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Court : Andhra Pradesh

Decided On : Sep-20-2004

Reported in : 2004(5)ALD762; 2004(6)ALT140; 2005(1)ARBLR1(AP); I(2005)BC219

Judge : L. Narasimha Reddy, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11, 11(1), 11(2), 11(3), 11(5), 11(6), 11(7), 11(8), 11(10) and 34; [Arbitration Act, 1940](#) - Sections 8; [Constitution of India](#) - Articles 136, 226 and 227; Arbitration Conciliation Rules; International Trade Law

Appeal No. : Civil Revision Petition No. 2840 of 2004

Appellant : A. Ramakrishna

Respondent : Union of India (Uoi), Rep. by Chief Engineer (Sz.ii), Central Public Works Department and ors.

Advocate for Def. : A. Raja Shekar Reddy, SC

Advocate for Pet/Ap. : K. Prabhakar, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

L. Narasimha Reddy, J.

1. This Civil Revision Petition is filed under Article 227 of the [Constitution of India](#), assailing the order, dated 29.3.2004, passed by the learned Chief Judge, City Civil Court, Hyderabad in O.P.No.2523 of 2003.

2.The petitioner is a Class 1 Contractor and claims to have executed several works entrusted to him, by the State of Andhra Pradesh and Union of India. The respondents, represented by the Chief Engineer, C.P.W.D, Hyderabad (SZ.II) invited tenders for construction of Office Building, Staff Quarters etc., for S.I.B, at Koti, Hyderabad. The petitioner emerged as a successful bidder, and an agreement was executed on 10.3.2002.

3.The petitioner alleges that the work was prolonged beyond the contract period, on account of various acts and omissions, on the part of the respondents, and that improper deductions were made from the bills, payable to him. He got issued a notice, dated 20.6.2003, calling upon the respondents, to appoint an Arbitrator, in terms of the Arbitration Clause contained in the agreement, dated 10.3.2002, and to refer the dispute to the Arbitrator for adjudication. When there was no response, another notice, dated 14.7.2003 was got issued, for the same purpose. Since the respondents failed to take any steps, the petitioner filed O.P.No.2523 of 2003 before the learned Chief Judge, City Civil Court, Hyderabad on 20.10.2003, under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#), hereinafter referred to as 'the Act'.

4. When the O.P was pending before the learned Chief Judge, the first respondent appointed one Sri A.K.Singhal as Arbitrator, in his proceedings, dated 13.11.2003. This fact was brought to the notice of the learned Chief Judge by the respondents. Through the order under revision, the learned Chief Judge took the view that no further action needs to be taken, since the Arbitrator was already appointed.

5. Sri K. Prabhakar, learned counsel for the petitioner submits that the order under revision cannot be sustained for more reasons than one. He submits that once an application is filed under Section 11(6) of the Act, the right of respondents to appoint an Arbitrator stands forfeited and it was no longer competent for them, to appoint. Placing reliance upon the judgments rendered by the Supreme Court and this Court, he submits that with filing of an application under Section 11(6) of the Act, the Chief Justice or his nominee alone are entitled to appoint an arbitrator, and that the respondents have no say in the matter.

6. Learned Senior Standing Counsel for Central Government Sri A. Raja Shekar Reddy, on the other hand, submits that there is no provision, contained in the Act, or the Scheme framed by the Chief Justice under Section 11 of the Act, under which the right of one of the parties, to take steps in conformity with the agreement, is forfeited. He contends that no law prohibits one of the parties to a dispute, from complying with the terms of a contract. He submits that according to the ratio laid down in various cases, the C.R.P is not maintainable.

7. The matter relates to the appointment of arbitrator. This used to be dealt with under Section 8 of [Arbitration Act, 1940](#). In the year 1996, the Parliament enacted the present Act, as a measure of fulfilling its obligation under the international treaties and conventions. The Act was drafted, taking the UNCITRAL (United Nations Commission on International Trade Law) Model Law on international Commercial Arbitration Conciliation rules, as the basis. The emphasis under the Act has been to accord primacy to resolution of disputes through arbitration, and to reduce the intervention of the Courts in such proceedings. On account of prescription of procedure, and use of certain terms, which are not found in most of the enactments in force in the country, the implementation of the Act, naturally gave rise to few teething problems. The main area of controversy was the appointment of arbitrators.

8. Most of the aspects have been dealt with, by the Hon'ble Supreme Court as well as this Court. The case on hand raises certain typical questions. Hence, it has become necessary to discuss the same, at some length.

9. The Act intends to promote and strengthen arbitration, as a mechanism for resolution of disputes. If the parties agree and appoint arbitrator, of their choice, the intervention of Courts becomes necessary only when the outcome of the arbitration, namely, the award is challenged, under Section 34 of the Act or at the stage of execution. Section 11 prescribes the procedure for appointment of arbitrators, when there is lack of unanimity between the parties. It is beneficial to extract the same.

Section 11:

(Appointment of arbitrators)

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

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

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

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

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

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

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

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the 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 belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (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 sub-section 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 sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to '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 itself is the Court referred to in that clause, to the Chief Justice of that High Court'.

10. A reading of the Section discloses that, it contemplates two different situations, namely (a) where no agreement exists between the parties in the matter of choosing arbitrators, and (b) where there exists what is known as 'appointment procedure' for appointment of arbitrators. In the former category of cases, if there is lack of unanimity between the parties to a dispute, in relation to appointment of a sole arbitrator or a third arbitrator, recourse is provided to the Chief Justice or his nominee, under sub-sections 4 and 5. The concerned party is required to call upon the other party, to agree upon the appointment within 30 days. Failure of the other party to accede to the request, enables the aggrieved party, to approach the Chief Justice or his nominee, for appointment of the sole or a third arbitrator, as the case may be.

11. For the second category of cases, namely where the appointment procedure is agreed to between the parties and the grievance is about non-compliance with that procedure, the remedy is provided for, under sub-section 6 of Section 11 of the Act. Sub-section (10) provides for framing of a scheme by the Chief Justice for dealing with the matters referred to under sub-sections 4, 5 and 6 of Section 11 of the Act.

12. Much of the controversy turns around two questions in relation to Section (11) namely: -

(a) Whether a party alleged to be not cooperating with the appointment of arbitrator loses or forfeits his right, to agree for such appointment; and

(b) Whether a decision rendered by the Chief Justice or his nominee on the applications made under sub-sections 4, 5 or 6 of Section 11 is amenable to adjudication.

13. The second question touches upon the maintainability of the revision. Hence, it deserves to be taken up first. The answer to this would depend upon the interpretation to be placed upon relevant provisions and the schemes framed for appointment of arbitrators.

14. As required under sub-section 10 of Section 11 of the Act, the Chief Justice of India as well as the Chief Justices of High Courts, framed schemes prescribing the procedure for dealing with applications that may be made under sub-sections 4, 5 and 6 of Section 11 of the Act. Un-certainty prevailed as to the nature of exercise of power by the Chief Justice or his nominee under the said provision, particularly in the context of remedy of a party aggrieved by such orders. Most of the judgments before the Supreme Court touching on this aspect, were in relation to amenability of such orders to the adjudication under Article 136 of the [Constitution of India](#).

15. In Ador Samia (p) Ltd. Peeday Holdings. Ltd., : AIR 1999 SC3246 the Supreme Court held that such orders are 'administrative' in nature. The same view was affirmed by a Bench of Three learned Judges in Konkan Railway Corporation Ltd. Vs . Mehul Construction Co., : AIR 2000 SC2821 However, a Bench of two learned Judges, in Konkan Railway Corporation Ltd. Vs . Rani Constructions Pvt. Ltd., : [2002]1SCR728 opined that the judgment in Ador Samia (1 supra) needs reconsideration, and thereby, it came to be adjudicated by a Bench of five Judges. As observed earlier, the examination of the issue by the Supreme Court was in the context of Article 136 of the [Constitution of India](#), which relates to grant of Special Leaves. After considering the various provisions of the Act, the Supreme Court

held as under: -

'As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the Arbitral Tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated'.

16. As to the nature of the orders to be passed by the Chief Justice or his nominee, the Supreme Court held as under: -

'In conclusion, we hold that the order of the Chief Justice or his designate under Section 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a tribunal. Such an order cannot properly be made subject of a petition for special leave to appeal under Article 136'.

17. In the process of taking this view, the Supreme Court held that there is no necessity for the Chief Justice or his nominee to issue any notice to other party, in an application filed for appointment of arbitrator. Clause (7) of the scheme framed by Chief Justice of India, which provided for issuance of such notice was held to be bad. The following observation makes it clear:

'The schemes made by the Chief Justice under Section 11 cannot govern the interpretation of Section 11. If the schemes, as drawn, go beyond the terms of Section 11 they are bad and have to be amended. To the extent that the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 goes beyond Section 11 by requiring, in clause 7, the service of a notice upon the other party to the arbitration agreement to show cause why the nomination of an arbitrator, as requested, should not be made, it is bad and must be amended. The other party needs to be given notice of the request only so that it may know of it and it may, if it so chooses, assist the Chief Justice or his designate in the nomination of an arbitrator'.

18. Learned Senior Standing Counsel urges that the principle laid down by the Supreme Court in Konkan Railway's case referred to above, applies to the facts of this case also. He contends that the order passed by the Chief Justice of High Court, or his nominee, under sub-Sections (4), (5) and (6) of Section 11, is not amenable to challenge in any proceedings, and thereby, the present revision is not maintainable.

19. Learned counsel for the petitioner, on the other hand, submits that the judgment of the Supreme Court in Konkan Railway's case (2 supra), has to be understood in the context of international arbitrations, and the principle laid down therein does not apply to domestic arbitrations. He further contends that this Court has been entertaining writ petitions and revisions under Articles 226 and 227 of the Constitution, as the case may be, against the orders appointing arbitrators, or refusing to accede to such request, and that the present revision is maintainable.

20. Before dealing with this question, it is necessary to note that in Konkan Railway's case (2 supra), the Supreme Court was dealing with the scheme framed by the Chief Justice of India. Sub-section (9) of Section 11 of the Act confers power on the Chief Justice of India, or his nominee, to appoint the sole, or third arbitrator, in 'International Commercial Arbitrations'. The expression 'International Commercial Arbitration' is defined under Section 2(f) of the Act. It reads as under:

'International commercial arbitration' means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;'

21. A reading of the same discloses that the residence of individuals, incorporation of bodies corporate, and the control of companies, etc., is in any country, other than India. Clause (iv) thereof, refers to Government of a foreign country. The amenability of the persons, bodies corporate, or Governments of foreign country, to the jurisdiction of ordinary civil Courts of the country, is not on par with Indian nationals or domestic agencies. This perceptible of difference is reflected in the schemes framed under sub-section (10) of Section 11, by the Chief Justice of India, on the one hand, and Chief Justices of High Courts, on the other, which read as under:

'THE APPOINTMENT OF ARBITRATORS BY THE CHIEF JUSTICE OF INDIA SCHEME, 1996

Clause 3: Authority to deal with the request.-Upon receipt of a request under paragraph 2, Chief Justice may either deal with the matter entrusted to him or designate any other person or institution for that purpose'.

'THE SCHEME FOR APPOINTMENT OF ARBITRATORS, ANDHRA PRADESH, 1996

Clause 3: Authority to deal with the request.-

(i) For the purpose of dealing with the request made under Para 2, the Chief Justice hereby designates-

(a) The Subordinate Judge including the Additional Judge in the Twin Cities of Hyderabad and Secunderabad, where the value of the subject matter does not exceed Rs.1,00,000/-

(b) The District Judge/Additional District Judge including the Chief Judge/Additional Chief Judge, City Civil Court in the Twin Cities of Hyderabad and Secunderabad, where the value of the subject matter does not exceed Rs.5,00,000/-

(c) The Judge of the High Court who at the relevant time has been allotted original side work in the High Court, where the value of the subject matter exceeds

Rs.5,00,000/-, but does not exceed Rs. One Crore; and

(d) The Chief Justice of High Court, where the value of the subject matter exceeds Rs. One Crore.

(II)The requests falling under sub-para (A) of para 3 shall be placed before the Subordinate Judge, having jurisdiction to try a suit in respect of a dispute arising out of contract or matter in request of which there in an arbitration agreement. Where there is more than one sub-judge, the request shall initially be placed before the Principal Subordinate Judge or First Additional Judge in the Twin Cities of Hyderabad and Secunderabad, as the case may be, for appropriate allotment;

The requests falling under sub-para (b) of Para 3 shall initially be placed before the District Judge or the Chief Judge, City Civil Court in the Twin Cities of Hyderabad and Secunderabad, as the case may be for appropriate allotment.

The requests falling under sub-para (c) of Para 3 shall be placed before the Judge of the High Court to whom the original side work in the High Court has been allotted at the relevant time.

The requests falling under sub-para (d) of Para 3 shall be placed before the Chief Justice of the High Court, who may, in his discretion take it up for consideration or make it over the Judge of the High Court mentioned in sub-para (c) of Para 3.'

22. In the scheme framed by the Chief Justice of India, the power to appoint arbitrator is retained by himself, or to designate any other person, depending on the exigency; whereas in the scheme framed by the Chief Justice of High Court of Andhra Pradesh, Courts in the hierarchy of State Judiciary, are conferred with the powers, depending on the value of the subject-matter. This appears to be one of the reasons, why the Hon'ble Supreme Court dealt with the scheme framed by the Chief Justice of India alone. Though Clause 7 of the scheme framed by the Chief Justice of India was found to be not legal or proper, the observation was not made in terms, so wide to include the analogous provisions in the schemes framed by the Chief Justices of High Courts (Clause 6 of the A.P. scheme). The omission cannot be said to be either accidental or not without purpose.

23. Further, Article 136 of the [Constitution of India](#) provides for grant of special leave by the Supreme Court, against the judgments or orders made by any 'Court or Tribunal'. It hardly needs any emphasis that the 'Court' referred to therein is to be a Court, subordinate to Supreme Court. By no stretch of imagination, the Chief Justice of India or his nominee can be treated as 'Court' of such a nature, much less, a Tribunal. The same cannot be said about the schemes at the High Court level.

24. A perusal of clause 3 of the Andhra Pradesh Scheme discloses that the applications filed under sub-sections (4), (5) and (6) of Section 11, of the Act, are to be dealt with by regular Courts, depending on the value of the subject-matter. It is not a matter between applicant, on the one hand, and the Judge, in his personal capacity, on the other. Regular hearings take place and decisions are rendered by recording reasons. It may be remembered that in Ador Samia's case (1 supra), the Supreme Court held that such orders are administrative in nature. An administrative order is amenable to jurisdiction under Article 226 or 227 of the [Constitution of India](#).

25. One of the biggest achievements of Indian Judiciary in general and the Supreme Court in particular, is in the field of principles of natural justice. The requirement was treated as so fundamental, that even where the relevant rules are silent, or in some cases, where the application of principles of natural justice is excluded, the Courts held that a person cannot be condemned, or, be visited with civil or criminal consequences, unless he is afforded an opportunity of being heard. Law reports are replete with decisions on this aspect. Reference to them here may amount to doubting what is universal. The fact that an individual may not have any plausible objection, was held to be not a ground, to deny him, the right of being heard. (See *Olga Tellis v. Bombay Municipal Corporation* - : AIR 1986 SC180). When such is the guarded protection accorded to the principles of natural justice, it is rather unimaginable that the Supreme Court would rule that in the proceedings before the regular Courts, initiated through applications under sub-sections (4), (5) and (6) of Section 11, are to be dealt with, or disposed of, without hearing the effected parties.

26. One of the distinguishing features of arbitration, vis--vis the various modes of adjudication is, that the parties choose their own adjudicator, in whom they have confidence and faith, and that they will abide by the verdict given by such person, the arbitrator. The emphasis in various enactments and conventions, relating to arbitration, has been, on the unanimity of opinion of the parties, about the person to be appointed as arbitrator. The invocation of proceedings before the Courts or Authorities, by whatever epithet, they are called, is mainly to bring about agreement as to the modalities, in the matter of appointment of arbitrators. Even where the Court appoints an arbitrator, either by way of enforcement of an existing agreement, or as a measure evolved by it, to resolve the dispute, arbitrators are appointed with the consent of both the parties. Appointment of arbitrator against the will of one of the parties is almost rarity; and in fact, it runs contrary to the very spirit of arbitration. If the proceedings before the Chief Justice of a High Court, or his nominees, are to be unilateral, without the participation of the other party to the dispute, several consequences, opposed to the basic tenets of arbitration, may ensue.

27. For example, if a party, with impunity approaches the Chief Justice of a High Court, or his nominee, by invoking a false, or totally unrelated agreement, and seeks appointment of arbitrator against another person, and if the Chief Justice or his nominee has no other option than to accede to the request, without having necessity to verify the facts from the other party, the amount of hardship that will be caused to the latter is phenomenal. There may be genuine defences to the other party, such as non-existence of the agreement, wrong description of the party, be it inadvertently or purposely, existence of factors touching on the qualifications or impartiality of arbitrator, etc. Once an arbitrator is appointed, without hearing him, such party, as a first step, has to contribute his part of the arbitration fee, which would, by no means be in the figures of ordinary magnitude. If his only remedy is to challenge the entire process of appointment, before the arbitrator himself, under Section 13, the arbitrator would be too unwilling to terminate his own appointment; even if he satisfied about the merit of such contentions. For initiation of an application under Section 34, the aggrieved party has to undergo the necessary ordeal before he is rescued. All this can be avoided, if he is given an opportunity to make his position clear, in the proceedings before

the Chief Justice or his nominee. Such a step, apart from conforming to settled principles of adjudication, would ensure fairness and justice. No one can suggest that this, in any way, is, antithetical to the concept of arbitration.

28. If the orders issued by the Chief Justice of a High Court or his nominee, are not amenable to adjudication, it may result in hardship to the applicants also. If the Chief Justice or his nominee refuses to accede to the request of the applicant, he would be left with no remedy. In some cases, it was held that since the decision is administrative in nature, it can be challenged in a writ petition. This, however, would result in begging the question. If an order rejecting the application for appointment of an arbitrator is administrative in nature, so would be the order, acceding to the request. Then, it would be too difficult to differentiate them in the context of a further remedy.

29. As on today, the scheme framed by the Chief Justice of High Court of Andhra Pradesh, contains a clause providing for issuance of notice to the aggrieved party. Once a decision is rendered by the nominee of the Chief Justice, after hearing both the parties, the power of High Court to review the same remains intact, notwithstanding the finality attached to such orders under sub-section (7) of Section 11 of the Act. It may be that the scope of review is limited. Hence the revision is maintainable.

30. Now, reverting to the first question, it may be recalled that, before approaching the Chief Justice or his nominee under sub-sections 4 and 5 thereof, the party has to call upon or require the other party, to agree for his proposal for appointment of arbitrator. It is on failure of the other party to respond within 30 days, from the date of receiving such proposal that the party can approach the Chief Justice or his nominee. As observed earlier, sub-sections 4 and 5 cover cases, where the matter of appointment of arbitrator between the parties is not covered by an agreement. Sub-section (6) on the other hand, relates to cases, where there exists a procedure for appointment of arbitrator. The occasion to invoke this provision arises when there is lack of unanimity, in the matter of appointment of an arbitrator, in terms of the agreement. No time frame, as in sub-sections (4) and (5), is prescribed to enable a party to take steps under this provision.

31. Till recently, the understanding was that, with the passage of 30 days from the date of receipt of proposal made by a party for appointment of arbitrator, the other party forfeits its right to take steps for appointment of an arbitrator, irrespective of the provision involved. In *Datar Switchgears Ltd. v. Tata Finance and another*, 2000(3) SCC 151 the Supreme Court held that such a contingency would arise only in cases of applications made under sub-sections 4 and 5, but not where the application is filed under sub-section 6 of Section 11 of the Act. The qualitative difference between these two categories of applications and situations was explained. It was further held that though the other party, in an application covered by sub-section 6, may not lose its right to take steps with the passage of 30 days from the date of receipt of notice, it can not have recourse to the same, once an application is filed. The question as to whether the Chief Justice or his nominee, can approve, for accept the nomination of an arbitrator in accordance with the terms of the agreement, though made after filing of the application, did not fall for consideration before their Lordships.

32. In *Union of India V. Vengamamaba Engineering Company* 2001(4) RAJ 459 (AP), a Division Bench of this Court considered the scope of the provisions of the Act, and in particular, Section 11 as well as the purport of the judgments rendered on the subject, including the one in *Datar Switchgears Ltd v. Tata Finance and another* (4 supra). It was held therein that, there is no bar against a party for appointing an arbitrator or for agreeing upon for a third arbitrator under sub-sections 4 and 5, even after the expiry of 30 days. The same view was expressed in relation to an application under sub-section 6 of Section 11 of the Act. Chief Justice S.B.Sinha, as he then was, speaking for the Bench held as under: -

'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'.

33. This observation suggests that the various events referred to in sub-sections (4), (5) and (6), at the most constitutes causes of action for submission of applications, and by themselves, they do not provide for, or result in, forfeiture of the right of the other party, either to accede to the request, or to comply with the terms of the agreement, as the case may be.

34. The word 'forfeiture' does not occur in Section 11 of the Act. By its very nature, forfeiture, as an incidence, or phenomenon in law, that visits the person, against whom it is invoked, with civil and penal consequences. It snatches or takes away the right vested in such person. Forfeiture of a right can take place only when the relevant law expressly provides for such an eventuality and stipulates the circumstances that may lead to it. In *Bankura Municipality v. Lalji Raja & Sons* : 1953 CriLJ1101 , the Supreme Court had an occasion to deal with the meaning of the word 'forfeiture' and its consequences. The appellant therein pleaded that seizure of a property under Section 431 of the Bengal Municipal Act is equivalent to forfeiture, and that the High Court did not have jurisdiction to quash an order resulting in forfeiture. Dealing with the submission, the Supreme Court held as under:

Para-9: 'This contention in our opinion is unsound. According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture....'

35. Crawford in his treatise, 'The Interpretation of Laws', equated forfeiture to penalty or deprivation of property and took the view that the same cannot be resorted to, even where the law provides for it, but is shrouded in doubt or ambiguity. The observation runs as under:

'So far as property rights are concerned, it occupies an analogous position to that occupied by statutes which restrict and destroy personal rights. Accordingly, in case of doubt or of ambiguity, that construction should be adopted which opposes the imposition of the tax. And, obviously, this strict rule of construction is especially applicable to statutes which impose a privilege tax, or a tax on an occupation, or impose penalties or forfeitures or deprive the taxpayer of his property by summary proceedings'. (page 503, 1989 reprint)

36. Similarly, Maxwell, in 'Interpretation of Statutes', observes that the effort of the Court should be to respect rights of citizens and any ambiguity in interpretation of the relevant provision should result in adopting the one, which protects the rights. (See Maxwell on Interpretation of Statutes Twelfth Edition page 251)

37. In any legal system, the substantive law provides for the rights, and the procedural law prescribes the mechanism for their enforcement. In some cases, the substantive and procedural law may be contained in the same enactment, or for that matter, in the same provision. Vestiture or forfeiture of a right is in the realm of substantive law. The procedural law may prescribe the circumstances under which the cause of action for enforcing the right under the substantive law, arise. It may also provide for denial of the remedy to a party, to enforce the right, if it fails to take steps prescribed under the procedural law. However, mere accrual of cause of action to a party does not, by itself, result in forfeiture of a right vested in the other party.

38. Whenever a party invokes the jurisdiction of the Forum or a Court for enforcing his rights under contract or a substantive law, the other party can chose either to plead and prove that the party who initiated the proceedings does not possess such right, or to agree to perform his part of obligations. If the plea raised by an applicant is admitted by the other party, the necessity to proceed with the matter ceases. The reason is that there would be no triable issue, in the absence of a denial. Mere initiation of proceedings by one of the parties to a contract for enforcement of his rights or the terms of the contract, can not render the corresponding rights of the other party, inoperative. In a way, such a situation would present a contradiction in terms. On the one hand, the applicant seeks to

enforce its rights under the terms of the contract, and on the other hand, it pleads that the opposite party has no right to do, exactly that. If so, in the context of applications under Section 11, it has to be inferred that the offer of the applicant, to the other party was either not serious or was deceptive.

39. For example, in a suit for recovery of money, the defendant may chose, either to pay money or to contest suit. It cannot be said that either because he did not respond to the notice issued by the plaintiff, or because the suit is filed, the defendant lost his right to act in accordance with the contract and to pay the amount. This example may, at the first blush, appear to be an over simplification of the issue. But, on a close scrutiny, there does not appear to be any perceptible difference between the illustration and the matters under Section 11 of the Act.

40. Whatever may be the possibility of placing various interpretations on the said provisions, there is nothing in them to suggest that arbitrator nominated by the respondent herein cannot be treated, as the one appointed by the nominee of the Chief Justice or his nominee. If the Chief Justice or his nominee is satisfied that the person, appointed as arbitrator, by the respondent, though subsequent to the filing of the application, is fit and suitable for that purpose, there is no reason why such appointment has to be ignored as a matter of principle. In fact, such a course of action, and appointment of such persons, would ensure adherence to the terms of the agreement, promote unanimity and reduce chances of inducting a stranger to the proceedings. Even other wise, the emphasis under sub-section (6) is to ensure compliance with the agreement between the parties, than to permit the parties to break it. This provision empowers the Chief Justice or his nominee 'to take necessary measure' in accordance with the 'appointment procedure'. In contrast, sub-sections (4) and (5) require that the 'appointment shall be made' by the Chief Justice or his nominee. This difference is significant and cannot be ignored.

41. Learned counsel for the petitioner relies on an order passed in W.P.No.11479 of 2004, filed by the respondents herein against the petitioner in relation to another contract. In that case, the petitioner filed an application under Section 11(6) of the Act before the Chief Judge for appointment of an arbitrator on the ground that his

request for appointment of arbitrator in accordance with the terms of the agreement was not acceded to. The learned Chief Judge appointed an arbitrator, notwithstanding the fact that, the respondent herein nominated an arbitrator in accordance with the clause to the contract. Through its order, dated 28.7.2004, a Division Bench of this Court dismissed the writ petition by placing reliance upon the judgment of Supreme Court in Datar Switchgears Ltd.'s case (4 supra). The said order does not apply to the facts of the present case. The reason is that once the Chief Judge found in the present case that the appointment of the arbitrator, by t!

he respondent is in accordance with the terms of agreement, such arbitrator comes to be treated, as the one appointed by the Chief Judge himself.

42. He also places reliance upon a judgment of this Court in Rajeev Traders V. General Manager, South Central Railway, Secunderabad, : 2002(5)ALD69 . In that case, the contractor made an application for appointment of an arbitrator for resolution of the disputes in terms of Clause 64 of the General Conditions of Contract. When his request was not acceded to, he filed an application before this Court under Section 11(6) of the Act. During pendency of the application, the respondent therein appointed an arbitrator. The O.P was dismissed on 27.12.1999. The sole arbitrator entered reference and rendered an award, dated 02.01.2001. He allowed two of the three claims referred to him. The contractor filed Arbitration Application No.40 of 2001, in relation to the same work, by contending that though his claim was for 9 items, only three were referred the earlier arbitrator and another arbitrator needs to be appointed for remaining 6 claims. During pendency of the second application, the respondent therein referred remaining 6 claims also to the same arbitrator through letter dated 25.6.2001. The application was allowed by this Court, with the following observation: -

'In the instant case, Clause 64 of the General Conditions of Contract, obligates the respondents to refer the disputes raised by the executor to the Sole Arbitrator for arbitration. Though the applicant raised as many as nine claims, the respondents have referred only three claims to the Sole Arbitrator, and immediately after filing

this application, they have referred the remaining six claims to the Sole Arbitrator for adjudication of those claims, and therefore, as rightly contended by the learned counsel for the applicant, the respondents have forfeited their right to appoint an Arbitrator, and such appointment of Arbitrator, made by the respondents, is no appointment and is honest in the eye of law'.

43. The facts of the present case are different. However, since the learned counsel placed heavy reliance on the said precedent, it becomes necessary to examine the principle laid down therein. In that case, between the same parties and as regards the same contract, two arbitrators were appointed. The question as to whether such a course is permissible or not, does not appear to have been urged before this Court. Had the proceedings been in a Court of Law, undoubtedly, the principle of res judicata or constructive res judicata would have straightaway been attracted. The question as to whether principle of res judicata applies to the proceedings in arbitration, was dealt with by the Supreme Court in an unreported judgment rendered on 11-10-1962 in Uttam Singh Dugal and Co., v. Union of India (Civil Appeal No.162 of 1962). The principle laid down therein was quoted with approval in Satish Kumar v. Surinder Kumar : [1969]2SCR244 , and in fact, the passage in the earlier judgment was reproduced verbatim, which reads as under:

'The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J. in the case of Bhajahari Saha Banikya v. Behary Lal Basak, (1909) ILR 33 Cal 881 at p. 898, 'the award is, in fact, a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive.....in reality, an award possesses all the elements of vitality even though it has not been

formally enforced and it may be relied upon in a litigation between the parties relating to the same subject-matter.

This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed.'

44. The same question arose for consideration before the Supreme Court in K.V. George v. Secretary to Government, Water and Power Department, Trivandrum, : AIR 1990 SC53 . In that case, the arbitrator passed an award, and when the validity of the same was pending before a civil Court, he passed another award on a subsequent claim petition, touching on certain other aspects.

The Supreme Court observed as under:

Para 16: ' In the instant case, the contract was terminated by the respondents on April 26, 1980 and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the Arbitrator by the appellant. This having not been done the second claim petition before the Arbitrator raising the remaining disputes is clearly barred'.

After extracting the passage from Satish Kumar's case (8 supra), the Supreme Court summed up the law as under:

Para 19: 'Considering the above observations of this Court in the aforesaid cases we hold that the principle of res judicata or for that matter the principles of constructive res judicata apply to arbitration proceedings and as such the award made in the second arbitration proceedings being Arbitration Case No.276 of 1980 cannot be sustained and is therefore, set aside.'

45. Though the judgments referred to above arise out of the [Arbitration Act, 1940](#), and the judgment of this Court in Rajeev Traders (7 supra) arises under the 1996 Act, the principle applies with all its vigor.

46. Another aspect of the matter is that any and every objection in relation to an arbitrator, needs to be raised before the arbitrator himself under Section 16 of the Act. In several judgments, the Supreme Court took the view that the questions, such as, whether there exists an arbitration agreement at all, whether the appointment of the arbitrator, be it by the parties or by the Chief Justice or his nominee, is in accordance with law, not to speak of the scope of the nature and extent of dispute between the parties, have to be raised before the arbitrator himself, under Section 16 of the Act. A party aggrieved by the award on any of those aspects has to canvas these aspects before the Civil Court under Section 34 of the Act. Therefore, it remains debatable as to whether it is permissible to entertain an application for appointment of an arbitrator on the ground that the reference in the earlier proceedings was not exhaustive.

47. I have no doubt in my mind that, had the law laid down by the Supreme Court in the decisions referred to above been brought to the notice of this Court when the case in *Rajeev Traders (7 supra)* has been decided, the outcome would certainly have been different. For the same reason, it is difficult to accept the contention of the learned counsel that the judgment of this Court in *Rajeev Traders (7 supra)* is an authority for the proposition that any number of arbitrators can be appointed between the same parties and as regards the same contract; and that the right of the other party stands forfeited to act according to the terms of the contract once an application is presented under Section 11(6).

48. For the foregoing reasons, the C.R.P. is dismissed. There shall be no order as to costs.