hereafter referred to as the claimant or Prime Industries as the case may be) being OMP 468/2006.

2. The brief facts necessary to decide the case are that SIEL entered into an agreement (referred to as the MoU) on 10.6.1994. It is not disputed that the SIEL is a manufacturer of Vanaspati and Vegetable oil and markets its products in various brands such as Rath, Panghat, Roshni and Palki for Vanaspati and Vegetable oil.

3. The MoU was expressed as being valid for two years with a stipulation for renewal, for a further period through consent of parties; it could be terminated

by either party giving notice, in writing. SIEL placed orders on the claimant to the extent of 1,562.975 MTs till March 1995. After that date it did not place any further order. The claimant alleged that it was aggrieved and issued a legal notice. It was alleged that the total quantity agreed to be lifted or purchased by SIEL was 5,000 MTs. Vanaspati for the first year and 6,000 MTs. Vanaspati for the second year.

4. The MoU contained an arbitration clause in the following terms:

18. ARBITRATION

All disputes between the parties hereto arising out of this agreement shall be referred to an arbitrator appointed by Indian Council of Arbitration, New Delhi, and the provisions of the Indian Arbitration Act for the time being in force shall be applicable to such reference. Such reference will be decided as per the rules of Indian Council of Arbitration. The award decision so given shall be final and binding upon the parties.

5. Prime Industries preferred an application before this Court being AA 120/96 for appointment of an Arbitrator u/s 11(6) of the act. That proceeding was disposed of by an order on 2.7.1999 whereby the Court recorded consent on behalf of the parties that an Arbitrator could be appointed in terms of Article 18 of the MoU dated 10.6.1994. The Court also recorded consent on behalf of the parties that the Arbitrator would be entitled to decide the question of existence of arbitration or otherwise in terms of Section 16 of the Act.

6. On 10.11.1999, a letter was addressed to the Indian Council of Arbitration on behalf of Prime Industries Ltd. for arbitration of the dispute with SIEL. This fact was intimated by the Indian Council of Arbitration (hereafter referred to as ICA) to SIEL in its letter dated 6.1.2000. The material portions of the said letter are as follows:

Please take notice that under Rule 17 of the Rules of Arbitration of the Council (copy enclosed), you are required to file on or before 6th February 2000, a Defence Statement setting out your case accompanied by all documents and information in support or bearing on the matter. In the Defence Statement, you are entitled to raise a counter claim provided it arises under the same transaction as the original claim as provided in Rule 18(a). You are requested to send five sets of the Defence Statement with enclosures, if any.

As the amount involved in the dispute is stated to be Rs. 6,81,12,565/-, under the Rules of Arbitration of the Council, it has to be heard and determined by the arbitral tribunal of three arbitrators, unless the parties to the dispute agree to refer the dispute to sole arbitrator (rule 21(b)). One each to be nominated by the parties and the third will be appointed by the Council, under its Rules. You are hereby required to forward the name of your nominee arbitrator from the panel of Arbitrators (copy enclosed) of the Council on or before 6th February 2000.

Under Rule 27 of the Rules of Arbitration of the Council, you are hereby required

to deposit a tentative amount of Rs. 95,500/- towards the costs and expenses of the above arbitration on or before 6th February 2000. The cheque/draft for the amount may be sent in the name of The Indian Council of Arbitration. The deposit will be taken into account by the arbitral tribunal in apportioning the costs while making the Award. The Arbitrator or the Registrar will have power to call for further deposit, if necessary.

7. On 18.1.2000, the counsel for the Prime Industries took the position that Clause 18 of the MoU referred to decision of disputes by an Arbitrator and, therefore, a plurality of Arbitrators were not called for. He invoked Rule 21(b) of the rules of the ICA and sought to justify the stand that the dispute was to be decided by a single Arbitrator. On 30.1.2000, the ICA wrote to the counsel for the Prime Industries going upon its earlier communication to SIEL about the number of Arbitrators. It now took the stand that the dispute could be decided by a single Arbitrator. That letter is extracted below:

The Indian Council of Arbitration (Registered under the Societies Registration Act, 1860) Sponsored by the Ministry of Commerce, Govt. of India

Ref. No. ICA/2729/AC/1154 January 30, 2000

Mr. O.P. Poplai Advocate for the Claimant New Delhi

Dear Sir,

Re: M/s. Prime Industries Ltd., Ludhiana v. M/s. Shriram Foods & Fertilisers, New Delhi

I am in receipt of you fax dated 24th January, 2000. Since both parties have agreed to refer the matter to an arbitrator i.e. sole arbitrator. We shall appoint the sole arbitrator on confirmation from the respondent also and in case both parties fail to forward the name of sole arbitrator by common consent. We have already sent a copy of the statement of claim to the respondent on 6th January 2000 directing them to file the defence statement, nominate the arbitrator and deposit a sum of Rs. 95,500/- towards the cost and expenses of arbitration in the above matter. We had asked the deposit of Rs. 95,500/- from each party on the basis of arbitral tribunal of three arbitrators. Since you have indicated that the matter has to be referred to sole arbitrator, each party will be required to deposit a sum of Rs. 47,875/- in stead of Rs. 95,500/-.

The respondent is directed to appoint the sole arbitrator with common agreement of the claimant for which the deposit will be Rs. 47,875/- by each party. Both parties are directed to comply with the directions latest by 15th February 2000.

Thanking you, Yours faithfully, Sd/- (Registrar)

cc: M/s. Prime Industries Ltd. Ludhiana M/s. Shriram Foods & Fertilisers, New Delhi

On 7.2.2000 the SIEL's attorney acknowledged receiving the letter of ICA and

expressed disagreement, with the stand of ICA, about its contents.

8. The ICA appointed Mr. Justice K.N. Singh, Retired Chief Justice of India as a Sole Arbitrator. Before him, the SIEL moved an application claiming that the order of the ICA Constituting the arbitral tribunal consisting of a Sole Arbitrator was contrary to Rule 21-B of the ICA Rules and also contrary to Clause 18 of the arbitration agreement. It, therefore, sought for appropriate orders u/s 13(2) of the Act, on 21.8.2000. After considering the merits of the application, the Arbitrator rejected it, holding that the Tribunal was appropriately constituted in accordance with the arbitration agreement as well as in terms of the ICA rules. The material extracts of the said order dated 6.12.2000 rejecting the SIEL's application are reproduced below:

Learned Counsel for the respondents urged that since Clause 18 refers to the provisions of the Indian Arbitration Act and the Rules of Indian Council of Arbitration, the dispute must be referred to a Tribunal of three arbitrators. I find no merit in the contention. The reference to the Arbitration act and to the Rules framed by the Indian Council of Arbitration refers to other matters and it does not refer to appointment of one arbitrator or three arbitrators. Once the parties agreed for the appointment of sole arbitrator for adjudication of the dispute between them reference to the Act and the Rules of Indian Council of Arbitration does not affect the intention of the parties as expressed in the first part of the Clause 18. All arbitration proceedings including proceeding before sole arbitrator or before the Arbitration Tribunal are to be decided in accordance with the provisions of the Arbitration Act.

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The Indian Council of Arbitration hereinafter referred to as the ICA has framed Rules of Arbitration. These Rules apply to the adjudication of dispute where parties have agreed in writing that the disputes shall be settled under the Rules of Arbitration framed by the Indian Council of Arbitration. Rule 20(b) lays down that where the claim exceeds 50 lacs the dispute will be heard and determined by three arbitrators unless the parties to the dispute agree to refer the dispute to a sole arbitrator within 30 days from the date of the notification of the request for arbitration. In the present case the claim exceeds Rs. 50 lacs. It is urged on behalf of the respondent that since the respondent did not agree to refer the dispute to a sole arbitrator within 30 days from the date of the notification of the request for arbitration, no sole arbitrator could be appointed. It is further urged that since the respondent had not committed any default as contemplated by clause of (b) of Rule 22, sole arbitrator could not be appointed for the adjudication of the dispute between the parties, instead the dispute should have been referred to a Tribunal of three arbitrators. The Learned Counsel for the respondent referred to documents in support of his contention that the respondents had not committed any default as contemplated by Rule 22(b), as such the ICA had "no authority to appoint sole arbitrator. I do not consider it necessary to refer to those documents as in my opinion Rule 22(b) is not

applicable to the instant case. As discussed earlier under the arbitration clause of the agreement, parties had agreed for the appoint of sole arbitrator. The respondents submission that as the Clause 18 provides reference will be decided as per the Rules of Indian Council of Arbitration, therefore Rule 20 and 22(b) are applicable and as such no sole arbitrator can be appointed unless the conditions contained the aforesaid Rules are fulfilled is misconceived. Clause 18, no doubt provides that the reference will be decided in accordance with the Rules of ICA, but that does not affect the agreement of the parties for the appointment of sole arbitrator under in the first part of Clause 18. In plain words, the opening part of Clause 18 provides for appointment of a sole arbitrator and it confers authority on the ICA to appoint the arbitrator. The second part of Clause 18 relates to procedure and other matters in deciding the reference. The Rules framed by the ICA refer to many other matter also e.g. filing of claim petition, counter claim and administrative fee, place of arbitration etc. The expression "reference will be decided as per the Rules of India Council of Arbitration" does not attract application of Rule 20 and 22(b) in view of the opening part of the Clause 18 of the agreement. If the agreement had stated that the dispute between the parties shall be settled by arbitration in accordance with the Rules of arbitration of the ICA, then Rule 20 and 22(b) would be applicable. But in the present case the language used in Clause 18 is quite different, under that clause, parties agreed for reference of the dispute to sole arbitrator who may be appointed by the ICA and they further agreed that the provisions of the Act and Rules of the ICA will be apply in deciding the reference.

Learned Counsel for the respondent then urged that initially the ICA had notified under its letter dated January 6, 2000 appointment of Arbitration Tribunal of three Arbitrators, and it had directed the parties to forward the name of their nominee arbitrators from the panel of arbitrators of the ICA. But later, the ICA changed its stand and decided to appoint sole arbitrator without there being any justification for the same. The respondents counsel referred to various letters which were exchanged between the parties and the ICA. On perusal of the same, I find that initially on the claimant's filing an application before the ICA for arbitration of dispute, the ICA issued notice to the parties on January 6, 2000 proposing to appoint Arbitration Tribunal as the amount involved in dispute exceeded Rs. 50 lacs. On the receipt of the ICA's notice dated January 6, 2000, the claimant raised an objection before the ICA under their letter dated January 18, 2000 saying that in view of the arbitration agreement between the parties, the claim was to be referred to the sole arbitration appointed by the ICA and not to an Arbitration Tribunal of three Arbitrators. The ICA considered the matter again and it agreed with the claimant's contention that since both parties had already agreed to refer the matter to sole arbitrator under Clause 18 of the agreement, it directed the parties to appoint sole arbitrator with mutual agreement by its letter dated 13.1.2000. The respondents by their letter dated February 7, 2000 addressed to the Registrar of ICA disputed the claimant's contention and denied that they had ever agreed for the appointment of a sole

arbitrator. The ICA by its letter dated February 9, 2000 requested both the parties to appoint sole arbitrator with mutual consent by February 20, 2000. Thereafter a number of letters were exchanged wherein the respondent continued to reiterate their stand that they never agreed for the appointment of sole arbitrator. The ICA continued to request the parties to nominate sole arbitrator with mutual consent but they failed to do so even till July, 2000 inspite of repeated reminders. Ultimately the ICA by its letter August 8, 2000 appointed the undersigned (Justice K.N. Singh) as the sole arbitrator to decide the matter in dispute between the parties. On a perusal of the various letters exchanged between the parties and the ICA, it is clear that the claimant as well as the respondent both had been given more than 30 days notice to nominate the sole arbitrator within mutual consent, but they failed to do so. The ICA extended the time for making the nomination of arbitrator, but even after five months of extended time, the parties failed to appoint sole arbitrator with mutual consent. Thereafter the ICA appointed sole arbitrator out of the panel maintained by it. The ICA in my opinion committed no illegality in appointing the sole arbitrator.

The learned Counsel for respondents further urged that assuming that the parties had agreed for appointment of a sole arbitrator under Clause 18 of the agreement, that agreement is invalid and inconsistent with Rule 21(b) of the ICA Rules which requires that where the claim exceeds Rs. 50 lacs disputes will be heard and determined by the three arbitrators. No doubt if arbitrators are to be appointed under the Rules framed by the ICA, then Rule 21(b) which requires appointment of three arbitrators if the claim exceeds Rs. 50 lacs would come into play but Rule 2(b) cannot be applied to a case where the agreement between the parties stipulated appointment of sole arbitrator. It is open to the parties to enter into an agreement for the appointment of a sole arbitrator, irrespective of the value of the claim, such an agreement would be valid as the Act itself provides for appoint of sole arbitrator. If the parties agree for appointment of sole arbitrator, notwithstanding the value of the claim, Rule 21(b) cannot be made applicable so as to override the agreement of the parties. Rule 21(b) comes into play in a case where there is no express agreement between the parties for the appointment of sole arbitrator or three arbitrators. The agreement in the instant case in Clause 18 for appointment of sole arbitrator is not rendered illegal or invalid in view of Rule 21(b) of the ICA Rules.

In view of the above discussion, I hold that the ICA has not acted in violation of any law in appointing sole arbitrator to decide the dispute between the parties. The respondent's application made u/s 13 of the Act is misconceived, it is accordingly rejected.

9. After the above order, the Arbitrator proceeded to adjudicate the merits of the claims. He concluded, by his impugned award dated 30.7.2005, that M/s. Prime Industries was entitled to Rs. 1,13,68,273/- as damages with interest from the date of the filing of the claim till date of Award at 6% per annum working out to Rs. 39,03,107/-. He also awarded future interest at 6% per annum till date of

payment and costs quantified at Rs. 2 lakhs.

10. The SIEL attacks the award as contrary to the arbitration agreement. It urges that the conduct of arbitration proceedings by the Tribunal, through the sole Arbitrator was not in accordance with the agreement of the parties and thus the Award is liable to be set aside by virtue of Section 34(2)(a)(v) of the Act. In this respect it is urged that Clause 18 of the MoU between the parties clearly refers to dispute resolution through arbitration in accordance with rules of ICA. According to the SIEL, the relevant rules of arbitration of ICA, clearly contemplated that if the claim exceeded Rs. 50 lakhs, it had be heard and determined by three arbitrators. Reliance is placed upon Rule 21(b) of the ICA Rules in this regard.

11. Mr. S. Ganesh, learned senior counsel for the SIEL contended that the ICA itself had determined that since the Prime Industries Ltd.'s claim was in excess of Rs. 50 lakhs the dispute had to be referred to three arbitrators. However, without explanation it did a volte face and, contrary to Rule 21(b) without recording the consent of parties, constituted a Tribunal comprising of a Sole Arbitrator. Learned Counsel contended that the reference to an Arbitrator has to be understood as the dispute resolving mechanism rather than as a conscious agreement of parties to refer their disputes to a sole arbitrator. He referred to the decision reported as Abbashbhai K. Golwala Vs. R.G. Shah and Others, and submitted that u/s 13(2) of the General Clauses Act, 1897, while interpreting an Act or Regulation a term in singular would include the plural and vice versa. Counsel contended that the decision of the Supreme Court in C.M.C. Ltd. Vs. Unit Trust of India and Others, is a clear authority on the point that rules of ICA would prevail and that contrary intention as regards the procedure or the constitution of arbitral tribunals has to be explicitly expressed in the agreement between the parties.

12. Learned Counsel for the SIEL contended that on the ground urged that the arbitral tribunals constitution was illegal and contrary to the agreement, the award had to be set aside and that the other objections to the award should not be adjudicated upon by the Court at this stage. He, however, pressed the same and submitted that the Arbitrator's understanding of the law as regards the nature of the contract, abandonment of the contract by conduct of parties and M/s. Prime Industry's inability to show any mitigation of its alleged damages, are a clear pointer to the findings being contrary to law as understood in terms of Section 34 of the Act.

13. Mr. Rajiv Nayar, learned senior counsel submitted that the objection to the Award on the ground of improper constitution of the arbitral tribunal is unfounded. He supported the reasoning of the Arbitrator, expressed his order dated 6.12.2000. Learned Counsel submitted that the expression an Arbitrator occurring in Clause 18 supported by the order of reference dated 2.7.1999 of this Court clearly pointed to an express agreement by the parties for the resolution of their disputes by a Sole arbitrator. He further submitted that in terms of the ICA

Rules, particularly, Rule 8, the decision of the Arbitration Committee [constituted under Rule 3(a)] relating to interpretation of Rules or in procedural matter, was final and binding on the parties. Consequently, the ICA's position that the dispute was to be decided by a sole arbitrator could not be termed as illegal or contrary to agreement.

14. Learned Counsel relied upon the decision reported a India Hosiery Works Vs. Bharat Woollen Mills Ltd., and submitted that the clear agreement of the parties under Clause 18 was for decision by a sole Arbitrator (discerned through the expression an Arbitrator). Therefore, there was no scope for applicability of the ICA Rules, as the parties had agreed to dispute resolution through a Tribunal of a different composition. Learned Counsel also relied upon the decision in C.M.C. Ltd. (supra) and contended that the ratio of that judgment supports the claimant's stand as well as the reasoning of the arbitrator.

15. Before embarking on an analysis of the contentions, it would be useful to deal with some relevant rules of the ICA. In terms of Rule 4 the ICA is empowered to have dispute relating to any commercial matter such as shipping, sale, purchase, banking, insurance, building construction, engineering etc. between two or more parties in India or a party or parties in a foreign country resolved through Arbitrator. Rule 5, prescribes that wherever the Parties have provided or agreed for arbitration by the Indian Council of Arbitration or for arbitration under the Rules of Arbitration of the Council, its rules or any amendment thereof in the form obtaining at the time the dispute is referred to arbitration of the Council, shall apply. Rule 8 states that the decision of the Committee or any question relating to interpretation of the rules or any procedural matter there-under shall be final and binding on the parties. Rule 14 of the ICA Rules states that a party wishing to commence arbitration proceedings under the rules (Claimant) shall be submit to the Registrar for arbitration including certain specified particulars and matters. Such statement is to be referred to the opposite party under Rule 17 which has to submit its defence statement and counter claim, if any. Rule 21 which deals with composition of the arbitral tribunal states as follows:

Rule 21 : The number of arbitrators to hear a dispute shall be determined as under:

(a) Where the claim does not exceed Rs. 50 lakhs and where the arbitration agreement does not specify three or more arbitrators, the reference shall be deemed to be to a sole arbitrator, unless the parties to the dispute agree to refer the dispute to three arbitrators within thirty days from the date of notification of request for arbitration.

(b) Where the claim exceeds Rs. 50 lakhs the dispute will be heard and determined by three arbitrators, unless the parties to the dispute agree to refer the dispute to a sole arbitrator within thirty days from the date of the notification of the request for arbitration.

(c) Where there arbitrators have to be appointed as per the above sub-rule and any of the parties to the dispute fails to make the necessary deposit towards the cost and expenses of arbitration, instead of three arbitrators, the Registrar may appoint a sole arbitrator, irrespective of the value of the claim.

16. The above narration of facts reveal that the parties agreed, through Clause 18 of the MOU, to refer their disputes to an arbitrator in accordance with the ICA's rules of arbitration. Now, Rule 21(a) extracted previously unambiguously prescribes that where the claim exceeds Rs. 50 lakhs the dispute would be decided by three arbitrators, unless the parties agree to refer the dispute to a sole arbitrator, within thirty days from the date of the notification of the request for arbitration. In plain terms the procedure contemplated under Rule 21 (a) is that all disputes where claims exceed Rs. 50 lakhs, are to be decided by a panel of three arbitrators, unless after notification of request for arbitration, the parties agree to refer the dispute to a sole arbitrator. In the facts of this case, that is undeniably, not the position. When Prime Industries sought for arbitration, ICA, through its letter, intimated that the arbitral tribunal would be of three members. However, it resiled from this stand, when the Prime Industries pointed out about the stipulation in Clause 18 being to an arbitrator. No reasons, however, were forthcoming.

17. The question is how is the court to construe the expression an arbitrator even while there is an express advertence to ICA rules, which would govern the parties in this case. Those rules are at variance, in the sense that for such claims, a panel of three arbitrators has to be constituted. In interpreting such a document, the court has to follow certain basic canons of construction. First, the term or terms in question should not be read in isolation, but have to be considered in their contextual setting. After all, the parties, in such cases, set their own ground rules, which would be considered as norms binding them. The other consideration is that the interpretive process itself should not inject ambiguity to a term in a document, if it is otherwise plain in its meaning. In *Sri Gedela Satchidananda Murthy (D) by LRs. Vs. Dy. Commr., Endowments Deptt., A.P. and Others*, , the Supreme Court underlined the importance of the courts respecting the mandate of the parties, in the following terms:

In the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator.

18. In *Basavarajappa, Appellants v. Gurubasamma and Ors.* 2005 (12) SCC 290, the Supreme Court held, by applying Section 13(2) of the General Clauses Act, that a term expressed in the singular would include the plural, and vice versa, having regard to the context. The court here cannot divorce the contextual setting of the term an arbitrator. It is set in an arbitration clause. Significantly, the parties did not use the widely used term Sole arbitrator or such like expression to manifest an intention that arbitration was to be by a single

arbitrator. Also, barring the letter written on behalf of the Prime Industries, in answer to the ICA's letter of 6-1-2000, there is nothing to support the ICA's assertion that the parties had agreed to a sole arbitrator, as mentioned in its letter of 30-1-2000. No doubt, CMC Ltd. is a judgment upholding the proposition that if parties express a clear intention to depart from the rules of ICA, or some other such body, they would be bound by it. Again, while reading such a judgment, the court cannot ignore the contextual facts. The arbitration clause was an elaborate one, where the parties' intention was more clearly expressed; the procedure prescribed by ICA was at variance from what was spelt out by the parties.

19. The Orissa High Court, in *Gayatri Projects Ltd. v. State Of Orissa Through The Executive Engineer, Heads Works Division, At/p. O. Samal, Dist. Angul*. 2004 (2) ARBLR 394 (Ori) had to deal with a somewhat similar situation where one party asserted that the expression an arbitrator meant the singular, and not a plurality of arbitrators, which was stipulated in the rules, of which the parties had made express mention, in the arbitration clause. The court dispelled the contention, in the following terms:

Clause (d) of Sub-section (1) of Section 2 of the new Act gives the meaning of Arbitral Tribunal. It provides that Arbitral Tribunal means a sole Arbitrator or a panel of Arbitrators. Therefore, an Arbitration Tribunal may consist of one Arbitrator or more than one Arbitrators. However, Sub-section (1) of Section 10 thereof further provides that parties are free to determine the number of Arbitrators, provided that such number shall not be an even number. It is true that Para 25.2 of Section 5 of the agreement stipulates that either party may refer a decision of the adjudicator to "an Arbitrator" within 28 days of the adjudicator's written decision. From the expression "an Arbitrator", learned Counsel for the petitioner submitted that Arbitrator contemplated thereunder cannot be more than one Arbitrator and, therefore, as the Arbitration Tribunal which consists of three members is incompetent to adjudicate the dispute between the parties or to examine the correctness of the decision of the adjudicator. But aforesaid words "an Arbitrator" occurring in Clause 25.2 of the said agreement has to be read along with other provisions stipulated in the said agreement. This expression "an Arbitrator" cannot be detached from the context in which it occurs and hence the same cannot be interpreted in the vacuum. An interpretation of the expression "an Arbitrator" has to be made in the light of other provisions of the agreement. The very next clause, namely, Para 25.3 occurring in Section 5 of the said agreement clearly stipulates that the Arbitration shall be conducted in accordance with the Arbitration procedure published by the institution named and in the place shown in the Contract Data, of the same agreement. Contract Data of the agreement clearly stipulates in an unambiguous language that the procedure followed by the Arbitration Tribunal shall be followed. I cannot lightly presume that the petitioner was ignorant about the existence of such Arbitration Tribunal or that it consisted of three members. This being the position, the expression "an Arbitrator" must be held to include

the Arbitration Tribunal also constituted by the Government under the provisions of the said Rules. If I accept this position, then I cannot allow the prayer of the petitioner to give a declaratory relief that such Arbitration Tribunal constituted under the said Rules consisting of three members is incompetent to adjudicate the dispute between the parties merely because it consists of more than one member.

20. This Court is in agreement with the reasoning of the Orissa High Court. As observed earlier, the term an arbitrator is to be understood in the context of the parties' desire for arbitration; the parties further wanted the arbitration to be in accordance with the ICA rules, which envisaged that in such claims, the tribunal was to be of three arbitrators. This was also the initial understanding of ICA, which for inexplicable reasons, later stated that the parties had agreed to a sole arbitrator. Prime Industries has been unable to point to any material or letter, in support of such consent, which can be the only justification, in terms of Rule 21(b) of the ICA rules. Apart from these, the court cannot overlook the fact that at the contract formation stage, the parties had access to ICA rules, which stipulated that such claims were to be adjudicated by three arbitrators. The parties, or one of them, proceeded to agree to arbitration, on the premise of decision by three arbitrators, as embodied in Rule 21(b) cannot be ruled out. As against this, the contentions of Prime Industries Ltd. that the term in Clause 18 is to be understood as an intention to have a sole arbitrator, are weaker. Not only is the evidence contrary to that understanding, but also the fact that the expression an arbitrator cannot be torn out of context; it would mean adjudication through arbitration, or simply, a generic reference to alternative dispute resolution through arbitration, in accordance with rules of ICA.

21. In view of the above reasons, the court is of opinion that SIEL has established that composition of the arbitral tribunal was not in accordance with the agreement between the parties, which incorporated Rule 21(b); the parties did not agree to decision by a sole arbitrator. As a result, SIEL's petition has to succeed. The court is of opinion that in view of the conclusions arrived at on this point, it would be inexpedient to examine the challenge to validity of the award, on other grounds. Since SIEL had moved an application at the earliest stage, but unsuccessfully, its challenge to the award on the ground spelt out in Section 34(2) (a)(v) of the Act is entitled to succeed. OMP 415/2005 is accordingly, allowed. For these reasons, OMP 468/2005 cannot succeed; it is disposed of. The parties are at liberty to take steps to have the dispute resolved in accordance with the arbitration agreement. The petitions are disposed of in the terms indicated. No costs.