

Sethi Constructions Vs. Kolkata West International City Private Limited

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Court : Kolkata

Decided On : Jun-24-2014

Judge : Sanjib Banerjee

Appellant : Sethi Constructions

Respondent : Kolkata West International City Private Limited

Judgement :

IN THE HIGH COURT AT CALCUTTA ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE AP No.830 of 2012 SETHI CONSTRUCTIONS -VERSUS-
KOLKATA WEST INTERNATIONAL CITY PRIVATE LIMITED For the Petitioner:
Mr Ratnanko Banerji, Sr Adv., Mr Reetobrata Mitra, Adv., Mr Dipayan Chowdhury,
Adv., Mr Suvradal Chowdhury, Adv., Mr Soumya Bhattacharjee, Adv., Ms Priyanka
Chowdhury, Adv., Mr Rudrajit Sarkar, Adv. For the Respondent: Mr Ranjan
Bachawat, Sr Adv., Mr Debnath Ghosh, Adv., Mr Shuvasish Sengupta, Adv., Mr
Arindam Guha, Adv., Mr S.

Roychowdhury, Adv. Hearing concluded on: June 19, 2014.

BEFORE SANJIB BANERJEE, Judge Date: June 24, 2014.

SANJIB BANERJEE, J.

: - In the respondent resisting the constitution of the arbitral tribunal as invited by the petitioner, several fundamental issues have been raised, some going to the cutting-edge of arbitration law.

The respondent insists that the present request under Section 11 of the Arbitration and Conciliation Act, 1996 is not maintainable in view of both the provisions of the said Act of 1996 and Section 69 of the Partnership Act, 1932.

The petitioner claims to be a partnership firm, now registered, with parents and son Sethis as its recorded partners. There is no dispute that the firm has been registered prior to the present request being carried to the Chief Justice or his designate and the names of the partners of the petitioner-firm are now reflected in the appropriate register of firms. The petitioner-firm is engaged in the construction business and it is the admitted position that the parties entered into an agreement contained in a letter of February 12, 2007 issued by the respondent for construction of buildings in a project known as Kolkata West International City floated by the respondent.

Clause 16 of the agreement is relied upon by the petitioner as the arbitration clause: 16.

ARBITRATION: Any dispute arising out of this contract, the decision of the Managing Director, Unitech Limited will be final and binding to contractor. According to the petitioner, disputes and differences have arisen between the parties which are covered by the perceived arbitration agreement contained in the matrix contract.

The petitioner claims that substantial sums remain due to it from the respondent and that payments have not been made despite several demands.

The petitioner claims to have invoked the arbitration agreement by its letter of January 31, 2012 addressed to the person designated as arbitrator.

The petitioner has relied on documents to demonstrate that the letter addressed to the arbitrator was duly posted and ought to have been received by the arbitrator.

The petitioner issued a subsequent letter of September 3, 2012 informing the arbitrator that since the arbitrator had not taken any steps for commencement of the reference and had, by his conduct, withdrawn from office, the petitioner construed the arbitrators mandate to have been terminated.

The letter of September 3, 2012 appears from the material downloaded from the India Post website, to have been delivered to the arbitrator on September 11, 2012.

The petitioner thereafter carried a request under Section 11 of the 1996 Act by way of AP No.376 of 2012 which the petitioner withdrew on August 21, 2012 with liberty to file afresh.

The present request has been filed on October 11, 2012.

The several objections canvassed by the respondent as to the maintainability of this request had been strenuously urged in courses of a previous round of hearing.

Almost at the close of the previous round of hearing, it was submitted on behalf of the respondent that since the letter of invocation of January 31, 2012 had not been served on the respondent, the present request could not be pursued.

It was at such stage that the petitioner sought to file a supplementary affidavit to demonstrate that copies of its letter of invocation of January 31, 2012 had, indeed, been served on the respondent and its senior officials.

Since it was a question of fact that had to be brought on record, the petitioner was permitted to file a supplementary affidavit, but subject to substantial costs being paid for the enormous waste of court time.

The supplementary affidavit has been filed; the respondent has used a re-joinder thereto; and, it is now the stand of the respondent that one of its officials did receive a copy of the letter invoking the arbitration agreement.

The respondent claims that its earlier submission may have been misunderstood and it had only sought to assert that the petitioner had no cause of action to carry this request to the Chief Justice or his designate since the petitioner had not

established that the arbitrator indicated by designation in the agreement had received the letter of invocation.

It, however, appears to be plain from the opening sentence of the order dated March 19, 2014 that the petitioner had sought to assert and establish that the letter invoking the arbitration agreement had been issued to and received by the respondent.

Such attempt on the petitioners part would not have arisen nor would the petitioner have been permitted to use a supplementary affidavit at the final stage of the hearing unless it was asserted on behalf of the respondent that it did not receive the letter of invocation and that the petitioner had not demonstrated that a copy thereof have been served on the respondent.

Since it is evident from the copy documents appended to the petition that the letter of January 31, 2012 had been posted in the usual course by the petitioner and the respondent cannot detract therefrom, the petitioner is entitled to the presumption that the letter of invocation was received by the addressee in the usual course.

In any event, the subsequent letter of September 3, 2012, wherein the earlier letter of January 31, 2012 has been referred to, has been duly received by the managing director of Unitech Limited as is evident from the document appearing at page 40 of the petition.

Three principal grounds, touching upon the maintainability of the present request, have been urged on behalf of the respondent.

The respondent suggests that the clause in the contract relied upon by the petitioner as an arbitration agreement is no arbitration agreement at all; since it does not indicate the parties consent to refer the disputes under the agreement for adjudication by way of arbitration.

The respondent next contends that though the petitioner-firm may now be registered and the names of its three partners recorded in the appropriate register, since the firm was admittedly not registered at the time that the letter invoking the arbitration agreement was issued on January 31, 2012, there was no valid request

for arbitration; and, as a consequence, no failure on the part of the arbitrator indicated by designation that would entitle the petitioner to carry a request under Section 11 of the 1996 Act.

The most substantial point canvassed by the respondent is that in an arbitration agreement where an arbitrator is named or indicated by designation, the failure of the arbitrator to take up the reference cannot prompt a court or a Chief Justice or his designate to name another as arbitrator in place and stead of the person named or designated as arbitrator.

The respondent has relied on Sections 11, 14 and 15 of the 1996 Act in support of such third contention.

The fiRs.count of objection is a non-starter.

In the affidavit filed by the respondent, it has claimed, at paragraph 3(vi) thereof, that at the time of execution of the matrix contract, Unitech LTD.was looking after the entire project of the respondent under an agreement with the respondent executed by and between the respondent and Unitech Limited. In the following sub- paragraph of its affidavit, the respondent has averred that it was agreed that if any disputes arising (sic) out of the contract, the decision of the Managing Director, Unitech Limited will be final and binding to contractors. At paragraph 3(xii) of such affidavit, the respondent has claimed, inter alia, as follows: 3.

xii) It appears from the clause that the arbitrator is a person designate and the parties intended to refer any dispute out of this contract to the Managing Director, Unitech Ltd and none else.

The High Court cannot supply the vacancy in appointing an arbitrator under section 11 of the Arbitration & Conciliation Act, 1996 in place of the Managing Director, United LTD.In such circumstances, the petition is barred by law and not maintainable and liable to be dismissed. The clause relied upon by the petitioner as the arbitration agreement may have been worthy of more scrutiny and careful consideration as to whether it amounted to an arbitration agreement or not if the affidavit stand of the respondent was not as clear and unambiguous as it is.

The respondent has unequivocally embraced the clause as an arbitration agreement, though it has asserted that the parties had agreed that the reference would only be taken up by the arbitrator specified by designation.

In the light of the affidavit stand of the respondent, it is not open to it to question the relevant clause or its efficacy as an arbitration agreement.

The ancillary point urged, that the parties had agreed only to go to a reference of the person specified by designation, is, of course, another matter.

It is the objection under Section 69 of the Partnership Act that has now to be considered for, if the petitioner was precluded from carrying the present request to the Chief Justice or his designate, the more involved arguments under the 1996 Act put forth by the respondent would not be necessary to be gone into.

It is the respondents contention that sub-section (3) of Section 69 extends the embargo, inter alia, under sub-section (2) to, inter alia, other proceedings.

The respondent says that a grievance may be harboured by a party to an arbitration agreement against the appointing authority not appointing an arbitrator or against the other party to the arbitration agreement not taking steps within reasonable time to ensure the constitution of the arbitral tribunal or against a named arbitrator if he does not take up the reference, provided a valid request for a reference has been made.

The respondent refers to Section 21 of the 1996 Act and claims that the request for an arbitral reference as envisaged in Section 21 of the 1996 Act is the equivalent of the institution of a suit by the lodging of the plaint.

The respondent reasons that if a suit in respect of a particular cause of action cannot be instituted by an unregistered partnership firm in view of Section 69(2) of the Act, an arbitral reference on the same cause cannot also be commenced validly by an unregistered partnership firm.

The respondent maintains that it is now legally accepted for long that even a petition filed in court in connection with an arbitral reference would be subject to

the embargo under Section 69(2) of the Partnership Act as any petition in connection with an arbitral reference has to be regarded as other proceeding within the meaning of Section 69(3) thereof.

The respondent submits that it would defy logic that an agreement not governed by an arbitration clause would be subject to the rigours of Section 69(2) of the Partnership Act, but the same agreement with an arbitration clause governing it would relieve the parties of the obligation to comply with the statutory condition.

The respondent asserts that there is no mandatory requirement for the registration of a partnership firm or for recording the names of the partners of a firm with the registrar; but if a partnership firm is not registered or the names of its partners not recorded in the appropriate register, certain consequences follow.

These consequences have, according to the respondent, been encapsulated in Section 69 of the Partnership Act.

The respondent relies on a judgment reported at (1989) 3 SCC476 (Shreeram Finance Corporation v.

Yasin Khan) for the proposition that an action instituted in derogation of Section 69(2) of the Partnership Act is incurably bad and the subsequent registration will not entitle the action to be continued and even an amendment to cure the defect cannot be allowed.

The judgments reported at (1998) 8 SCC559 (Delhi Development Authority v.

Kochhar Construction Work) and (2004) 7 SCC332 (U.P. State Sugar Corporation Ltd v.

Jain Construction Co.) have been placed by the respondent in support of its contention that subsequent registration of the partnership firm will not cure the defect as the proceedings instituted in derogation of Section 69(2) of the Partnership Act have to be regarded as void ab initio.

A stray line in paragraph 7 of the last-named judgment is emphasised by the petitioner as it suggests that arbitral proceedings would not be maintainable at the

instance of an unregistered firm. However, the relevant sentence cannot be understood to imply that an unregistered partnership firm may not initiate an arbitral reference.

Judgments of courts are not read as edicts on stone without reference to the context or the milieu in which the legal questions are raised therein.

The issue before the Supreme Court in the relevant case was whether a petition under Section 20 of the Arbitration Act, 1940 or a request under Section 11 of the Arbitration and Conciliation Act, 1996 would require compliance with Section 69 of the Partnership Act.

The respondent refers to Section 69(3) of the Partnership Act that mandates that the provisions of sub-sections (1) and (2) of that Section shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract. According to the respondent, there is no charter to read down the relevant provision in Section 69(3) of the Act to give it any constricted meaning as there can be no distinction between a claim carried by way of a plaint in a suit to a court or a claim carried by way of statement of claim before an arbitral tribunal.

The respondent insists that if the consequence of non-registration as recognised in Section 69 of the Partnership Act is to be given its due meaning, the splitting of hair by making a distinction between the institution of a civil action in court and the institution of a contractual action before an arbitral tribunal would be impermissible.

The respondent further cites a judgment reported at (1964) 8 SCR 50 (*Jagdish Chandra Gupta v.*

Kajaria Traders (India) LTD.) for the principle that the words 'other proceeding' in Section 69(3) of the Partnership Act would apply to all proceedings, including matters pertaining to arbitration, and it would be erroneous to interpret such words in *eiusdem generis* with the species of actions preceding the words in the provision.

Though the respondent is fair in drawing the courts attention to a Division Bench judgment of this court reported at AIR1955 Cal 278 (Meghraj Sampatlall v.

Raghunath and Son) and a more recent judgment of a Division Bench elsewhere reported at AIR2002 Bom 90 (Ram Nandan Prasad Sinha v.

K.M.Consultants).it is respondents submission that the judgment in Meghraj Sampatlall has to be regarded as having been impliedly overruled by Jagdish Chandra Gupta and the reliance on Meghraj Sampatlall in Ram Nandan Prasad Sinha has to be discredited on such score.

In Jagdish Chandra Gupta, the challenge before the Supreme Court was to an order passed under Section 8(2) of the Arbitration Act, 1940 on the ground that Section 69(3) of the Partnership Act had been erroneously interpreted in the impugned order and the bar thereunder was wrongly not applied.

The legal question that was framed by the Supreme Court, in paragraph 3 of the report, was whether the application under Section 8(2) of the Arbitration Act can be regarded as a proceeding to enforce a right arising from a contract and, therefore, within the bar of S.

69 of the Indian Partnership Act. It was in such perspective that the Supreme Court opined that the words other proceeding must receive their full meaning, untrammelled by the words a claim of set-off.

The reasoning in the judgment appears to be that not only would the institution of suit to enforce a right arising from a contract be barred by an unregistered partnership firm under Section 69 of the Partnership Act, but the prohibition would also apply to any other proceedings for the enforcement of a right arising from a contract if filed in court.

The respondent seeks to take advantage of the judgment not expressly specifying that the bar under Section 69 of the Partnership Act applies only to proceedings in court, though it is evident that the issue before the Supreme Court arose in connection with a petition filed under the 1940 Act in court.

The judgment in Jagdish Chandra Gupta cannot be read to imply that an unregistered partnership firm or a partnership firm carrying partners whose names are not recorded in the register maintained by the registrar of firms would not be entitled to initiate an arbitral reference without the intervention of court.

In Meghraj Sampatlall one of the contentions of the appellant, whose petition for annulment of an arbitral award had been repelled by a Single Bench, what was the whole reference to arbitration was invalid as the respondent-firm was unregistered and, therefore, prevented by Section 69(3) of the Partnership Act from making any reference to arbitration.

The Single Bench opinion was guided by a previous Single Bench judgment reported at AIR1950 Cal 391 (Babulal Dhandhanania v.

MesSr.Gauttam and Co.).which has been cited by the petitioner here.

The Division Bench in Meghraj Sampatlall approved the view taken in Babulal Dhandhanania that Section 69(3) of the Partnership Act did not preclude a reference to arbitration without the intervention of a court, in as much as reference to arbitration aliunde the court could not be said to be a proceeding within the meaning of the section. Paragraph 8 of the report is instructive: (8) Quite apart from the reasons given by the learned Judge, it appears to me to be implicit in the terms of S.

69 itself that the proceedings contemplated by it are proceedings in Court.

Those contemplated by sub- ss.

(1) and (2) are expressly so.

Sub-section (3) begins with a reference to the provisions of sub-ss.

(1) & (2) and says significantly that they shall apply also to a claim to set-off or other proceeding to enforce a right arising from a contract.

It appears to me that when sub-s.

(3) draws in the provisions of sub-ss.

(1) and (2).it draws in the whole of those provisions, including the reference to proceedings in Court, and when it says that the provisions of the earlier two sub-sections shall apply also to a claim of set-off or other proceeding, it seems to make it abundantly clear that the proceedings it is contemplating are of the same class as the proceedings contemplated in sub-ss.

(1) and (2).That limitation also appears from the provisions of sub-s.

(4)(b) which mentions certain proceedings to which the section shall not apply.

It is laid down that the section shall not apply to any suit or claim of set-off not exceeding one hundred rupees in value etc.It will be noticed that the proceedings from which the application of the section is excluded are all proceedings in Court. In the more recent Bombay judgment in Ram Nandan Prasad Sinha, the validity of an arbitral award was questioned on the basis of Section 69 of the Partnership Act.

The court framed the legal question at paragraph 4 of the report: whether reference to arbitration without recouRs.to Court is barred by Section 69(3) of the Partnership Act. The Bombay Division Bench reasoned that the bar under Section 69(3) of the Partnership Act means something in the nature of a suit that is a proceeding which is instituted or initiated in a Court. The Division Bench quoted with approval the views expressed in Babulal Dhandhanania and Meghraj Sampatlall and distinguished the judgment in Jagdish Chandra Gupta on the ground that it dealt with a petition under Section 8 of the 1940 Act and was not concerned with a reference to arbitration made without the intervention of court.

In addition to the two Calcutta judgments of the 1950s, the petitioner has also referred to the Bombay Division Bench judgment and a pithy opinion reported at AIR1957 Assam 159 (Bhattacharjee and Co.v.Union of India).The issue in the last-named case was whether the issuance of a notice under Section 80 of the Code of Civil Procedure, 1908 by an unregistered partnership firm made the subsequent institution of the connected suit bad by virtue of Section 69 of the Partnership Act

notwithstanding the firm having been registered prior to the suit being filed.

The Division Bench held that the bar to the institution of a suit under Section 69 of the Partnership Act did not extend to the service of a notice under Section 80 of the Code.

The petitioner has relied on the minutes of a meeting of November 3, 1930 of the special committee set up to draft the Partnership Act.

The petitioner also quotes copiously from the Seventh Report on the Partnership Act, 1932 authored by the Law Commission of India in 1957.

The petitioner cites the special committees reasons for making registration optional, but providing commensurate inducement to register partnership firms. The Law Commission suggested the registration of all partnership firms to be made compulsory though it recognised the special committees report in 1930 that small or ephemeral joint ventures to be registered would produce little public benefit and would act as a clog to petty enterprise. The petitioner says that since all matters pertaining to partnership firms have not been covered by the bar in Section 69 of the Partnership Act, it would be injudicious to read any more into the prohibition than is expressly provided in the statute or is discernable by necessary implication.

Though it is tempting merely to refer to sub-sections (2) and (3) of Section 69 of the Partnership Act in couRs. of the present discussion, since the operative words in Section 69(3) thereof cover sub-section (1) and the closing limb of clause (b) of sub-section (4) also throws some light on the matter in issue, the entirety of Section 69 must be seen in the context: 69.

Effect of non-registration.- (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and

the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect - (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or (b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply- (a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, are situated in areas to which, by notification under section 56, this chapter does not apply, or (b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Causes Courts Act, 1882, or, outside the Presidency- towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim. Sub-sections (1) and (2) of Section 69 of the Partnership Act are the substantive provisions and the two other sub-sections are extensions or exceptions which extend, exempt or otherwise qualify the operation of these substantive provisions in certain situations.

Both sub-sections (1) and (2) of Section 69 have a when, what, where and whom to them.

The four dimensions to the prohibition under either provision are: the time of its operation; the nature of actions on which it operates; the situs of the actions that attracts its operation; and, the persons that its operation covers. Neither sub-section (1) nor sub-section (2) of Section 69 of the Partnership Act prohibits the institution of suits of all kinds.

They preclude the institution of specified classes of suits.

On the aspect of time, it is well established that the bar operates at the threshold and when an objection is canvassed under such provision, the court decides whether it could have received the action at all.

The time of the operation of the bar cannot be postponed to any later stage of the action and high authorities instruct that an action instituted in derogation of the prohibition envisaged in the provision is incurably bad and cannot be resurrected by subsequent surgery.

As to on whom the bar operates and which classes of defendants or respondents are covered thereby appears plain to see from either substantive provision.

Likewise, the place of operation of the bar is captured in either substantive provision in the words in any Court. On a plain reading of sub-sections (1) and (2) of Section 69 of the Partnership Act, without reference to any other provision, the prohibition thereunder applies at a particular time, to a specified nature of actions, to an identified class of persons and to a designated place of institution.

The bar in either sub-section (1) or (2) of Section 69 of the Partnership Act cannot be seen to apply, on its own, elsewhere even in related fields.

The application of the prohibition, inter alia, under Section 69(2) of the Partnership Act to related fields is mandated by sub-section (3) in the words shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract.

The four features of the prohibition - the time of it taking effect, the nature of actions covered thereby, the class of persons covered by the disability or conferred the benefit thereunder and the situs of its operation - are not all referred to in sub-section (3). Sub-section (3) is silent as to the time of the operation of the prohibition, the class of persons to which it would apply and the venue of its operation.

A statutory provision may have several parameters or dimensions to it.

Once the circumstances that attract a particular consequence are stipulated in any statutory provision and a subsequent or another provision extends or curbs or

qualifies its operation in certain situations, the subsequent or other provision need not repeat all the other attendant parameters or dimensions as that would result in cumbersome and inartistic draftsmanship.

The subsequent or other provision must then necessarily be understood to imply that the features of the original provision that it does not specifically deal with remain unchanged in their operation to the extended situations.

Sub-section (3) of Section 69 of the Partnership Act extends the operation of, inter alia, sub-section (2) thereof to certain other classes of action and exempts its operation in certain other kinds of actions.

Sub-section (3) deals only with one aspect of the four dimensions that cover the operation of the prohibition, inter alia, in sub-section (2). Just as sub-section (3) leaves the time of the operation of the prohibition, inter alia, under sub-section (2) unaltered in the extended classes of actions that it specifies, it also leaves unaffected the classes of persons on whom the disability would operate and who may get the benefit thereunder.

It would then defy logic that sub-section (3) is seen to operate at a venue other than where the bar under, inter alia, sub-section (2) is confined to.

In sub-section (3) only extending the operation of the prohibition, inter alia, in sub-section (2) to other forms of action by not repeating the classes of persons covered thereby or the venue of its operation or the time at which it is to be reckoned, there is no mandate to interpret sub-section (3) to extend its operation to a different time or other classes of persons or different venues of actions than what is specified in sub-sections (1) and (2). In other words, in sub-section (3) focussing on only one of the four aspects of the prohibition recognised in sub-sections (1) and (2) of the Act, it is deemed to confine its extended operation in respect of certain other forms of action to the three other aspects as embodied in sub-sections (1) and (2). Sub-section (3) doubtless, extends the bar under sub-section (2) to a claim of set-off or other proceedings and it would not do to read down the expression other proceeding; but that does not imply that the bar under sub-section (3) would extend to persons not covered by sub-section (2) or a

theatre of operation not specified in sub-section (2) or that it would operate at some other time than as stipulated in sub-section (2). The prohibition under sub-section (3) has to be read in the context of sub-sections (1) and (2) and its field of operation restricted to only in any Court.

Since it is the undeniable position that the petitioner-firm was registered as at the date of the institution of the present request under Section 11 of the 1996 Act with the names of all its partners being reflected in the register of firms, the bar under Section 69(2) or its extension under Section 69(3) of the Partnership Act does not affect the present proceedings.

The incidental issue raised by the respondent, that the commencement of arbitral proceedings within the meaning of Section 21 of the 1996 Act by the issuance of the letter of invocation of January 31, 2012 cannot be taken cognizance of in view of Section 69 of the Partnership Act, is of no merit.

The Assam judgment in *Bhattacharjee and Co.* is a direct answer on the point, but it can also be added that the deemed commencement of an action by any legal fiction would not apply to a bar when the time and place of the bar have been specified in the statute.

The bar under Section 69 of the Partnership Act operates at the time of the institution of a suit or a claim of set-off or other proceedings to enforce a right arising from a contract in any court.

Since the commencement of the arbitral proceedings, within the meaning of Section 21 of the 1996 Act, by the issuance of the letter of invocation of January 31, 2012, was not in any court, the bar under Section 69 of the Partnership Act did not disqualify the petitioner-firm from commencing the arbitral reference and such matter is of no consequence even though the firm was not registered on such date nor its partners names entered in the registrar of firms. Though the respondent has referred to a judgment reported at (2004) 7 SCC 288 (*Milkfood Ltd v.*

GMC Ice Cream (P) LTD.) to suggest that Section 21 of the 1996 Act is not unidimensional, apart from the relevance of such section in the context of the

transitional provision under Section 85 thereof, its present operation is essentially limited to arresting the clock of limitation qua the substantive disputes between the parties.

Apart from the fact that the relevant prohibition applies only to proceedings in court, there is a further reason why the bar directly under Section 69(2) of the Partnership Act would not apply to the initiation of an arbitral reference without recourse to a court.

The bar in Section 69(2) of the Partnership Act is to the institution of a suit.

The word suit may not have been defined in the Code of Civil Procedure but it is generally understood, particularly in legal parlance, to be an action initiated in a court of law by the filing of a plaint.

It is the receipt of a plaint in certain cases that is prohibited by Section 69(2) of the Partnership Act.

Just as a suit for tort or a trademark action lodged by an unregistered firm cannot be repelled on the ground of Section 69(2) of the Partnership Act, the area and scope of its operation are also limited as Section 69(4) instructs that it would not apply to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim. The respondents second line of resistance to the reference or appointment sought by the petitioner, fails.

There are two aspects to the final issue.

The first is whether the 1996 Act empowers the Chief Justice or his designate to entertain a request for the constitution of an arbitral tribunal if the arbitration agreement names or indicates an arbitrator by designation and such named or designated arbitrator either refuses to take up the reference or declines to continue with it after initially accepting the same.

The related question on the second limb of the last issue is whether an arbitration agreement with a named or designated arbitrator extinguishes upon the failure or refusal or inability of the named or designated arbitrator to take up or pursue the

reference.

The second bough of the respondents final count of challenge to the maintainability of the present request is that Section 11 of the 1996 Act is only a default mechanism and the default has to be one of the appointment or constitution of the arbitral tribunal and not of taking up the reference.

The respondent submits that when an arbitration agreement names an arbitrator or sufficiently identifies the arbitrator by designation, such named or identified person has the mandate of the parties immediately upon the execution of the arbitration agreement.

The respondent suggests that a person named or indicated by designation in an arbitration agreement does not obtain his mandate, within the meaning of that word as used in several provisions of the 1996 Act, only upon the disputes covered by the arbitrator being referred to him.

The mandate, according to the petitioner, is traceable to the arbitration agreement itself and, though the personnel of the arbitrator may be altered by the parties without reference to such arbitrator, such a change has to be regarded as the termination of the mandate of the earlier named arbitrator and the conferment of the mandate on the subsequent person agreed to by the parties.

The respondent says that while there may not be any difficulty in the termination of the mandate of an arbitrator named or indicated by designation in an arbitration agreement by the parties consensus without reference to such arbitrator and at any time after the execution of the arbitration agreement or prior to the disputes being referred to such arbitrator or after the commencement of the reference by such arbitrator or at any time prior to the final award being rendered on the disputes, there is considerable difficulty if one of the parties to the arbitration agreement asserts the termination of the mandate of such arbitrator and the other does not acquiesce therein or disputes it.

The respondent reads Sections 14 and 15 of the 1996 Act to imply that the role of the court arises only when there is a controVeRs.between the parties to the

arbitration agreement as to whether an arbitrator has become de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay.

The role of the court in such a scenario would, according to the respondent, be only to decide on the issue as to whether the mandate of the arbitrator has been terminated.

The respondent places Section 15(2) of the 1996 Act that stipulates that upon the termination of the mandate of an arbitrator, a substitute arbitrator is required to be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

The respondent argues that since the extent of judicial intervention in matters covered by Part I of the 1996 Act is limited by Section 5 of the Act to what is only provided for in the relevant Part, no authority exercising judicial powers to adjudicate upon any matter covered by Part I of the 1996 Act should do anything which is not mandated by the provisions contained in Part I.

The respondent maintains that Part I of the 1996 Act does not give any power to any judicial authority in seisin of any matter thereunder to ascertain or assess any nebulous subject of what the parties intended to do or not to do.

The respondent insists that the scope of adjudication by a judicial authority in seisin of any matter covered by Part I of the 1996 Act is restricted to that what appears from the arbitration agreement and not what the judicial authority may perceive a party thereto to have intended to imply thereby.

Thus, the respondent says, when an arbitration agreement names an arbitrator or indicates the identity of the arbitrator by designation and such arbitrator fails or declines to take up the reference and his mandate is terminated thereby, no judicial authority can fill up the vacancy as Section 15(2) of the Act makes the rules that were applicable to the appointment of the arbitrator being applied again, which would result in a wasted effort of running around in circles.

The respondent submits that the parties to the arbitration agreement may remedy such a situation by concurring in the appointment of another arbitrator, but if that is not done, it is the end of the arbitration agreement as the arbitration agreement is rendered incapable of performance or enforcement.

The respondent refers to Section 8(1)(b) of the 1940 Act which spoke of the intention of the parties and submits that in the 1996 Act not incorporating such provision or any other akin or comparable thereto, the assessment of what the parties may have intended to do or not do is not mandated by the 1996 Act.

The respondent lowers the pitch somewhat to say that even if it is accepted that an arbitration agreement may survive the death of the arbitrator named therein or despite the failure or incapacity of the arbitrator named or indicated by designation to take up the reference, such a situation has to be regarded as an arbitration agreement without the personnel of the arbitrator identified therein and would oblige a party desirous of invoking the arbitration agreement to seek the concurrence of the other party in the appointment of an arbitrator before resorting to the default mechanism of carrying a request under Section 11 of the 1996 Act to a Chief Justice or his designate.

The respondent relies on Section 11(2) of the 1996 Act in such context.

Such provision leaves the parties to an arbitration agreement free to decide on the arbitrator.

The respondent places Section 11(5) of the 1996 Act that covers a situation where in an arbitration with a sole arbitrator there is no agreement between the parties as to the personnel of the arbitrator and submits that the recourse to a Chief Justice or his designate under such provision may be had only upon the failure of the parties to agree on the arbitrator within thirty days from the receipt of a request in such regard by one party from the other.

Without prejudice to its contention that an arbitration agreement with an arbitrator named or indicated by designation perishes upon the death or inability of such arbitrator to take up the reference, the respondent emphasises the lesser

argument with an example.

It says that in an arbitration agreement carrying a named arbitrator it is possible that the disputes thereunder may arise with the named arbitrator either dead or otherwise incapable of taking up the reference.

In such a case, the respondent suggests, there would be no occasion to request the named arbitrator to take up the reference and, as a consequence, no failure on the part of the arbitrator.

Such a situation would oblige a party to the arbitration agreement desirous of seeking a reference to request the other party to agree on the appointment of an arbitrator as contemplated in Section 11(5) of the Act and carry a request to the Chief Justice or his designate only upon the failure of such an essay, according to the respondent.

The petitioner suggests that the situation that has arisen in this case is squarely covered by Section 11(6) of the 1996 Act.

According to the petitioner, when an arbitrator named or indicated by designation in an arbitration agreement fails to respond following a notice invoking the arbitration agreement or demonstrates a conduct consistent with a perception that such arbitrator is not inclined to take up the reference, there is no obligation on the party invoking the arbitration agreement to regard the situation as one as if the arbitration agreement did not name or indicate any arbitrator.

The petitioner submits that the failure by an arbitrator named or indicated by designation in an arbitration agreement to take up a reference leads to the inevitable conclusion that such person, who under the appointment procedure agreed upon by the parties was required to perform a function entrusted to him under that procedure, has failed to perform the function.

The petitioner says that such a situation is what Section 11(6)(c) contemplates and covers and a party to the arbitration agreement may, as a consequence, request the Chief Justice or his designate to take the necessary measure under the relevant provision.

The petitioner suggests that the material provision of Section 11(6)(c) entitling a Chief Justice or his designate to take the necessary measure does not imply that if the appointment is made in the arbitration agreement itself there is no failure to perform any function under (the) appointment procedure agreed upon by the parties. The petitioner contends that Section 11(5) of the 1996 Act comes into play only if there is an arbitration agreement with a sole arbitrator but the arbitrator is not identified nor the manner of his appointment specified; and the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree. The petitioner says that Section 11(6) of the Act conceives of several possibilities, including the failure of a party to act as required under the appointment procedure, the failure of the parties or of two appointed arbitrators to complete the constitution of the arbitral tribunal, the failure of the appointing authority indicated in the arbitration agreement to make an appointment of an arbitrator, and even the failure of an arbitrator named or indicated by designation in an arbitration agreement to take up the reference.

The petitioner submits that the purpose of Section 11 is to ensure that a reference commences.

In most cases, according to the petitioner, the commencement of the reference or the initiation of the process of adjudication may be stalled by reason of a party or an appointing authority or one or both of the arbitrators already on the panel failing to perform the function of constituting the arbitral tribunal to take up the reference; but it is equally possible that the effective commencement of the arbitral reference is delayed or there is no effective commencement at all upon the arbitrator named or indicated by designation in the arbitration agreement failing or declining to take up the reference or being incapable of taking up the reference.

The petitioner questions the rationale of the respondents submission that the failure by a person or an institution named in an arbitration agreement to make an appointment of an arbitrator would be a failure to perform any function under (the) appointment procedure, but the failure of the arbitrator named or indicated by designation in the arbitration agreement to take up the reference would not be such a failure.

The petitioner says that if the object of the exercise under the 1996 Act is to promote arbitration and the speedy commencement and conclusion of a reference, it would not stand to reason that the failure of a party or an appointing authority to secure the appointment of the arbitrator can be addressed by the Chief Justice or his designate but the failure of an arbitrator named or indicated by designation in the arbitration agreement to take up the reference cannot.

The parties have carried several authoritative pronouncements on the various aspects that cover the larger final issue.

The respondent refers to a judgment reported at AIR1969 Bom 227 (Keshavsingh Dwarkadas v.

Indian Engineering Co.) that arbitration law does not recognise or require the acceptance of an appointment by an arbitrator.

A distinction was sought to be made in that case between the mere nomination of an arbitrator and a valid appointment on the argument that it was only after the acceptance of the nomination that the appointment was complete.

The court rejected the submission on the ground that nothing in the 1940 Act required the appointment to be completed upon the acceptance of the nomination.

A judgment reported at (2009) 3 Arb LR81(Sara International Ltd v.

Arab Shipping Co.(P) LTD.has been placed by the respondent for the same principle and the following observation at paragraph 31 of the report: 31.

For the same reasons why acceptance is not required in the case of an umpire, the appointment, in the case of an arbitrator, also does not require his acceptance.

The Act does not impose such a condition; in the event an arbitrator declines to take up the assignment, it is open to the parties to agree upon another name; in the event of disagreement, the court can be approached, under Section 14 or 15 as the case may be. An opinion of a Single Bench reported at AIR2001 Mad 440 (Mamala Solvent v.

Manipal Finance Corporation LTD.has been relied on by the respondent for the observation therein that the order that can be made under Section 11(6) of the 1996 Act is only to implement the agreed procedure but not to venture upon to pass an order otherwise. However, the matter pertained to a petition under Section 9 of the 1996 Act where the petitioner challenged the appointment of an arbitrator and the choice of the venue of the reference.

The observation in the judgment on the scope of the authority available to a Chief Justice or his designate under Section 11 of the 1996 Act was based on the then perception that the Chief Justice or his designate exercised only administrative powers and no judicial authority under the relevant provision.

The Constitution Bench judgment on such aspect in *Konkan Railway Corporation Ltd v.*

Rani Construction (P) Ltd reported at (2002) 2 SCC388has now been overruled in *SBP & Co.v.Patel Engineering Ltd* reported at (2005) 8 SCC618 The petitioner has relied on a judgment reported at (2012) 7 SCC71(*ACC Limited v.*

Global Cements Limited) for the proposition that an arbitration agreement with a named arbitrator does not necessarily cease to be operative upon the death of such named arbitrator.

The petitioner has also placed the Bombay judgment reported at (2012) 4 Arb LR229(*Global Cements Ltd v.*

The Associated Cement Companies LTD.which was carried to the Supreme Court.

The Bombay judgment was based on a Supreme Court judgment rendered in 2005 but reported much later at (2012) 7 SCC192(*San-A Tradubg Company Limited v.*

I.C.Textiles Limited).It is such judgment, from which much sustenance was drawn by the Bombay High Court and the Supreme Court in *ACC Ltd v.*

Global Cements LTD.that should fiRs.be seen.

In *San-A Tradubg Co.LTD*, the designate of the Chief Justice of India was approached in an international commercial arbitration upon the arbitrator named in the arbitration agreement expressing his inability to take up the reference.

The argument by the respondent was that when an arbitration agreement provides for the reference of the disputes thereunder to a particular individual and such agreed arbitrator refuses to act, the arbitration agreement itself comes to an end.

It was held that in the absence of any specific condition debarring appointment of a fresh arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named arbitrator's refusal to perform his function. In the Bombay judgment of *ACC Limited v.*

Global Cements LTD, the principle of law culled from *San-A Tradubg Co.Ltd* was that unless there is specific stipulation in the contract under which parties have debarred the appointment of a new arbitrator if the named arbitrator refuses to act or perform his function, the arbitration clause in the contract would not stand obliterated and the jurisdiction of the court to appoint a fresh arbitrator can be invoked. The Bombay judgment also referred to a previous view of the same court reported at (1998) 2 Bom CR627 (*Satya w/o Kailashchandra Sahu v.*

Vidarbha DistilleRs, where it was observed that when a named arbitrator refuses to act, then the procedure which is required to be followed is provided in Section 11 of the Act. The Supreme Court considered the question afresh and expressed the following opinion at paragraph 29 of the report in *ACC Limited*: 29.

The question may also arise in a given case that the named arbitrator may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary.

Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator. It is the initial aspect of this last issue - whether the subject arbitration agreement stands exhausted upon the arbitrator named by designation therein not

taking up the reference despite a request - that has fiRs.to be resolved; for, if the arbitration agreement itself is seen to have perished, no other question needs to be addressed.

It is possible that parties to an agreement agree to have their disputes thereunder resolved through arbitration only on condition that the reference would be taken up by a particular person.

That would be a case where the arbitration agreement would be incapable of being severed from the personnel of the arbitrator and the refusal or inability of the named arbitrator to take up the reference would extinguish the arbitration agreement itself.

But in a statutory regime of pronounced preference for arbitration, it may not be easily accepted or inferred that an arbitration agreement is inseparable from the personnel of the arbitrator named therein.

The respondent has contended that in Section 8(1)(b) of the 1940 Act not being preserved by the 1996 Act, there is no occasion to gauge the intention of the parties upon an arbitrator named in the arbitration agreement failing to take up the reference or being incapable of taking up the reference.

Such argument does not appeal.

In most cases before any judicial authority, including a Chief Justice or his designate, to ascertain whether there is any arbitration agreement between the parties, such assessment is based on the perceived intention of the parties.

The assessment of intention is so ingrained in the process of adjudication that it was not necessary for the 1996 statute to spell out the same.

It must also be appreciated that even though the 1996 statute is the successor in law of the 1940 Act, it is not modelled on the predecessor statute.

It follows an international model and merely because it does not carry some of the provisions of the previous statute does not imply that the rules of assessment are altogether changed.

The approach to the question ought to be that an arbitration agreement should overtly indicate its extinction upon the arbitrator named therein not taking up the reference or being incapable of taking up the reference.

If the express intention of the arbitration agreement to perish upon the failure or inability of the named arbitrator to take up the reference is not evident, it may be inferred that the agreement to go to arbitration survives the failure or inability of the named arbitrator to take up the reference.

At any rate, the onus of demonstrating that the arbitration agreement itself perishes upon the named arbitrator failing to take up the reference or being incapable of doing so, will be on the party resisting the reference and a high test would be required on its part.

There may also be a distinction in degrees as to whether an arbitration agreement survives the refusal or inability of the arbitrator indicated therein to take up the reference between an arbitration agreement with a named individual as an arbitrator and an arbitration agreement indicating the arbitrator by designation.

The reason for this is that it is more likely that if an arbitration agreement is founded only on the confidence of the parties in the arbitrator, it ought to be a named individual rather than the incumbent of a particular post.

But again, an arbitrator named by designation could be a person in such a post that the parties to the arbitration agreement would intrinsically have confidence in him.

That an arbitration agreement with an arbitrator named or indicated by designation therein demonstrates the confidence of the parties in such person or the incumbent in the post, is beyond doubt.

It still begs the question as to whether such an arbitration agreement necessarily implies that the parties thereto did not have any confidence, at the time of entering upon the arbitration agreement, in any one else taking up the reference.

The respondent in this case has only hinted in its affidavit that the association of Unitech Limited with the respondents project at the relevant point of time prompted the respondent to include the arbitration agreement in the matrix contract with the managing director of Unitech Limited designated as arbitrator.

It does not follow that upon Unitech Limited not being associated with the project or its managing director not taking up the arbitral reference, the parties intended that there would be no arbitration at all.

In any event, the respondent has failed to make out such a high case when the onus was on the respondent to demonstrate the extinction of the arbitration agreement upon either Unitech Limited not being associated with the project or its managing director not taking up the reference.

Though an arbitration agreement is regarded as the consensus of the parties thereto to have the disputes covered thereby adjudicated by a private forum outside the system of courts, in practice, arbitration agreements are more unilateral and are often thrust upon the lesser party by the other.

In an arbitration agreement fashioned by one party or in a matrix contract containing an arbitration clause being drafted by one party and the other party merely being required or expected to accept the same, it is difficult for the party responsible for drawing up the agreement to demonstrate that both parties intended the arbitral reference to be taken up only by the person indicated in the arbitration agreement or not at all.

In the matrix contract in this case being a letter issued by the respondent herein, it has a further hill to climb on top of a mountain.

The respondent has, clearly, fallen short of establishing that the arbitration agreement stood exhausted and incapable of performance upon the arbitrator named therein by designation not taking up the reference.

If it is possible for a party to an arbitration agreement to resist a reference by urging that the relevant arbitration agreement was rendered inoperative upon the arbitrator named therein or indicated by designation failing to take up the reference

or being incapable of taking up the reference, on the ground that the parties had only reposed confidence in such arbitrator, it would follow that a party can take a ruse that even an arbitration agreement indicating an appointing authority to name an arbitrator to take up the disputes covered by the arbitration agreement would perish upon the appointing authority not making the reference, on the same ground that the parties agreed to go to arbitration only on the ground that the named appointing authority would choose the arbitrator.

But the governing statute says to the contrary and even some arbitration agreements contained in government contracts, which provide that there would be no arbitration if the named appointing authority did not make the appointment, have been read down by the highest court on the ground that such clauses interfere with the authority of the Chief Justice or his designate to take the necessary measure.

The fifth limb of the final issue is answered against the respondent and it is held that the arbitration agreement between the parties has not perished upon the arbitrator indicated therein by designation not taking up the reference despite request.

Before the other branch of the third and final issue that has arisen herein is considered, Section 11 of the 1996 Act may be seen in its material part in sub-sections (2) to (6) thereof: 11.

Appointment of arbitrators.- (1) (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 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 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 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,- (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 (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, unless the agreement on the appointment procedure provides other means for securing the appointment. Section 11(2) of the 1996 Act leaves the parties free to agree on a procedure for appointing the arbitrator or arbitrators but once an appointment is made under sub-section (6).the parties may not tinker with such choice; though it cannot be immediately comprehended why any judicial authority should take unkindly to the parties to an arbitration agreement altering, by consent, the arbitrator appointed under sub-section (6).Sub-sections (3).(4) and (5) are based on Article 11(3) of the UNCITRAL Model Law and deal with situations where the parties fail to agree on a procedure for appointing the arbitrator or arbitrators.sub-sections (3) and (4) deal with arbitration agreements providing for three arbitrators without indicating the procedure for the appointment of the arbitrators and sub-section (5) deals with an arbitration agreement with a sole, unidentified arbitrator.

Sub-sections (4).(5) and (6) of Section 11 of the 1996 Act indicate the several circumstances in which a party to an arbitration agreement may request the Chief Justice or his designate to complete the constitution of the arbitral tribunal or appoint the sole arbitrator or take any other measure that may be appropriate, as the case may be; but in every case it has to be regarded as a default mechanism in the sense that it cannot be resorted to without the failure of the agreed

procedure; or, when there is no agreed procedure, an attempt to constitute the arbitral tribunal being undertaken prior thereto.

Every limb of the relevant provision that can be invoked before a Chief Justice or his designate has to be preceded by a failure: of a party to an arbitration agreement; or, of the two appointed arbitrators when the tribunal consists of three; or, of any other person, including an institution, which fails to perform any function entrusted to it under the appointment procedure agreed upon by the parties to the arbitration agreement.

The expression fails to perform has, perforce, to be understood to include both a refusal to perform and the inability to perform.

The failure to perform a function, within the meaning of the cognate expression in the provision, implies such failure (including inability) as would inhibit the commencement or the conduct of the reference in pursuance of the agreed procedure.

It is such malady which is remedied by the provision and, in such backdrop, the approach has to be more wholesome than to lose the plot in the perceived limitation of the words.

Sub-sections (3) and (4) do not apply in this case as both provisions are concerned with arbitration agreements providing for three arbitrators ORS. Sub-section (5), equally, does not apply in terms since the condition for its applicability as expressed in its opening words, Failing any agreement referred to in sub-section (2), is not met in this case as the parties had, indeed, agreed on a procedure for appointing an arbitrator to take up a reference under the subject arbitration agreement.

The death or unwillingness or refusal or inability of an arbitrator named or indicated by designation in an arbitration agreement does not amount to the failure of the parties to agree on a procedure for appointing the arbitrator in an arbitration with a sole arbitrator.

The refusal or the incapability of the arbitrator named or indicated by designation in an arbitration agreement to take up the reference may give a party to the relevant arbitration agreement a right to approach the Chief Justice or his designate, but such right cannot be under Section 11(5) of the 1996 Act.

The respondents primary contention on such score is that if there is an arbitrator named or indicated by designation in an arbitration agreement and such arbitrator does not or cannot for any reason to take up the reference, his mandate would be deemed to be terminated; whereupon Section 15(2) of the 1996 Act would come into play and the rules that were applicable to the appointment of such arbitrator would have to be applied for running around in circles without really moving at all.

As such argument, in a circuitous way, amounts to suggest that an arbitration agreement with an arbitrator named or indicated by designation therein perishes upon such arbitrator failing or being unable to take up the reference, and such contention has been rejected, it is to be seen whether the lesser argument of the respondent would then hold good.

The respondent suggests that upon the failure or the impossibility of the arbitrator named or indicated by designation in an arbitration agreement to take up a reference, it is incumbent on the parties to forge an agreement on the appointment procedure and a party thereunder cannot approach the Chief Justice or his designate with a request under Section 11 of the 1996 Act without calling upon the other party to concur in a suggested appointment.

But it does not appear, on a reading of Section 11(5) of the 1996 Act, that when there is an agreed procedure for appointment of the arbitral tribunal, a party to the arbitration agreement is called upon to approach the other party upon the agreed procedure failing.

It is simply a situation which is not covered or governed by Section 11(5) of the 1996 Act.

Juridically, it is completely unacceptable that a party desirous of initiating an arbitral reference is left with no remedy when the arbitrator named or designated in

the arbitration agreement fails or refuses to take up the reference and it is evident that the arbitration agreement itself does not perish thereby.

If Section 11(5) of the 1996 Act does not apply to such a circumstance - as it clearly does not - and the respondent is right in asserting that Section 11(6) cannot accommodate such a party, it would again result in the disagreeable conclusion of the arbitration agreement being exhausted or rendered inoperative.

It is in such light that clause (c) of sub-section (6) of Section 11 must be searched to discover whether such a party can make a request to the Chief Justice or his designate thereunder.

The petitioner does not blame the respondent, as it cannot, for the present imbroglio.

It insists that it has a right under the arbitration agreement to have the disputes covered thereby adjudicated by a private forum.

The petitioner asserts that it has been compelled to approach the Chief Justice or his designate upon the arbitrator indicated by designation in the arbitration agreement failing to take up the reference despite due request.

Since there is no failure here on the respondents part, clause (a) of sub-section (6) is not attracted; and, clause (b) excludes itself in the context by its very words.

If at all, it is clause (c) of sub- section (6) that can be of any solace to the petitioner, provided the remedy for the situation that has arisen is found therein.

The respondents argument is that the Chief Justice or his designate cannot make any appointment of his choice under Section 11(6) of the Act in view of the words securing the appointment appearing at the tail of the provision and the use of the definite article the instead of the indefinite an. The respondent says the word the is relatable to what has been agreed upon by the parties under the appointment procedure; and does not give the Chief Justice or his designate any leeway to make some other appointment.

This submission may have been worthy of consideration had the closing limb of Section 11(6) of the Act read: to take the necessary measure, unless the agreement on the appointment procedure provides other means, for securing the appointment. In there being no comma between the words means and for in the last line of the sub-section, the submission does not hold good.

At any rate, even if the contention is accepted, it cannot defeat the object of the exercise undertaken by the Chief Justice or his designate under the relevant provision to ensure an effective appointment for the arbitral reference to be taken up.

The argument of the respondent ignores the fact that the expression securing the appointment appears as a part of the situation described by the adverb clause unless the agreement on the appointment procedure provides the means for securing the appointment. Such expression qualifies the authority of the Chief Justice or his designate to take the necessary measure only when the situation contemplated thereby presents itself.

Simply put, it implies that when the agreement between the parties on the appointment procedure provides other means for constituting the arbitral tribunal notwithstanding the failure of any person to perform any function entrusted to him thereunder, the necessary measure the Chief Justice or his designate may take has to be confined to the other means for securing the appointment provided for in the agreement between the parties on the appointment procedure.

But when there is no alternative means under the agreed appointment procedure to secure the appointment, the jurisdiction of the Chief Justice or his designate to take the necessary measure is unfettered and not subject to any qualification.

The subject arbitration agreement does not provide any means for securing the appointment other than the one which has been exhausted by its failure.

The respondents submission on this count does not appeal and, in any event, it is irrelevant in the backdrop of the agreed procedure for appointment as provided in the subject arbitration agreement.

The ancillary argument of the respondent is that the failure to act cannot be equated with the impossibility to act and it cannot be said that the failure to act on the part of a named arbitrator would give rise to a certain consequence and the impossibility on his part to act would result in another.

The respondent emphasises that the failure that is material for the relevant provision is the failure to perform any function entrusted to the person under the appointment procedure agreed upon by the parties and it concerns only the appointment of the arbitrator and not the failure or impossibility on the part of the arbitrator to take up the reference.

With respect, much of the respondents argument plays and preys on the ubiquitous gap between an idea and its expression, the doleful limitation of language and the known ineptitude of the written or the spoken word to adequately cover the entirety of the thought behind what is reflected in a bouquet of sets of alphabets or sounds.

The sense that the 1996 Act conveys, and the entire purpose of Section 11 thereof, is to expedite the commencement of the process of arbitration and to ensure the compliance with an arbitration agreement.

In its three operative limbs, Section 11 of the 1996 Act takes care of the recalcitrance of the concerned delinquent and removes the impediments to the commencement of the adjudication process under the arbitration agreement.

Viewed in this light, the failure of an arbitrator named or indicated by designation in an arbitration agreement to respond to a request for taking up the reference has to be seen as a failure on his part to perform a function entrusted to him under the appointment procedure agreed upon by the parties to the arbitration agreement.

While there is no obligation on an arbitrator named or indicated by designation in an arbitration agreement to consent to his appointment or formally accept the same, if his conduct is consistent with the perception of his refusing to take up the reference, it would amount to a failure of the kind that Section 11(6)(c) of the 1996 Act will permit a party to the arbitration agreement to carry a request to a Chief

Justice or his designate for the necessary measure to be taken.

A statutory provision has an object or a purpose which it sets out to achieve or a particular remedy that it seeks to provide.

The overwhelming consideration of Section 11 of the 1996 Act is to ensure that an arbitral tribunal is put in place, by removing the roadblocks that may have been placed, unwittingly or by design, by the various stakeholders. If such is the avowed purpose of the provision, the words in which the idea is expressed ought to be reasonably understood and seen in consonance with the object of the provision.

Nothing in sub-section (6) of Section 11 gives any statutory indication as to the dimension of time or the expiry of any period upon which the failure to perform the relevant function must be inferred.

In other words, the provision does not indicate when the non-compliance of the relevant function by the concerned person may be regarded as failure on the part of such person for the right to seek the remedy thereunder to kick in.

It is with the ethos of the provision in mind that the judgment reported at (2000) 8 SCC151 (Datar Switchgears Limited v.

Tata Finance Limited) opined that the period of time indicated in Section 11(5) of the 1996 Act should be read into Section 11(6) thereof and regarded as the reasonable time for fulfilling the obligation to perform the necessary function.

It is with the same philosophy that a problem of the present kind has to be endeavoured to be resolved.

There is a distinction between an arbitrator named or indicated by designation in an arbitration agreement, whether he is the sole arbitrator or one on a panel, and an arbitrator who is appointed following a request after the disputes have arisen.

Though there may be no difference in such context between an arbitration with a sole arbitrator and an arbitration with a panel of arbitrators. Since the subject agreement conceives of arbitration by a sole arbitrator, the discussion here is

confined to such a situation.

An arbitration with a sole arbitrator may either carry the name of such arbitrator, individually or by designation, in the arbitration agreement; or may entitle either party to name the arbitrator; or may even require some other person or institution to nominate the arbitrator.

In an arbitration with a sole arbitrator when a party thereto is required to name or appoint the arbitrator fails to do so, a request may be carried under Section 11(6)(a) of the 1996 Act to the Chief Justice or his designate to take the necessary measure.

When an appointing authority, including an institution, is named for such purpose in the arbitration agreement, it is the obligation of such person to perform the function entrusted to it by the arbitration agreement; or a Chief Justice or his designate may remedy the situation.

It is possible that an appointment is made but there is a failure on the part of the appointee to take up the reference.

In that case there would be no failure on the part of the person entrusted to make the appointment under the arbitration agreement to perform any function; it would only be a failure by his appointee which the appointing authority can remedy by, ordinarily, making another appointment as even Section 15(2) of the Act conceives of the appointment of the substitute arbitrator being made after the termination of the mandate of the original arbitrator by observing the rules that were applicable to the appointment of the arbitrator being replaced.

But when the named arbitrator himself or any person indicated as arbitrator by designation does not or cannot take up the reference, it is the failure to take up the reference which is the material failure within the meaning of the expression fails to perform any function entrusted to him under an appointment procedure agreed upon by the parties Section 11(6)(c) of the 1996 Act recognises institutional arbitration in, particularly, including an institution within the meaning of a person indicated therein.

This is of some significance in the present scenario.

Institutional arbitration, in the context of domestic arbitrations, would be the reference of the disputes covered by any matrix contract to an identified institution, whether or not it specialises in arbitration.

Many modern domestic arbitration agreements provide for the resolution of the disputes covered by the matrix contract to be by arbitration conducted by a named institution.

The function that is then entrusted by such an arbitration agreement to the named institution to perform, is the conduct of the reference.

The rules of the institution may have a procedure for appointment of one or more arbitrators or the matter left to the choice of the parties.

But the rules aside, the obligation of the institution would be to conduct the reference.

If there is any failure on its part to ensure the commencement of the arbitral reference (which expression is distinct from and must not be confused with the legal fiction of commencement of arbitral proceedings as used in Section 21 of the 1996 Act or transitional provision Section 85(2) thereof).that can be remedied at the instance of a party to the arbitration agreement under Section 11(6)(c) of the Act.

If the Chief Justice or his designate does not reckon the arbitration agreement to have perished upon the named institution not conducting the same, it is open for the Chief Justice or his designate to take the necessary measure to ensure the effective conduct of the reference, including by setting up an altogether different arbitral tribunal if the relevant institution is not inclined or unable to conduct the reference.

Take again, an arbitration agreement naming or indicating an arbitrator by designation and permitting such person to either take up the reference or nominate another to do so.

If such person does not respond despite due request to perform his function under the arbitration agreement, it would be a conundrum whether he has merely failed to take up the reference or he has merely failed to make the appointment by nominating an arbitrator.

If it is said that the failure of a named appointing authority to nominate an arbitrator is a matter capable of being addressed under Section 11(6)(c) of the Act, but the failure or incapability of an arbitrator named or indicated by designation in the arbitration agreement to take up the reference cannot be remedied under the provision, it would lead to a serious anomaly or result in the absurdity of the object of the assessment in such case being whether such person in the example in the previous sentence failed to take up the reference or he failed to make the appointment for varying consequences following the answer to the riddle.

It is for such reason that the third clause of Section 11(6) of the Act leaves sufficient flexibility in its two variables - person and fails to perform any function - apart from the latitude offered by the generality of the words in its operative limb: take the necessary measure. The end purpose in every case is to facilitate the effective commencement of the arbitral reference.

There may be another way of approaching the matter.

Part I of the 1996 Act bunches certain matters in Chapter III thereunder.

Of the six sections in the chapter, Section 10 deals with the number of arbitrators. Section 11 pertains to the appointment of arbitrators. Section 12 covers the grounds for challenging the appointment of an arbitrator; Section 13 lays down the challenge procedure; and, Sections 14 and 15 govern when the mandate of an arbitrator would terminate and the consequential substitution and its effect.

Sections 12, 13, 14 and 15 carry an unmistakable flavour of the provisions thereunder coming into play after the appointment or constitution of the arbitral tribunal has effectively taken place.

Sections 12 and 13 of the Act provide for the grounds and procedure for challenging the appointment of an arbitrator and pre-suppose the concerned

arbitrator taking up and pursuing the reference; for, otherwise, there would be no occasion to challenge his appointment.

The initial limbs of Section 14 and 15 give an impression of an arbitrator subsequently being unable to perform his functions or withdrawing from his office after having entered upon the reference.

Seen in such context, it is possible to visualise the operation of the opening subsection of either Section 14 or Section 15 at a time after the arbitrator has entered upon reference, and not if he declines the reference or fails to take it up.

That is not to suggest that an appointment or a request to take up a reference has to be followed by an acceptance, but only that the formal act of appointment has to be regarded as a *Co.in the wheel*, where an appointment is completed only upon it being effective.

The mandate of an arbitrator is not conferred till a request is made to take up the reference whether as a sole arbitrator or as one in a panel of arbitrators. When an arbitrator is named in an arbitration agreement or indicated by designation, it is only an agreement between the parties thereto to refer their disputes covered by the arbitration agreement at a future date and that, by itself, does not give any mandate to the arbitrator without the disputes being actually referred to him.

None of the objections raised by the respondent holds any water.

The request, AP No.830 of 2012, is entertained under Section 11(6)(c) of the 1996 Act and Mr Asok Kumar Ganguly, a venerable retired Judge of the Supreme Court, is appointed arbitrator to adjudicate upon the disputes between the parties covered by the arbitration agreement at a remuneration to be fixed by the arbitrator on the basis of sittings of duration not less than four hours unless otherwise expressly agreed to by the parties.

The petitioner will also be entitled to costs assessed at 4,000 GM, from the respondent, including refund of the 1,000 GM paid to the respondent under the order of March 19, 2014.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)

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