

respondents' applications seeking upgradation, were per se not as per the prescribed procedure.

16. We are, therefore, of the opinion that the Division Bench was not justified in directing the State Government to accord the same treatment which had been given to two other schools, which had been upgraded ignoring the statutory rules and upgrade the respondents' schools. In this view of the matter, decision of the High Court is clearly unsustainable and deserves to be set aside.

17. In the result, the appeal is allowed; the judgment of the Division Bench is set aside and both the writ petitions are dismissed. There will, however, be no order as to costs.

Appeal allowed.

### AIR 2007 SUPREME COURT 2706

S. H. KAPADIA, J.

Arbitration Petition No. 8 of 2007,  
D/- 31-7-2007.

M/s. Aurohill Global Commodities Ltd. v.  
M/s. M.S.T.C. Ltd.

**(A) Arbitration and Conciliation Act (26 of 1996), Ss. 11, 16 — Appointment of arbitrator — Petition for — Order for supply of steel products — Contract in question was an international transaction — Questions whether Draft purchase order acquired character of concluded contract or not, whether contract was non est — And question whether ultimate buyer necessary party — Have to be decided in arbitration proceedings — Plea that arbitration petition is not maintainable — Cannot be accepted.**

**Contract Act (9 of 1872), S. 10.**

**(Paras 13, 16)**

**(B) Arbitration and Conciliation Act (26 of 1996), S. 28 — Arbitration — Procedural law applicable — International contract for supply of steel products — Parties had agreed to settle their dispute by arbitration in London and in accordance with Rules of arbitration of Great Britain — Mere fact that respondent agreed or concurred in principle that too without prejudice to the offer made by petitioner to be guided by Arbitration and Conciliation Act cannot waiver of British Rules of Arbitration — British Rules of Arbitration cannot be therefore substi-**

**tuted by procedural law under Arbitration Act.**

**Evidence Act (1 of 1872), S. 115.**

**(Paras 14, 15)**

**Cases Referred : Chronological Paras**

2004 AIR SCW 1266 : AIR 2004 SC 1766 :  
2004 CLC 438

2002 AIR SCW 1285 : AIR 2002 SC 1432 :  
2002 CLC 647

Sunil Kumar, Sr. Advocate, Prakash Sinha, Abhishek Singh, Anshuman Kr. & Shekhar Kumar, for Petitioner; Chetan Sharma, Sr. Advocate, Ms. Ramini Taneja, Anil Shrivastav, for the Respondent.

**ORDER :—** M/s. Aurohill Global Commodities Ltd. has filed an arbitration application herein under Section 11(9) read with Section 11(5) of the Arbitration and Conciliation Act, 1996 (the "said Act") for the appointment of arbitrators to settle the dispute between the said company and M/s. M.S.T.C. Ltd. (PSU). The facts giving rise to this petition briefly are as follows :

2. Petitioner-company is based in Cyprus having its offices in Russia and India. Petitioner has been exporting steel products for more than a decade.

3. Vide letter dated 2-3-2005, M/s. Sunvijay Rolling and Engineering Ltd., Nagpur placed an order on the petitioner for supply of 5000 MT of Billets. Accordingly, on 10-3-2005 petitioner forwarded pro forma invoice to the said Sunvijay Rolling and Engineering Ltd. for the required quantity of Billets for a total consideration of US \$ 22,25,000. Payment was to be made through irrevocable confirmed letter of credit ("LC") payable 100% at sight. Petitioner's banker was M/s. BNP. Subsequently, M/s. Sunvijay Rolling and Engineering Ltd. informed the petitioner that they prefer to buy the Billets through M/s. M.S.T.C. Ltd. (respondent herein).

4. On 24-3-2005 a Draft Purchase Order dated 24-3-2005 was issued by M/s. M.S.T.C. Ltd. which was accepted by the petitioner. It is the case of the petitioner that the said purchase order was issued as a result of negotiations between the petitioner and M/s. M.S.T.C. Ltd. According to the petitioner, this constituted a contract between the parties at Kolkata. The date of shipment was 15-5-2005 and payment was to be made through irrevocable LC to be opened by First Class Indian Bank. The LC



was to be made operative only after receipt of credential report from Dan & Bradstreet. Clauses 19 and 20 of the Purchase Order read as under :

**"19. ARBITRATION :**

Any disputes, controversies and/or claims arising out of or relating to this agreement or any modification thereto, or any alleged breach or cancellation thereof, which cannot be settled amicably between Seller and buyer, shall be settled by arbitration in London and in accordance with rules of arbitration of the Great Britain arbitration and the award in pursuance thereof shall be binding on the parties.

(Emphasis supplied)

**20. JURISDICTION :**

The competent Court under the laws applicable in Great Britain alone shall have exclusive jurisdiction to decide all matters, disputes and controversies relating to this contract, including arbitration proceedings instituted or to be instituted. The jurisdiction of Court will be London."

**5.** On 29-3-2005 M/s. M.S.T.C. Ltd. requested M/s. Indian Overseas Bank, Kolkatta, for opening for an irrevocable LC. Accordingly, M/s. Indian Overseas Bank informed the petitioner's bankers that LC has been opened on the request of M/s. M.S.T.C. Ltd. and that the petitioner was the beneficiary under the LC. The date of expiry of the LC was 5-6-2005. The last date of shipment was 15-5-2005. The LC was to operate only after receiving confirmation from the Opening Bank.

**6.** On 20-4-2005 the petitioner's banker confirmed the LC. The LC was payable against presentation of FCR (a receipt of confirmation) of goods at the port of loading.

**7.** On 10-5-2005 it is alleged that the petitioner received the requisite confirmation on which basis the petitioner prepared the goods for shipment. The goods arrived at the port in Ukraine and a FCR was issued to this effect. The said receipt was presented to the bank along with the documents. However on 13-5-2005 M/s. Sunvijay Rolling and Engineering Ltd. addressed a letter to the petitioner to suspend all the dispatches on the LC opened by M/s. M.S.T.C. Ltd. On the same day, the petitioner informed M/s. Sunvijay Rolling and Engineering Ltd. that it was not possible to suspend the dispatches as the goods were al-

ready placed at the port. M/s. Sunvijay Rolling and Engineering Ltd. requested the petitioner vide letter dated 23-5-2005 to decrease the price by US \$ 50 PMT. The petitioner was further informed that the LC would remain suspended till the petitioner agrees to decrease in the price. The petitioner refused to reduce the price. On 26-5-2005 the bankers of M/s. M.S.T.C. Ltd. stated that the LC was inoperative as certain conditions were not satisfied, namely, non execution of the performance guarantee. According to the petitioner herein, there was no such requirement in the alleged contract dated 24-3-2005.

**8.** Ultimately, on 31-5-2005 M/s. M.S.T.C. Ltd. informed the petitioner that the LC stood cancelled.

**9.** On 23-8-2006 a legal Notice was given by the petitioner requesting M/s. M.S.T.C. Ltd. to settle the dispute through arbitration before a sole arbitrator. By the said Notice, the petitioner stated that it was agreeable to be governed by Arbitration and Conciliation Act, 1996 for the purposes of procedural law as the substantive law applicable was the Indian Contract Act. In response to the said Notice, M/s. M.S.T.C. Ltd. stated vide reply dated 19-9-2006 that the alleged contract was non est and that the above Purchase Order did not constitute a valid and binding contract between parties. They contended that the Purchase Order was a draft and that it never became a binding contract since the conditions preceding did not materialize. M/s. M.S.T.C. Ltd. further contended that there was no concluded contract, much less an agreement to arbitration. However, without prejudice to the aforesaid contentions, M/s. M.S.T.C. Ltd., in its reply, stated that if the petitioner insisted on arbitration then it had no option but to concur in principle to be guided by the said Act for the purpose of procedural law as well as the substantive law, namely, the Indian Contract Act. One of the contentions raised on behalf of the petitioner herein is that vide letter dated 19-9-2006 M/s. M.S.T.C. Ltd. had waived its option to be governed by the Rules of Arbitration of Great Britain as mentioned in Clause 19, quoted above.

**10.** By way of counter, M/s. M.S.T.C. Ltd. submitted that the arbitration petition was not maintainable as it was based on an alleged contract, which, in any event, was non est as it did not constitute and as it did



not acquire the character of a valid and binding contract between the parties. According to M/s. M.S.T.C. Ltd. the Draft Purchase Order on which the petitioner has made its claim was a provisional one and never matured in terms of a binding or conclusive contract and since there was no contract there was no arbitration agreement and, therefore, the present petition was misconceived and inappropriate. According to M/s. M.S.T.C. Ltd. the Draft Purchase Order cannot be vested with the trapping of a binding or conclusive contract and, therefore, the said order did not constitute an arbitration agreement. It was further submitted by M/s. M.S.T.C. Ltd. that, in any event, this Court cannot appoint an arbitrator of its own choice as the arbitration clause itself states that all disputes and/or claims arising out of the agreement for alleged breach shall be settled by arbitration in London and in accordance with the rules of arbitration of Great Britain.

**11.** Two questions arise for determination. Firstly, whether the question as to whether the Draft Purchase Order constituted a concluded contract and/or whether such contract was non est could be decided by me in this petition in which the petitioner has sought the appointment of an arbitrator.

**12.** In the case of Bhatia International v. Bulk Trading S.A. and Anr. reported in (2002) 4 SCC 105 this Court held that provisions of Part I of the Arbitration and Conciliation Act, 1996 are equally applicable to international commercial arbitration ("ICC") held outside India, unless any or all the provisions have been excluded by an agreement between the parties, expressly or by implication, therefore, where arbitration is to be carried out as per rules of ICC, parties can deviate only to the extent permissible.

**13.** In the present case, M/s. Aurohill Global Commodities Ltd. has filed this petition under Section 11(9) read with Section 11(5) of the said Act. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the said Act, the arbitral Tribunal has very wide powers. The powers of the Courts have been curtailed. The arbitral Tribunal's authority under Section 16 of the said Act is not confined to the width of its jurisdiction but goes

to the very root of its jurisdiction (see *Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd. and Anr.*, (2004) 3 SCC 447). In the present case, therefore, the question as to whether the Draft Purchase Order acquired the character of a concluded contract or not and the question as to whether the contract was non est can only be decided by the arbitrator. Therefore, the aforesaid question have got to be decided by arbitration proceedings. In my view, therefore, there is no merit in the contention advanced on behalf of M/s. M.S.T.C. Ltd. that the arbitration petition was misconceived and not maintainable in law. Before concluding on this point, one of the objections raised on behalf of M/s. M.S.T.C. Ltd. was that, in any event, the arbitration proceedings were not maintainable on account of non-joinder of M/s. Sunvijay Rolling and Engineering Ltd., who was the ultimate buyer. In my view, the objection was also required to be raised by M/s. M.S.T.C. Ltd. before the arbitrator. Therefore, on the first issue, I am of the view that the arbitration petition was maintainable under the said Act.

**14.** The second question which arises for determination in the present case is whether by virtue of reply dated 19-9-1996 to the legal notice given by the petitioner, M/s. M.S.T.C. Ltd. could be said to have waived its right to claim holding of arbitration proceedings in accordance with the British Rules of Arbitration as mentioned in Clause 19, quoted above. To recapitulate, on 23-8-2006 a legal notice was given by the Advocate for the petitioner to M/s. M.S.T.C. Ltd. After stating of the facts and submission, petitioner requested M/s. M.S.T.C. Ltd. to give its consent for settlement of disputes through arbitration before a sole arbitrator. By the said legal notice, petitioner proposed the place of arbitration at New Delhi instead of London. By the said Notice, the petitioner stated that it was agreeable to be governed by the said Act so far as the procedural law is concerned. According to the petitioner vide letter dated 19-9-2006 addressed by the Advocate for M/s. M.S.T.C. Ltd., the respondent agreed in principle to be guided by the said Act so far as the procedural law was governed and this letter, therefore, constituted waiver on the part of M/s. M.S.T.C. Ltd. to be governed by



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the British Rules of Arbitration as mentioned in Clause 19, quoted above. There is no merit in the contention advanced on behalf of the petitioner. The letter dated 19-9-2006 addressed by the Advocate for M/s. M.S.T.C. Ltd. concurred only in principle to the offer made by the petitioner to be guided by the said 1996 Act so far as the procedural law is concerned. Further, it cannot constitute a waiver because it is a without prejudice concurrence. In the circumstances, the parties shall abide by the terms of the alleged contract. Moreover, it is well settled that parties have to stand by the terms of the contract. We have before us an international transaction. Petitioner is a company registered in Cyprus. The parties entered into the alleged contract with open eyes. They agreed to settle their disputes by arbitration in London and in accordance with the rules of arbitration of Great Britain. (Emphasis supplied by me). Moreover, vide Clause 20 of the alleged contract the parties argued that the competent Court in Great Britain alone shall have exclusive jurisdiction to decide all matters including arbitration proceedings to be instituted. Reading Clauses 19 and 20 conjointly, it is clear that the procedural law application to the arbitration proceedings had to be the British Rules of Arbitration. In the circumstances, it is not possible for this Court to substitute the British Rules of Arbitration by the procedural law under the said 1996 Act.

15. Accordingly, I hold that the question as to whether there existed a concluded contract, the question as to whether the alleged contract was non est and the question as to whether M/s. Sunvijay Rolling and Engineering Ltd. was necessary and proper party are all questions to be decided in the arbitration proceedings and, to that extent, this petition is maintainable under the Arbitration and Conciliation Act, 1996. However, as stated above, there is no waiver of the British Rules of Arbitration and, therefore, the parties are bound by the terms of the arbitration clause No. 19 quoted hereinabove.

16. Accordingly, the arbitration petition stands disposed of with no order as to costs. Order accordingly.

**AIR 2007 SUPREME COURT 2709**

(From : Punjab and Haryana)\*

Dr. ARIJIT PASAYAT AND

P. P. NAOLEKAR, JJ.

Criminal Appeal No. 376 of 2002,  
D/- 27-7-2007.

Shakuntala v. State of Haryana.

**(A) Evidence Act (1 of 1872), S. 32 — Dying declaration — It is admitted in evidence on certain principle which is indicated in Legal maxim 'nemo moriturus proesumitur mentiri' i.e. a man will not meet his maker with a lie in his mouth.**

(Para 7)

**(B) Evidence Act (1 of 1872), S. 32 — Dying declaration — It cannot be laid down as an absolute rule of Law that dying declaration cannot form sole basis of conviction unless it is corroborated — The rule requiring corroboration is merely a rule of prudence.**

(Para 9)

**(C) Evidence Act (1 of 1872), S. 32 — Dying declaration — Conviction based on — Sustainability — Appellant, mother-in-law of deceased, allegedly set her on fire — Dying declaration of deceased was voluntary and trustworthy — There was no tutoring or prompting — Evidence of witnesses, doctor established that deceased was in fit condition to give declaration — Magistrate also confirmed said fact — Background in which appellant put match stick on body of deceased proved her intention to murder — Conviction of appellant under S. 302 — Proper.**

(Paras 11, 12, 13)

**Cases Referred : Chronological Paras**

|                                           |    |
|-------------------------------------------|----|
| 1996 AIR SCW 1392 : AIR 1996 SC 3035 :    |    |
| 1996 Cri LJ 2003                          | 10 |
| 1994 AIR SCW 1978                         | 10 |
| 1993 AIR SCW 2971 : 1993 Cri LJ 3414      | 10 |
| 1992 AIR SCW 767 : AIR 1992 SC 948 : 1992 |    |
| Cri LJ 1290                               | 10 |
| 1992 AIR SCW 2050 : AIR 1992 SC 1817 :    |    |
| 1992 Cri LJ 2919                          | 9  |
| AIR 1989 SC 1519 : 1989 Cri LJ 1485       | 9  |
| AIR 1988 SC 912 : 1988 Cri LJ 936         | 9  |
| AIR 1985 SC 416                           | 9  |
| AIR 1983 SC 164 : 1983 Cri LJ 221         | 9  |
| AIR 1982 SC 839 : 1982 Cri LJ 630 (2)     | 9  |
| AIR 1982 SC 1021 : 1982 Cri LJ 986        | 9  |

\*Criminal Appeal No. 149 DB of 1998, D/- 24-2-2001 (P & H).