



disputes to the "Engineer" for adjudication in terms of the Arbitration Clause 32.2 of the GCC. The "Engineer" gave his decision on 26th March, 2008. The petitioner did not accept this decision, and informed respondent No.1, of its intention to invoke arbitration under Clause 32.6. Petitioner appointed its arbitrator on 31st March, 2008 and respondent No.1 appointed its arbitrator on 30th April, 2008. The President of the Institution of Engineers (India) appointed the third arbitrator on 2nd July, 2008. The petition under Section 11(6) of the Act was filed by respondent No.1 on 17th July, 2008 with the prayer that the appointment of the third arbitrator be declared illegal and a Presiding Arbitrator be appointed in terms of the provisions of Section 11(8) of the Act.

In such circumstances, by order dated 17th December, 2010, the High Court rejected the petition filed by respondent No.1 under Section 11(6) of the Act with the observations that respondent No.1 has got the remedy under Section 16(2) of the Act. The review petition filed by respondent No.1 seeking recall of the aforesaid order was dismissed on 21st January, 2011 with the observations that if respondent No.1 was aggrieved by the appointment of its third arbitrator, contending that the same is not in conformity of the provisions of the Act, it can raise that plea before the arbitral tribunal. Thereafter, respondent No.1 filed 2nd application for review on the ground that on 17th December, 2010, the High Court, while rejecting the petition under Section 11(6), had observed that the third arbitrator should not be a member of the arbitral tribunal at the hearing of the petition under Section 16(2) of the Act. The review petition filed by respondent No.1 was accepted by the High Court in the impugned order dated 6th May, 2011. It was directed that the third arbitrator shall not be a member of the arbitral tribunal on the petition filed by the respondent under Section 16(2) of the Act.

In our opinion, the High Court was not justified in giving such a direction. In an application under Section 11(6) of the Act, the High Court assumed the jurisdiction to disqualify the arbitrator who had been appointed after following due procedure. The High Court was fully aware that to challenge the jurisdiction of the tribunal, after it had been duly constituted in accordance with the procedure under the arbitration clause, the remedy of the parties lay before the arbitral tribunal. In the order dated 17th December, 2010, it is clearly held by the High Court that under Section 11(6) of the Act, the petitioner can not seek a declaration that the appointment of the third arbitrator Mr. Madan Lal is illegal and without jurisdiction. The High Court had clarified that if the petitioner is aggrieved that the appointment of third arbitrator is without jurisdiction, "the same may be challenged before the arbitral tribunal and thereafter if he succeeds, steps for appointment of third arbitrator under Section 11(6) can be taken." This legal position was reiterated by the High Court in the order dated 21st January, 2011.

Section 16 of the Act clearly provides that the arbitral tribunal may rule on its own jurisdiction. Once the arbitral tribunal had been constituted, it was open to any of the parties to challenge its jurisdiction under Section 16(2). The aggrieved party would have to pursue the remedy of appeal under Section 37 or to challenge the award under Section 34. In case the plea of the respondents is accepted, the petitioner would have the right to appeal under Section 37(2)(a). However, in case the plea of respondents is rejected, it can only challenge the decision at the time when final award is challenged, in case the award is rendered against the respondents. The Chief Justice exercising the limited jurisdiction under Section 11(6) had no power to direct that the third arbitrator shall not be the member of the arbitral tribunal



UPON hearing counsel the Court made the following  
O R D E R

Leave granted.

The appeal is allowed in terms of the signed order.

| (Parveen Kr.Chawla)  
| Court Master  
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| | (Indu Bala Kapur)  
| | Court Master  
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[signed order is placed on the file]