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M.M.T.C. LIMITED

*v.*

STERLITE INDUSTRIES (INDIA) LTD.

NOVEMBER 18, 1996

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[J.S. VERMA AND B.N. KIRPAL, JJ.]

*Arbitration and Conciliation Act, 1996: Sections 7, 10 (1) and 11 (3).*

C *Arbitration agreement—Provided appointment of one arbitrator by each party—The two appointed arbitrators required to appoint a third arbitrator—Act of 1996 became applicable as dispute arose after Act came into force—Held: Arbitration agreement valid—It satisfied requirements of Ss. 7 and 10(1)—And accorded with implied condition contained in para 2 of First Sch. to Arbitration Act, 1940—Hence, third arbitrator had to be* D *appointed to act as presiding arbitrator in accordance with S. 11(3)—Arbitration Act, 1940, First Sch. para. 2.*

**The respondent claimed that it had not received certain dues under the contract from the appellant and, therefore, it invoked the arbitration clause in the agreement between them. Subsequently, the** E **respondent appointed its arbitrator. The appellant claimed that arbitration could not be resorted to and, therefore, it did not name its arbitrator. The respondent filed an application in the High Court for appointing an arbitrator in accordance with the Arbitration and Conciliation Act, 1996.**

F **The High Court allowed the application and directed the appellant to appoint an arbitrator. The appellant had in the meantime appointed its arbitrator. Hence this appeal.**

**On behalf of the appellant it was contended that an arbitration** G **agreement providing for the appointment of an even number of arbitrators was not a valid agreement because of Section 10 (1) of the New Act; that Section 10(2) of the New Act was not attracted since there was no failure to determine the number of arbitrators according to Section 10 (1) of the New Act; and that Section 10 of the New Act was inconsistent with para 2 of the First Schedule of the Arbitration** H **Act, 1940.**

On behalf of the respondent it was contended that each of the parties having nominated its arbitrator, the third arbitrator was required to be appointed according to Section 11(3) of the New Act and the failure to do so attracted the consequences under the New Act; and that the provision for number of arbitrators was a machinery provision and did not affect the validity of the arbitration agreement which was to be determined according to Section 7 of the New Act. A B

Disposing of the appeal, this Court

HELD: 1. The validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 of the Arbitration and Conciliation Act, 1996 which is a part of machinery provision for the working of the arbitration agreement. Therefore, an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the new Act. Moreover, the arbitration agreement in the present case accords with the implied condition contained in para 2 of the First Schedule to the Arbitration Act, 1940 requiring the two arbitrators, one each appointed by the two sides, to appoint an umpire not later than one month from the latest date of their respective appointments. [682 H, 683 D,E] C D

2. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Section 10(1) of the New Act is satisfied and sub-section (2) thereof has no application. Since the agreement satisfies the requirement of Section 7 of the New Act and, therefore, is a valid arbitration agreement, the appointment of arbitrators must be governed by Section 11 of the New Act. [683-D-G] E F

3. In view of the fact that each of the two parties have appointed their own arbitrators Section 11(3) of the new Act was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by Section 11(4) (b) of the New Act. Since the procedure prescribed in Section 11(3) has not been followed the further consequences provided in Section 11 must follow. [683H, 684A] G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12736 of H

A 1996.

From the Judgment and Order dated 28.6.96 of the Bombay High Court in A.A. No. 1. of 1996.

Ashok Desai, Attorney General, Shri Narain, C.M. Oberoi, Sandeep
B Narain and Ashok Sharma for the Appellant.

Dushyant Dave and K.J. John for the Respondents.

The Judgment of the Court was delivered by

C **J.S. VERMA, J.** The point involved for decision is, the effect of The Arbitration and Conciliation Act, 1996 (for short "New Act") in the present case on the arbitration agreement made prior to the commencement of the New Act. Clause VII of the agreement dated December 14, 1993 between the parties is, as under:

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> "VII. In the event of any question or dispute arising under or out of or relating to the construction, meaning and operation or effect of this agreement or breach thereof, the matter in dispute shall be referred to arbitrator. *Both the parties shall nominate one Arbitrator each and the arbitrators shall appoint an umpire before proceeding with the reference.* The decision
E of arbitrators or in the event of their not agreeing the decision of the umpire will be final and binding on the parties. *The provisions of the Indian Arbitration Act and Rules made thereunder shall apply for proceedings.* The arbitrators or the umpire, as the case may, shall be entitled with the consent
F of the parties to enlarge the time, from time to time, for making the award. The arbitrators/umpire shall give a reasoned award. The venue of the arbitration shall be Bombay."

(Emphasis supplied)

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Sterlite Industries (India) Ltd.;—respondent, claimed that it had not received certain dues under the contract from the appellant-MMTC Ltd. and, therefore, it invoked the above arbitration clause in the agreement between them by a letter dated January 19, 1996 which was received by the MMTC Ltd. on January 31, 1996. On February 7, 1996 the respondent
H appointed Shri M.N. Chandurkar, a former Chief Justice of Madras High

Court, as its arbitrator. The MMTC Ltd. claimed that arbitration could not be resorted to and, therefore, it did not name its arbitrator. The Sterlite Industries (India) Ltd. filed an application in the Bombay High Court for appointing an arbitrator in accordance with the New Act.

Before the High Court, learned counsel for the MMTC Ltd. contended that the arbitration clause was not attracted but this objection was rejected. The other contention on behalf of the MMTC Ltd. was that the arbitration agreement provided for the appointment of two arbitrators while Section 10 (1) of the New Act does not envisage the appointment of an even number of arbitrators. The High Court by its order dated 28.6.1996 rejected the contention and gave time to the MMTC Ltd. till July 5, 1996 to appoint an arbitrator. In further held that in the event of the MMTC Ltd. failing to name its arbitrator, the arbitrator appointed by Sterlite Industries (India) Ltd. would be the sole arbitrator under Section 10(2) read with Section 11 (5) of the New Act. Time for appointment of the arbitrator was later extended. The MMTC Ltd. has in the meantime appointed Shri. S.N. Sapra, a former Judge of the Delhi High Court as its arbitrator. Hence this appeal by special leave.

The contention of the learned Attorney General on behalf of the appellant is that an arbitration agreement providing for the appointment of an even number of arbitrators is not a valid agreement because of Section 10 (1) of the New Act; and, therefore, the only remedy in such a case is by a suit and not by arbitration. For this reason, he urged, that sub-section (2) of Section 10 is not attracted since there is no failure to determine the number of arbitrators according to sub-section (1). Another argument of the learned Attorney General was that Section 10 is a departure from para 2 of the First Schedule of the Arbitration Act, 1940 (for short 1940 Act), which reads as under;

> "2. If the reference is to an even number of arbitrators the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."

In reply Shri Dave, learned counsel for the respondent contended that there is no such inconsistency between Section 10 of the New Act and the corresponding provision in the '1940 Act, both being substantially the same. Learned counsel contended that the provisions of the New Act must be construed to promote the object of implementing the scheme of alternative dispute resolution; and the New Act must be construed to enable

A the enforcement of the earlier arbitration agreements. It was urged that each of the parties having nominated its arbitrator, the third arbitrator was required to be appointed according to Section 11 (3) and the failure to do so attracts the consequential results under the New Act. Learned counsel contended that the provision for number of arbitrators is a machinery provision and does not affect the validity of the arbitration agreement
B which is to be determined according to Section 7 of the New Act.

Some provisions of the New Act may now be referred. Section 2 (b) defines the 'arbitration agreement' to mean an agreement referred to in section 7. Section 7 deals with arbitration agreement, Section 10 with the number of arbitrators and Section 11 with the appointment of arbitrators.
C Sections 7, 10 and the relevant part of the Section 11 are as under :

*Section 7 :*

"7 Arbitration agreement -(1) In this part, "arbitration
D agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an
E arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing .

F (4). An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

G (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and
H not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

*Section 10 :*

"10. Number of arbitrators -(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

*Section 11 :*

"11. Appointment of arbitrators. -(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and -

(a) A party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) The two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by

A the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request
B by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,
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(a) A party fails to act as required under that procedure; or

(b) The parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
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(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure,
E unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the
F person or institution designated by him is final.

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Chapter II of the New Act contains Sections 7 to 9 under the heading
G "Arbitration Agreement". Chapter III under the heading "Composition of Arbitral Tribunal" contains Sections 10 to 15.

Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and sub-section (4) describes the kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators
H as a part of the arbitration agreement. Thus the validity of an arbitration

agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General. A

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Section 10 deals with the number of arbitrators. Sub-section (1) says that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Sub-section (2) then says that failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator. Section 11 provides for appointment of arbitrators. This is how arbitral tribunal is constituted. C

The arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference. The arbitration agreement is valid as it satisfies the requirement of Section 7 of the New Act. Section 11 (3) requires the two arbitrators to appoint the third arbitrator or the umpire. There can be no doubt that the arbitration agreement in the present case accords with the implied condition contained in para 2 of the First Schedule to the Arbitration Act, 1940 requiring the two arbitrators, one each appointed by the two sides, to appoint an umpire not later than one month from the latest date of their respective appointment. D

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The question is : whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of sub-section (1) of Section 10 is satisfied and sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Section 11 of the New Act. F

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In view of the fact that each of the two parties have appointed their own arbitrators, namely, Justice M.N. Chandurkar (Retd.) and Justice S.P. Sapra (Retd.), Section 11 (3) was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, H

A failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by section 11 (4) (b) of the New Act. Since the procedure prescribed in Section 11 (3) has not been followed the further consequence provided in Section 11 must follow.

B Accordingly, we direct that the chief Justice of the High Court is to appoint the third arbitrator under Section 11 (4) (b) of the New Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator within thirty days from the date of their appointments. Direction given by the Chief Justice of the High Court is substituted to this effect.

C The appeal is disposed of accordingly. No costs.

V.S.S. Appeal disposed of.