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**Union of India Vs. Vengamamba Engineering Co., Juputi, Krishna Dist. and Another**

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**Court :** Andhra Pradesh

**Decided On :** Apr-27-2001

**Reported in :** 2001(3)ALD776; 2001(4)ALT45

**Judge :** S.B. Sinha, CJ and ;V.V.S. Rao, J.

**Acts :** [Arbitration and Conciliation Act, 1996](#) - Sections 11 (6) and 26, 33, 34, 75 and 81; Arbitration (Protocol and Convention) Act, 1937; [Arbitration Act, 1940](#)

**Appeal No. :** WP No. 931 of 2001 and Batch

**Appellant :** Union of India

**Respondent :** Vengamamba Engineering Co., Juputi, Krishna Dist. and Another

**Advocate for Def. :** Mr. Prasad Rao Vemulapalli, ;Mr. C. Pradeep Kumar, ;Mr. K.V.N. Bhupal, ;Mr. M.R.K. Chowdhary for ;Mr. M. Sudhir Kumar and ;Mr. Keerthi Prabhakar, Advs.

**Advocate for Pet/Ap. :** Mr. S.R. ashok for ;Mrs. C.V. Vinitha Reddy and ;Mr. E. Manohar for ;Mr. S. Srinivasa Varma, Advs.

**Judgement :**

ORDER

S.B. Sinha, CJ

1. To what extent a writ petition would be maintainable against an order passed by the Chief Justice or the nominee of the Chief Justice appointing an arbitrator in terms of sub-section (6) of Section 11 of the [Arbitration and Conciliation Act, 1996](#) is the question involved in all these writ applications.

2. Before advertent to the question, we may briefly state few facts leading to the filing of these petitions.

South Central Railway, Secunderabad is the petitioner in all these writ petitions. It entered into various agreements with the contractors for execution of certain works.

In WP No.931 of 2000, the respondent had entered into five agreements separately with the petitioner on 11-3-1996, 12-3-1996, 29-6-1994, 29-6-1994 and 8-8-1994 for different works at different places coming under the Vijayawada division and the works were executed separately. The 1st respondent made claim on 26-4-1997. One Sri K. Venkateswara Rao, Dy. Chief Engineer (Construction)/Works, Secunderabad was appointed as the sole arbitrator on 27-5-1999 for adjudication of the dispute as per the terms and conditions of the contract, Special Conditions and General Conditions of Contract (GCC).

The respondent filed a single arbitration application being AA.71 of 1999 for appointment of a sole arbitrator on 22-12-1999 and this Court by order dated 25-9-2000 appointed sole arbitrator for resolving the dispute.

The petitioners claim that a single application for all the agreements is not maintainable as per clauses 63 and 64 of GCC as the agreements were entered into for different works at different places.

According to the 1st respondent, he made representation to refer the left over claims to the arbitrator by letter dated 24-7-1999, but the same was rejected. Even the appointed arbitrator did not enter into reference.

3. In WP No.1063 of 2001, the 1st respondent had entered into an agreement with the petitioners for construction of staff quarters for the Railway employees on 10/15-11-1998 for Rs.20-37 lakhs within a period of nine months and the period was extended upto 31-3-1999. The work was completed and handed over to the Railways after a delay of 19 months. There was a subsidiary agreement between the parties for certain additional works. 1st respondent filed WP No.4172 of 1992 and this Court by order dated 22-6-1992 directed to pay the undisputed amount within two weeks and as regards the disputed amount a review committee was directed to be appointed with a further direction that if the result thereof is not acceptable, the party shall go for arbitration. The review committee made certain recommendations. There was no indication from the 1st respondent that the recommendations are not acceptable to him. He filed AA No.12 of 1999 for appointment of a sole arbitrator, which was disposed by this Court on 6-12-2000 appointing a sole arbitrator.

It was contended that the arbitration application did not satisfy the requirements of the provisions of Section 11 of the Act and it was barred by limitation. The application was also not maintainable under the Act as the contract was entered into under the provisions of [Arbitration Act, 1940](#).

4. In WP No.2465 of 2001, the 1st respondent entered into an agreement with the petitioners on 19-4-1993 for certain works which should be completed within a period of 39 months. He had not adhered to the terms and conditions of the contract and there was delay in executing the work. Disputes arose as the petitioners deducted amounts towards penalty. On 5-11-1997 the 1st respondent sought for reference of the disputes to arbitral Tribunal for the total value of Rs. 861.44 lakhs including interest. The petitioner by letter dated 5-5-1998 furnished names of four Railway officers and he has chosen the name of Sri Raghavan as the arbitrator. Thereafter, the disputes were referred to arbitral Tribunal on 20-8-1998 as per the agreement consisting of three members. On 16-10-1998, 1st respondent filed AA No.60 of 1998 seeking appointment of sole arbitrator. On 20-11-1998, due to some administrative reasons, arbitral Tribunal was reconstituted changing the second member. In response to the notice, 1st respondent filed statement of claim on 10-2-1999. To the counter filed by the petitioner, 1st

respondent filed rejoinder on 21-5-1999. Notices were issued to both the parties on 15-6-1999 fixing the hearing of the matter on 29-6-1999 and 30-6-1999. The arbitration application AA No.60 of 1998 was allowed on 28-11-2000.

It was urged that the 1st respondent cannot invoke the jurisdiction of this Court under Section 11(6) of the Act as the matter was already referred to the arbitral Tribunal and was pending before it. As per the GCC, Railway officers are only to be appointed as arbitrators and due regard shall be had to the technical qualifications for appointment of the arbitrators.

5. In WP Nos.3498 and 3499 of 2001, agreements were entered into with the petitioner by the respective contractors for supply concrete sleepers. As per Clause 1.11 of the agreement, the petitioner could reduce the quantity to be supplied by the contractors. Invoking the said clause, the petitioner reduced the quantity placed under the agreement by 30% on 29-10-1997.

The contractors filed AA Nos.29 and 31 of 1999 respectively for appointment of sole arbitrator which were allowed on 8-12-1999.

6. In WP No.6248 of 2001, the 1st respondent had entered into an agreement with the petitioner on 24-4-1995 for the construction of a over bridge in lieu of existing level crossing between Thady and Duwada of Vijayawada - Visakhapatnam section which was to be completed within 12 months, which was, however, extended upto 30-9-1997. As per Clause 2.1 and 2.2 of the special conditions and specifications of the contract, the Railways reserve the right to alter the design drawings. The contractor also executed certain subsidiary agreements: 1st respondent raised certain disputes as regards the subsidiary agreements. As per the rates agreed in the subsidiary agreements, the final bill amount was paid and the security deposit was also refunded. The 1st respondent filed AA No. 14 of 2000 for appointment of a sole arbitrator which was ordered by this Court on 5-12-2000.

The claims, according to the petitioner, raised by the 1st respondent falls under the category of 'excepted matters' and thus are not arbitrable as per clause 63 of GCC. This Court, it was urged cannot appoint an arbitrator contrary to the

conditions of agreement and the respondent cannot invoke the provisions of Section 11(6).

7. In WP No.6769 of 2001, the 1st respondent entered into an agreement with the petitioner for the works of Mudkhed-Jambhali proposed bridge in between Mudkhed-Jambhali halt station as per the agreement dated 3-10-1994 for Rs.9,85,000/-to be completed within a period of three months. The 1st respondent, however, made a claim for Rs. 22,49,511/- in respect of additional items of work also. The claim was rejected. In AA No.22 of 2000 this Court by order dated 20-2-2001 appointed sole arbitrator.

8. In WP No.6770 of 2001, an agreement was entered into on 22-1-1996 for complete track renewal work in Secunderabad division for Rs. 10,71,831/- to be completed by 19-6-1996, As the respondent No. 1 had not started the work of track linking, the contract was terminated on 19-6-1996 and he was paid Rs.1,42,701/-on account of bill dated 9-9-1996. This Court in AA No.21 of 2000 appointed sole arbitrator on 20-2-2001.

9. In WP No.6778 of 2001, the 1st respondent entered into an agreement with the petitioner on 10-5-1995 for the works of cause conversion of Hospet-Hubli section from MG to BG. The 1st respondent completed the work and submitted variation statement but the same was rejected by the petitioner. This Court by order dated 8-11-2000 appointed a sole arbitrator in AA No. 44 of 1998.

10. Apart from the contentions raised in the individual writ applications, the main ground urged in all the applications is that the agreement between the parties provides for detailed procedure for appointment of an arbitrator and as such the respondents could not invoke the jurisdiction of the Court under Section 11(6) of the Act. It was also contended that as per GCC, only General Manager is the nominated arbitrator and he is only empowered to appoint any Railway gazetted officer as arbitrator for adjudication of the disputes and, therefore, the appointment of sole arbitrator by the nominee of the Chief Justice, High Court is contrary to Section 11(6) of the Act.

11. The arbitration law in India was not confined to one enactment but to several enactments, namely, [Arbitration Act, 1940](#), Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. The Indian Parliament in its wisdom thought it fit to enact the [Arbitration and Conciliation Act, 1996](#) (Act No.26 of 1996) on UNICITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration Conciliation rules. The decisions rendered by the Courts in India to a great extent under the old Act have become out-dated. Section 11 of the said Act which is the longest section has been baffling the Indian Courts and the question as to whether the said provision confers an administrative or judicial power upon the Court is still res Integra.

12. The powers of the Chief Justice or his nominee to appoint an arbitrator are laid down in sub-sections (4) to (6) of Section 11 of the Act, which reads thus:

(4) If the appointment procedure in subsection (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 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.

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

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties so belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by subsection (4) or sub-section (5) or subsection (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant subsection shall alone be competent to decide on the request.

(12)(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to 'Chief Justice' in those sub-sections shall be construed as a reference to the 'Chief Justice of India'.

(b) where the matters referred to in subsections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference 'Chief Justice' in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court is the Court referred to in that clause, to the Chief Justice of that High Court.

13. Sub-section (4) is not a bar against a party under clause (a) from appointing an arbitrator or the two appointed arbitrators under clause (b) from agreeing on the third arbitrator despite the expiry of the specified time. By reason of the said provision, merely a right to approach the Chief Justice has been conferred. Sub-section (6) of Section 11 postulates: (a) in case of failure to act as required under an agreed procedure by the parties or (b) the parties, or the two appointed arbitrators, failing to reach an agreement expected of them under the procedure; or (c) failure of a person or an institution to perform any function entrusted to him or it under that procedure, the Chief Justice or any person or an institution designated by him, may be approached with the request to take necessary measures to make the appointment, unless an alternative method of appointment is provided in the agreement for securing the appointment.

14. The appointment made by the Chief Justice or his nominee is final. The question as regards the qualifications, independence and impartiality of the arbitrator, the same can be raised before the arbitrator. The question of jurisdiction of the arbitrator can also be raised before him. Section 13 lays down the procedure as to how the jurisdiction of the arbitrator has to be questioned. Section 13 reads thus:

13. Challenge procedure :--(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the Constitution of the arbitral Tribunal or after becoming aware of any circumstances referred to in subsection (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral Tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral Tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under subsection (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Upon making of an award, an application for setting aside the same can be made on limited grounds specified under Section 34 of the Act, which reads thus:

34. Application for setting aside arbitral award:--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if,--

(a) the party making the application furnishes proof that,--

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in

force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or to contain decisions on matters beyond the scope of the submission to arbitration ;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

(b) the Court finds that,--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation :--Without prejudice to the generality of sub clause (ii) of Clause (b),it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter. (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.

15. In *Konkan Railway Corporation Ltd. v. Mehul Construction Co.*, : AIR 2000 SC2821 , the Apex Court held that a Special Leave Petition under Article 136 would not lie. In *Datar Swilch gears Ltd v. Tata Finance Ltd.*, : (2000)8SCC151 , it has been held that delay in appointing an arbitrator despite expiry of time may not matter but such appointment must be made before an application under sub-section (6) of Section 11 is made. In the said case, however, the Apex Court, without deciding the question as regards the maintainability of the application for grant of special leave, the Supreme Court proceeded to deal with a matter as if an application under Article 136 is maintainable.

In *M/s. Konkan Construction Corporation Ltd v. M/s. Rani Construction Pvt. Ltd.*, : (2000)2SCC388 , however, Jagannadha Rao, J., speaking for the Bench, doubted the correctness of *First Konkan Railway Construction* case and referred the matter to a larger Bench. The learned Judge referred to his earlier decision in *Wellington Association Ltd v. Kirit Mehta*, : AIR 2000 SC1379 , whereas to the existence of the arbitration clause was in question, the issue was decided as a matter of law by assigning reasons and in fact, it was held that there was no arbitration clause at all.

16. Yet again in *Nimeet Resources v. Essar Steels Ltd*, : AIR 2000 SC3107 , another Bench of the Apex Court felt bound by the three Judge Bench in *First Konkan Railway* case.

The Supreme Court, therefore, is yet to put its final seal in the matter.

17. In First Konkan Railways case, a three-Judge Bench referring to various provisions of the said Act observed that when the legislative intent is clear, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues raised at that stage, by a party objecting to the appointment of an arbitrator inasmuch as all issues can be raised in the arbitral proceedings. But dealing with a contingency where the Chief Justice or his nominee refuses to make an appointment of arbitrator, it was held that remedy by way of writ petition would lie. It was held that if an order passed under Section 11(6) is construed to be a judicial or quasi-judicial order, the same would be amenable to judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a Court of law even against an order of appointment of an arbitrator, which interpretation should be avoided with a view to achieve the basic objective for which the Parliament enacted the Act of 1996 adopting UNICITRAL Model. It was held:

If on the other hand, it is held that the order passed by the Chief Justice under Section 11(6) is administrative in nature, then in such an event in a case where the learned Chief Justice or his nominee refuses erroneously to make an appointment then an intervention should be possible by a Court in the same way as an intervention is possible against an administrative order of the executive. In other words, it would be a case of non-performance of the duty by the Chief Justice or his nominee, and therefore, a mandamus would lie. If such an interpretation is given with regard to the character of the order that has been passed under Section 11(6) then in the event an order of refusal is passed under Section 11(6) it could be remedied by issuance of a mandamus. We are persuaded to accept the second alternative inasmuch as in such an event there would not be inordinate delay in setting arbitral process in motion. But, as has been explained earlier in the earlier part of this judgment, the duty of the Chief Justice or his nominee being to set the arbitral process in motion, it is expected that invariably the Chief Justice or his nominee would make an appointment of arbitrator or so that the arbitral proceeding would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved.

18. Drawing our attention to paragraph 7 of the said judgment wherein it was held that the special leave petition under Article 136 was not maintainable, it was contended that a writ petition would be maintainable. We do not agree, inasmuch the said paragraph must be read with the observations made by the Apex Court in the earlier paragraphs.

19. But, decision on a question as to whether an arbitration agreement exists at all or not inasmuch may attract the ambit of jurisdiction as even an administrative order can only be exercised provided the Chief Justice or his nominee satisfies himself as regards his jurisdiction under Section 11(6) of the Act or not. A question as regards maintainability of a writ petition may further arise as would appear from one of those cases when an anomaly may be created by appointing an arbitrator where another arbitrator had validly been appointed.

20. In a situation of the first nature when an arbitrator is refused to be appointed on the ground that there does not exist any arbitration clause, the same may not be held to be strictly administrative in nature.

21. Yet again in a case of the second nature where appointment of an arbitrator may instead of facilitating early settlement of the claim may give rise to a situation where further litigation would be a near certainty, a writ of certiorari, assuming that such order would be an administrative order, may issue.

22. The aforementioned questions did not fall for consideration before the Apex Court. However, as we are bound by the decision of the Apex Court in First Konkan Railway Construction case, we are of the opinion that the writ petitions (except WP No.931 of 2001 and WP No.2465 of 2001), would not be maintainable.

This aspect of the matter has also been considered by one of us, (S.B. Sinha, CJ,) in Explosives Consultation and Application Pvt. Ltd. v. IDL Industries Limited, AA No.53 of 2000) dated 16-2-2001 and AA No.41 of 2000 dated 23-3-2000. Reference in this connection may also be made to the decision of the Punjab and Haryana High Court in Ajit Prasad Jain v. Union of India, reported in 2001(1) ICC 44.

23. Mr. Manohar learned Counsel appearing on behalf of the petitioner would urge that it is not a case where there has been total refusal on the part of the General Manager to refer the matter to the arbitrator in respect of all the matters herein. In some cases i.e. WP No.931 of 2001 and WP No.2465 of 2001 arbitrators have already been appointed prior to the filing of the arbitration applications. In a situation of this nature, the respondents could have only raised their other claims before the arbitrator.

The learned Counsel would submit that delay in appointing the arbitrator is not material and reliance is placed on the decision of the Apex Court in Datar Switchgears Ltd case (supra).

24. In relation to WP No.931 of 2001 we may notice that in respect of five agreements, an arbitrator had already been appointed and the 1st respondent has also filed his claim petition before the arbitral Tribunal and there against a counter has also been filed. In WP No.2465 of 2001 also, arbitral Tribunal had already been constituted. It is, therefore, a clear case that where an application under Section 11(6) although at the threshold was maintainable, but, by reason of the subsequent events, became infructuous keeping in view the principle of waiver, Furthermore, by reason of the impugned order, the learned single Judge has not set aside the constitution of the arbitral Tribunal constituted by the General Manager. Thus, in this case, the two arbitral Tribunals will function in relation to the self-same contracts which may give rise to conflict of decisions and would lead to further complications. It is now a well settled principle of law that if a party without any demur whatsoever submits himself to the jurisdiction of the arbitrator, he would waive his right to continue.

25. Clauses 63 and 64 of General Conditions of Contract reads thus:

63. Matters finally determined by the Railway :--All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided

that matters for which provision has been made in clauses 8(a), 18, 22(5), 39, 43(2), 45 (a), 55, 55-A, 57, 57-A, 61(1), 61(2) and 62(l)(b) of General Conditions of Contract or in any clause of special conditions of the contract shall be deemed as 'excepted matters' and decisions of the Railway authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded further from the purview of the arbitration clause and not be referred to arbitration.

64(l)(b); Demand for Arbitration.

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contract or may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but excepted any of the 'excepted matters' referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

64(1)(ii): The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item wise. Only such disputes or differences in respect of which the demand has been made, together with counter claims or set off shall be referred to arbitration and other matters shall not be included in the reference.

64(1)(ii)(a) The arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claims along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim (s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

64(1)(iii) No new claims shall be added during proceedings by either party. However, a party may amend or supplement the original claim or difference thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64(1)(iv) If the contractor does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railways shall be discharged and released of all liabilities under the contract in respect of these claims.

64(2) Obligation during pendency of Arbitration: Work under the contract, shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

64(3)(a)(i): In cases where the total value of all claims in question added together does not exceed Rupees 10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a sole Arbitrator who shall be either the General Manager or Gazetted Officer of Railways not below the grade of JA Grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.

64(3)(a)(ii): In cases not covered by clause 64(3)(a)(i), the Arbitrator shall consist of a panel of three Gazetted Railway Officers not below JA grade, as the Arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway to the contractor who will be asked to suggest to General Manager upto 2 names out of the panel for appointment as contractor's nominee. The General Manager shall

appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the Presiding Arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Account Department. An officer of selection Grade of the Accounts department shall be considered equal status to the officers in SA Grade of other departments of the Railways for the purpose of appointment of arbitrators.

26. In the facts and circumstances of these cases, we are of the opinion that although it is not a case where the learned single Judge has refused to appoint an arbitrator, keeping in view the subsequent events to the said application, the only order which could be passed was to direct the same arbitrator to be appointed, as otherwise, the same would give rise to conflict of awards. Unfortunately, as the above aspects have not been brought to the notice of the learned single Judge, we direct that the petitioner may approach the learned single Judge by filing an appropriate application in this regard. Having regard to the facts and circumstances, the learned single Judge may pass appropriate orders.

27. The learned Counsel appearing on behalf of the petitioners would submit that in a case of this nature, a direction should have been issued upon the General Manager to exercise his power having regard to the fact that the General Manager must act as an arbitrator. Our attention in this connection has been drawn to Datar Switchgears Ltd, and the decision of the Delhi High Court in Engineering Development Corporation v. MCD, 2000 (1) Arb. LR 269 (Delhi). It was also contended that having regard to the nature of claim in WPN0.2465 of 2001, as per the GCC, arbitrators having special knowledge are required to be appointed and, therefore, the appointment of an outsider as arbitrator would not be in accordance with the agreed terms of contract.

28. Mr. Prasad Rao learned Counsel appearing on behalf of the respondents, on the other hand, would submit that as the procedure laid down under Clause 64 of GCC had not been followed, the application under Section 11(6) was maintainable. The learned Counsel would contend that special qualifications do

not contemplate any special knowledge inasmuch as the arbitral Tribunal is at liberty would be free to take the assistance of any qualified person in this behalf. In support of the said contention, he relied upon the decisions in *Larsen and Toubro Ltd v. Konkan Railway Corporation Ltd.*, III (1999) CLT 166, Russel's treatise on Arbitration by Sweet and Maxwell, at page 114, *G. Ramachandra Reddy v. Chief Engineer, Madras, MES*, : [1994]3SCR808 , *Nandyal Co-operative Spinning Mills v. K.V. Mohan Rao*, : [1993]2SCR280 and *State of West Bengal v. M/s. National Builders*, : AIR 1994 SC200 .

29. The submission of the learned Counsel for the petitioner to the effect that the Court could issue a direction upon the General Manager to appoint an arbitrator by exercising his power is misconceived. If such a direction is given, the purpose of Section 11(6) will clearly be defeated inasmuch as the said authority would sit over the matter again or arise technical objections which would delay the entire proceedings. In *Engineering Development Corporation v. MCD* (supra) wherein a direction had been issued by a learned single Judge of the Delhi High Court to the authority to appoint an arbitrator, in our opinion, does not lay down the correct proposition of law. In that case, no formal agreement was executed. Interpreting the provisions of Section 11, the learned Judge observed that the scope of sub-sections (5) and (6) are different. Once the existence of an arbitration clause is not disputed, the Court having regard to the decisions of the Apex Court in *First Konkan Railway Construction* case, has no other option but to make appointment of the arbitrator as quickly as possible.

However, in terms of the provisions of 1996 Act, even the authority after filing of an application under Section 11(6) of the Act forfeits his right to appoint an arbitrator and such right exclusively vests in Court.

In *Larsen and Tourbo Limited v. Konkan Railway Corporation Limited*, it was held:

Moreover, it is also clear on a conjoint reading of sub-sections (6) and (8) of Section 11 of the Act that the power of the Chief Justice is to appoint arbitrator or arbitrators himself and not to direct the appointing authority to do so because while appointing arbitrator/ arbitrators, the Chief Justice has to have regard to the considerations as are likely to secure appointment of independent and impartial

arbitrator/arbitrators. If the Chief Justice is merely to direct the appointing authority to appoint the arbitrator/arbitrators in accordance with the procedure agreed upon by the parties, there would be no occasion to have regard to the considerations set out in sub-section (8) of Section 11 of the Act.

30. The decision of the Apex Court in Datar Switchgears Ltd., case is not apposite. Paragraph 23 whereupon reliance has been placed reads thus:

When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of 'freedom of contract' has been whittled down by various labour and social welfare legislation, still the Court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally, he is bound by it and obliged to comply with the procedure laid down under the said clause.

The said observations must be read in the context of the fact situation obtaining in that case. Therein, it has clearly been held that appointment can be made by the authority despite the expiry of the specified period but such appointment is valid if it was made prior to the filing of an application under Section 11(6). In that case, the arbitration agreement did not provide for a prescribed notice period. The Apex Court rejecting the contention that since the appointment of arbitrator was made after a long lapse of time a fresh arbitrator should have been appointed by the Chief Justice, observed that:

We do not find much force in this contention, especially in view of the specific words used in the arbitration clause in the agreement, which is extracted above. This is not a case where the appellant requested and gave a notice period for appointment of an arbitrator and the latter failed to comply with that request. The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the arbitration clause in the agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and settling the dispute. It is pertinent to note that the

appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. Under such circumstances, it cannot be said that there was a failure of the procedure prescribed under the contract.

31. The Apex Court distinguished the decision of the Bombay High Court in *Naginbhai C. Patel v. Union of India*, (2000) 2 Arb. LR 190, stating that in that case appointment had not been made till an application under Section 11(6) has been filed. In some of the cases herein applications had already been filed but so far no arbitrators have been appointed by the General Manager.

32. So far as the contention of the petitioner to the effect that as per the GCC, arbitrators should possess special knowledge is concerned, we are of the opinion that it is not necessary that the arbitrator should have a special knowledge. Section 26 of the Act reads as follows:

Expert appointment by arbitral Tribunal:--(1) Unless otherwise agreed by the parties, the arbitral Tribunal may,--

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral Tribunal; and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral Tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to satisfy on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of all party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

In *Larsen and Toubro Ltd case* (supra), the Bombay High Court held that an arbitrator should not be delegated with the same power. In the treatise 'Russel on arbitration', 21st Edition at page 114 the law was stated thus:

4-020: Are there professional arbitrators:

The law does not impose general restrictions on who may be appointed an arbitrator. It is not a recognised profession like that of Solicitor or Barrister. It is a feature of English arbitration practice that non-lawyers may become arbitrators in specialist fields such as shipping and construction. The Chartered Institute of Arbitrators runs courses and awards recognition to those it regards as competent arbitrators. Other professional bodies in England which act as appointing authorities for arbitrators also take steps to ensure that professional standards are maintained by running courses and setting examinations and providing continuing education and by periodically reviewing the membership lists and removing certain names. However, arbitration does not form part of the compulsory training of either Solicitors or Barristers, although arbitration is now being taught in postgraduate courses attended by Lawyers in the fields of commercial and construction law. There are in fact no minimum requirements at all, because the authority of the arbitral Tribunal arises from the parties contract, and the law allows contracting parties complete freedom to choose their Tribunal. Common sense people. But usually, but not always, prevents the appointment of completely unsuitable parties and their advisers wish to appoint the most suitable candidate(s), and not simply avoid those that are completely unsuitable. Advice should be taken and references obtained where the proposed candidates are not known. Even after that stage, it may be difficult to secure the appointment of the preferred candidates, because the party's agreement is required and the other party may reject the proposal. From a practical point of view, one of the most important qualifications for any arbitrator is that he should remain alive and well for the duration of the proceedings. Parties who are concerned about the serious consequences of having to replace Tribunal members who may die or become infirm take out insurance on the arbitrator's life and health. This will at least help to cover the costs of fresh hearings should an original appointee become too ill to continue or die in the course of the reference.

#### 4.023 Special qualifications and Jurisdiction:

The arbitration agreement may provide that the members of the Tribunal must have some special qualification. It is then a ground of objection to the jurisdiction of a Tribunal that one or more of its members does not have that qualification. The sort of qualification may be:

Membership of a particular trade association; or

Being commercial men, or Being a Queen's Counsel.

Special qualifications that Tribunal members must have may be imposed.

Either expressly by the words of the arbitration agreement; or

Indirectly by the words of rules incorporated into an arbitration agreement.

The requirement that members of a Tribunal hold a particular qualification does not extend to the umpire appointed in the same reference unless the arbitration agreement, or the rules as it incorporates, require the umpire to have that some qualification. The Courts strive to uphold the jurisdiction of a Tribunal if the deviation from the qualification is not clearly established.

An arbitration agreement provided: 'The arbitrators shall be disinterested executive officials of insurance or reinsurance companies'. At the date of his appointment one of the members of the Tribunal was an executive official of an insurance company. Subsequently, he retired from that position, and one of the parties challenged his right to continue as arbitrator. The Court of Appeal dismissed the challenge. The purpose of the condition was to ensure the right sort of people familiar with the practice at the time of their appointment sat as arbitrators, not to oblige arbitrators to remain in full-time employment so as to be allowed to continue to sit on a Tribunal.

The effect of a successful challenge to an arbitrator on the ground that he does not have all special qualification required by the arbitration agreement is that the appointment, and all proceedings which follow, including the award, are void, because the arbitrator lacks jurisdiction. But the right to object can be lost if it is

not exercised in a timely fashion.

Commercial Men. Arbitration clauses sometimes specify that Tribunals are to be composed of commercial men. What does this expression mean? The Courts are reluctant to lay down general principles preferring to construe the expression in its context, as can be seen from the following example.

A man who had formerly been a solicitor, but was for many years a full-time maritime arbitrator, was held to be within the class of persons to whom the parties to a charter party were referring when using the expression 'commercial men'. What mattered was the arbitrator's practical commercial experience.

33. In *G. Ramachandra Reddy & Co. v. Chief Engineer, Madras, MES*, (supra), the Apex Court clearly held that once an appointing authority abdicates his power, no further chance should be given to him.

The decision of the Apex Court in *Nandyal Co-operative Spinning Mills v. K.V. Mohan Rao*, deals with the importance of an arbitral Tribunal being honest and impartial. The decision has no application to the facts of the present cases. The question as to whether the arbitrator appointed is dishonest or partial cannot be raised at this stage.

34. In *State of West Bengal v. National Builders*, : AIR 1994 SC200 , it has been held:

Even where an authority is named by office to be the sole arbitrator but he refused to act then the jurisdiction to appoint another arbitrator vests in the Court. Since arbitration clause of the agreement in the instant case does not indicate that the parties did not intend to supply the vacancy the Court can assume jurisdiction under Section 8(1)(b) to appoint another arbitrator. Basis for assuming such jurisdiction is that the clause is rendered inoperative. Where the agreement provides for appointment of a specific person either by name or by designation and that person refuses to act then the question of appointing him again cannot arise. Refusal by such a person results in the agreement clause ceasing to operate. When two parties agree for appointment of 'A' or 'B' by name or

designation and the person so named refuses to act then the agreement shall be deemed to have exhausted itself. The person so named having refused to act he cannot be asked again to arbitrate. That would be contrary to the very basis of arbitration that no one can be forced to act against his free will. It would also be contrary to the agreement and if there is no agreement to appoint another person, the only remedy is to approach the Court to exercise its statutory power and appoint another arbitrator. Same result follows where the arbitration clause empowers the sole arbitrator either to arbitrate himself or to nominate anyone else.

35, Another question that arises for consideration i.e., in WP No.6248 of 2001 is, as to whether the respondent could file an application although he has received the final bill amount. Reference in this connection has been made to *Union of India v. M/s. Popular Builders*, 2000 (7) Supreme 72, wherein the Apex Court relying on its earlier decision in *M/s. P.K. Ramaiah & Company v. Chairman and Managing Director, NTPC*, 1994 Supp (3) SCC 126 and *Nathani Steels Ltd. v. Associated Construction*, 1995 Supp.(3) SCC 324, held that the contractor having accepted the final bill without any protest, he had no arbitral dispute. However, the said case was under the old Act. However, in a case where by reason of a subsequent agreement, there has been negation of contract, the Court may not refuse to appoint an arbitrator, as, having regard to the provisions of the 1996 Act, all such disputes can be raised before the arbitrator.

The matter might have been different, had the parties entered into an agreement relinquishing all claims under the contract. In *Union of India v L.K. Ahuja*, : [1988]3SCR402 , it has been held that even after accepting the final bill, disputes can be referable to an arbitrator.

36. For the reasons aforementioned, the writ petitions are dismissed. However, as regards the WP Nos.931 and 2465 are concerned, the petitioner may approach the learned single Judge by filing appropriate applications for appropriate orders as regards the appointment of the arbitrators. There shall be no order as to costs.