

Supratik Ghosh and anr. Vs. Pasari Housing Development (P) Ltd.

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SooperKanoon Citation : sooperkanoon.com/856444

Court : Kolkata

Decided On : Dec-01-2000

Reported in : (2001)1CALLT341(HC)

Judge : Satyabrata Sinha and; Pratap Kumar Ray, JJ.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 7, 9, 11(4), 21, 34(2) and 36;; [Specific Relief Act, 1963](#) - Sections 2, 10, 14, 20, 41 and 142;; [Constitution of India](#) - Articles 9 and 10;; [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 3

Appellant : Supratik Ghosh and anr.

Respondent : Pasari Housing Development (P) Ltd.

Advocate for Pet/Ap. : Mr. B.K. Chatterjee, ;Mr. A.N. Mukherjee, ;Mr. J. Saha and ;Mr. A. Dutta, Advs.

Judgement :

S.B. Sinha, J.

1. The defendants are the appellants in this appeal. They are aggrieved by an order dated 31.7.2000 passed by Sri S.K. Bhadra, the learned Additional District Judge, VIIth Court at Alipore in Title Suit No. 132 of 1999, whereby and whereunder an application filed by the plaintiff-respondent herein in exercise of his power conferred upon him under section 9 of the [Arbitration and Conciliation Act](#),

[1996](#) (hereinafter called and referred to for the sake of brevity as 'the said Act') was allowed.

2. The facts of the matter are as follows :--

On or about 3.9.1993, the appellants as owners of the property being premises No. 16A, Curusaday Road, Calcutta, entered into a development agreement for the purpose of constructing a multi-storeyed complex with the plaintiff-respondent. A power of attorney to the Director of the respondent company was also executed by the appellants herein and possession of the said premises was also handed over. Three tenants were and still are occupying a part of the said premises. On the ground of breach of the conditions of the agreement, the said agreement dated 3.9.1993 was terminated by the appellants herein, whereafter a fresh development agreement has been entered into by the appellants with Messrs. Rajat Hait Private Limited on 21.9.1999. On 22nd September, 1999, an application was filed by the respondent before the learned District Judge at Alipore being Title Suit No.132 of 1999 in terms of section 9 of the said Act. wherein a prayer for injunction was made which is to the following effect :--

'Injunction restraining the respondent from taking any steps or further steps in breach of and in derogation of the agreement dated 3rd September, 1993 and/or in furtherance of the purported notice dated 20th September, 1999 and/or in any manner that would amount to interference with the petitioners possession, occupation and user of the said premises and/or transferring and/or disposing of and/or creating any third party interest in the said property'.

An ex parte interim order of injunction was passed on the said date which was the subject matter of an appeal before this Court marked as F.M.A.T. 4042 of 1999, *inter alia*, on the ground that the said interim order was passed without assigning sufficient and cogent reason. A Division Bench of this Court allowed the said appeal. The said judgment has since been reported in 2000(3) CLT 97 (Supratik Ghosh & Anr. v. M/s. Paseri Housing Development Pvt. Ltd.)

3. Pursuant to or in furtherance of the direction issued by the appeal Court, the matter was heard again by the learned trial Judge and the impugned order was

passed. In the meantime, allegedly, the respondent on 4.2.2000 referred the dispute to the Hon'ble Justice Susanta Chatterji, a former Judge of this Court, for arbitration. Dispute exists as to whether such appointment was allegedly made or not.

4. Mr. B.K. Chatterjee, learned senior counsel appearing on behalf of the appellants, inter alia, raised the following contentions :--

(1) the impugned order has been passed by the learned trial Judge without Jurisdiction as it failed to satisfy itself with regard to the existence of the contention precedent for passing the said order; (2) in view of the finding that the letter dated 2.4.2000 is a fake and fabricated one as there was no evidence that the same was ever served, the impugned order could not have been passed; (3) Mr. Chatterjee would urge that had the learned trial Judge believed the veracity of the intention of the plaintiffs-respondent, it would not have directed the parties to refer the dispute to the Arbitrator; (4) that part of the impugned order whereby and whereunder the defendants had been directed to refer the dispute to the arbitration is wholly without jurisdiction; (5) as no decree for specific performance of contract can be granted in relation to a development agreement having regard to the provision of sections 10 and 14 of the Specific Relief Act, no interim order which is passed in aid of the final order could be passed by the learned trial Judge. In any event, as the said purported development agreement contains several conditions, supervision in respect whereof by the Court would be impossible, no decree for specific performance of such agreement can be granted under the provisions of the Specific Relief Act and on that ground too no order of injunction could be issued. In support of the aforementioned contentions, strong reliance has been placed by the learned counsel on *State of West Bengal & Ors. v. Anil Kumar Bhuiya* reported In 1982(1) CHN 377, *Dr. S. Dutta v. University of Delhi* reported in : [1959]1SCR1236 , AIR 1951 Punjab 426 and : AIR1963 Cal594 .

5. Mr. S. Pal, learned senior counsel appearing on behalf of the plaintiff-respondent on the other hand submitted that the Arbitrator has the jurisdiction to pass an Award directing specific performance of contract. Reliance in this connection has been placed on *Olympus Super Structures Pvt. Ltd. v. Meena*

Vijay Khetan and others reported in : [1999]3SCR490 . The learned counsel would contend that development agreement is an agreement for transfer of an immovable property and as such the same is specifically enforceable and thus having regard to the explanation appended to section 2 of the Specific Relief Act; there does not exist any embargo in passing an Award directing specific performance of contract. The learned counsel would contend that the dispute is not only with regard to the specific performance of the said agreement but also illegal termination of the development agreement and thus reference cannot be said to be not maintainable in law. It was contended that although in terms of the arbitration agreement entered into by and between the parties both of them are to nominate their own arbitrator, the same is not a void one as in terms of section 11 of the said Act a third arbitrator can be appointed. Strong reliance has been place on M.M.T.C. Ltd. v. Sterlite Industries (India) Ltd. reported in : (1996)6SCC716 . Our attention has been drawn to the fact that questioning the validity or otherwise of the development agreement executed by the appellant in favour of the said Rajat Hait Pvt. Ltd., a suit has been filed by the plaintiff-respondent before the learned second Civil Judge (Senior Division) which has been marked as Title Suit No. 89 of 1999, wherein also an interim injunction has been passed restraining the appellants and the said Rajat Hait Pvt. Ltd. from giving any effect thereto. Our attention has been drawn to the fact that an application was filed by the aforementioned Rajat Hait Pvt. Ltd. for rejection of the plaint and dismissal of the suit and the matter is now pending before this Court in a Civil Revision application and a learned single Judge of this Court by an order dated 9.5.2000 directed continuance of the said interim order passed in the said suit until further orders. Mr. Pal would submit that the Court while passing an order of injunction in terms of section 9 of the said Act is not required to go into the merit of the matter as merit of the case will have to be adjudicated upon by the arbitrator himself. According to the learned counsel, as the arbitrator has already been appointed, the condition imposed by the learned trial Judge to the effect may be modified to the extent by directing the parties to appoint their arbitrator within a fixed period and thereafter arbitrators may appoint a third arbitrator within a fortnight from their appointment as per section 11(3) of the 1996 Act. It was submitted that the appointment of Justice Chatterjee as the nominated arbitrator by the plaintiff may be treated as an

effective appointment in terms of the Order dated 31.7.2000 of the learned trial Court.

6. The property in question is situated in a prime locality in the town of Calcutta. The scope of the aforementioned development agreement had been stated in Article III, relevant provisions whereof are 3.1, 3.2 and 3.3. Article IV of the said development agreement deals with consideration, which inter alia, provided, 'In consideration of the Developer's having agreed to develop erect construct and complete the building and to commercially exploit the said property in accordance with the plan to be sanctioned by the Calcutta Municipal Corporation and/or other competent authority or authorities and to allocate the Owners' allocation free of cost as mentioned herein above. The owners have agreed to sell assign, transfer the undivided 50% shares of interest in the said land and premises to the Developer and/or its nominee or nominees in such part or portions.' The other provisions which are relevant for the purpose of this case are 4.2(i), 6.2, 6.4, 8.1, 8.2 and 9.4. Articles IX and X of the said agreement referred to the mode and manner of construction of building and apartments. Article XI contains owners' Obligations; whereas those of the Developers are stated in Article XII thereof. Article XVIII of the said Agreement contains an arbitration clause being 18.1 thereof which reads thus :--

'In case of any disputes, differences and/or question arising out of and concerning this Agreement, the matter will be referred to the Arbitration of two Arbitrators one of whom will be appointed by the Owners and the other by the Developer and in case of any difference between the Arbitrators the same will be referred to an Umpire to be appointed by the Arbitrators and the decision of the Umpire shall be final and binding upon the parties.'

7. The question as to whether the said development agreement is purely an agreement appointing the respondent to as contractor for construction of building or not although argued in great details by the learned counsel, for the parties, we are of the opinion that it is not necessary for us at this stage to consider the same as the construction of the said agreement may also fall for decision before the learned Arbitrator. There cannot however, be any doubt whatsoever that prima

facie the said agreement cannot be said to be an agreement simplicitor for appointment of a contractor to raise construction but thereby the appellants herein ultimately are required to transfer portion of the properties upon which apartments would be constructed except those which would be retained by them in terms of the aforementioned development agreement. As noticed hereinbefore, there is also an agreement for assignment, transfer of undivided 50% share of interest in the land and premises to the developer and/or its nominee or nominees as would appear from clause 4.1 of the said agreement.

8. The apex Court in Olympus Superstructures Pvt. Ltd. (supra) while repealed a contention that the arbitrator has no jurisdiction to pass an award directing specific performance of contract, inter alia, on the ground that a discretion in relation thereto exists in Court in terms of section 20 of the Specific Relief Act, while doing so, it took into consideration conflicts of decisions rendered by different High Court in this regard. While it upheld the decision of Punjab High Court in Lakshmi Narain v. Raghbir Singh reported in . Fertiliser Cropn. of India v. Chemical Construction Corpn. reported in 1LR 1974 Bom. 856 and unreported decision of this Court in Keventor Agro Ltd. v. Seegram Company Ltd. (APO 498 of 1997 and APO 499 of 1997 disposed of on 27.1.1998, it overruled the decision of the Delhi High Court in P.N.B. Finance Ltd. v. Shital Prasad Jain reported in : [1990]185ITR298(Delhi) . It held--

'Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Ketr v. Leeman [1846]9 QB 371. Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst =(1801)2 Bos & P.444), Wilson v. Wilson = (1848)1 HL Cas 538 and Cahill v. Cahill = (1883)8 AC 420.

Further, as pointed out in Calcutta case merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the Civil-Court can exercise such a discretion. In the above case, Ms. Ruma Pal, J. observed : merely because the sections of the Specific Relief Act confer discretion on Courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a Court by statute e.g. the grant of interest or costs, parties could be precluded from referring the dispute to arbitration.'

We agree with this reasoning. We hold on point 3 that disputes relating to specific performance of a contract can be referred to arbitration and section 34(2)(b)(i) is not attracted. We overrule the view of the Delhi High Court. Point 3 is decided in favour of the respondents.'

9. Having considered the same we may notice the provision of section 9 of the said Act, in terms whereof a party may before or during arbitral proceeding or after any time after making arbitral award but before it enforces section 36, appeal to a Court in relation to the matter specified therein which includes interim injunction or appointment of receiver : submission of Mr Chatterjee having regard to sub-clause (e) of clause (ii) of section 9, the Court while passing an order of interim injunction is not only required to see the existence of an arbitration agreement but also is required to see as to whether any order passed therein would be just and convenient or not which in turn would mean that the Court will have to take into consideration the pre-requisites for grant of injunction, namely prima facie case, balance of convenience and irreparable injury. Mr. Pal on the other hand submitted that the Court while passing an order of injunction has no jurisdiction to go into the merit of the claim and counterclaim. Section 9 of the Act has been inserted for the purpose of protecting the interest of a party to the arbitration agreement so long an award is not made. Such an application cannot only be filed during the pendency of the proceeding as was the case under the Arbitration Act, 1940, but also before such proceeding commences. The appointment at issue is no longer res integra in view of the decision of the apex Court in Sundaram Finance Ltd. 's case : [1999]1SCR89 . The apex Court in the aforementioned

decision repealed the contention that an order of interim injunction can be granted only during the pendency of the arbitration proceeding. It pointed out the distinction between the old Act and the new Act which had been enacted having regard to UNCITRAL of Rules of Model and held that the same is in pari materia with section 44 of the England Act. The Court quoted Russell on Arbitration (21st Edn.) 386 as under :

'The Court may exercise its power to grant an interim injunction before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant Intends to refer the dispute to arbitration in due course.

The power to grant an interim injunction under section 44 of the Act extends to the granting of a Mareva injunction in appropriate cases. It may also include granting an interim mandatory injunction, although the Court will be slow to grant an injunction which provides a remedy of essentially the same kind as is ultimately being sought from the Arbitral Tribunal.'

10. The apex Court agreed with the view of the Court of appeal rendered in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. reported in (1992)2 All ER 609. It was held--

'When a party applies under section 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceeding taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application under section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to, the arbitral proceeding, if, at the time when the application under section 9 is filed, the proceedings have not commenced under section 21 of the 1996 Act. In order to give full effect to the words 'before or during arbitral proceedings' occurring in section 9. it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal. But a

situation may so demand that a party may choose to apply under section 9 for an interim measure even before issuing a notice contemplated by section 21 of the said Act. If an application is so made, the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the Court will have the jurisdiction to pass orders under section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application under section 9 merely because no notice has been issued under section 21 of the 1996 Act.'

11. The aforementioned decision has been considered by a Division Bench of this Court in *Tata Finance Limited v. Pragati Paribahan and Ors.* reported in 2000(3) ICC 563. wherein it was observed. 'Having heard the learned counsel for the parties, we are of the opinion that there exists disputes and differences between the parties which might have been referred to the arbitral proceedings. The power under section 9 of the Act is exercised, inter alia, to keep the property under arbitration intact. In the arbitral proceedings a finding may be arrived at that the seizure of the vehicle was illegal and thus, in a case, like the present one where no order of injunction is passed, it may be open to the appellant to dispose of the same upon causing a seizure of the vehicle which may give rise to further complication. In a situation of this nature, therefore, an attempt should be made to protect the interest of both the parties. It further put the applicant to certain conditions as would appear from paragraph 14 thereof.

12. Although existence of an arbitration agreement and readiness and willingness on the part of the applicant to take steps for referring the dispute to an arbitral tribunal would be main factors for the purpose of exercise of Jurisdiction by a Court under section 9 of the said Act, there cannot be any doubt whatsoever that the power of the Court is not different than the power of a Civil Court granting

Injunction is a suit. The Division Bench in the earlier decision in the lis between of the parties reported in 2000(3) CLT 97 has clearly held that even the Court granting an ad interim injunction must follow the pari materia principles laid down in Order 39 Rule 3 of the Code of Civil Procedure. Thus, there cannot be any doubt whatsoever that although the Court may in a given case decline to go into the merit of the matter, but there cannot be any doubt that the principle for grant of injunction must be kept in mind before an order under section 9 of the said Act is passed. This aspect of the matter has been considered by a learned single Judge of the Delhi High Court in Sezukl Motor Corporation v. Union of India and Another reported in 1997(2) Arb LR 477. Yet again in the decision reported in 1988 Company Cases 741, a Division Bench of Andhra Pradesh High Court clearly held that the said principle must bear in mind by the Court granting injunction. However, it appears that in Narain Sahai Aggarwal v. Santosh Rani reported in 1997(2) Arb. LR 322 a learned single Judge of the Delhi High Court has held, 'obviously, it is not within the scope of the said section to inquire into the claim and the counter claim made by both the parties in regard to the custody of the articles beyond what has been admitted by the respondent. In that case the Court without going into the merit of the application held that the proceeding under section 9 of the act was not legally maintainable. The said decision must be considered having regard to the factual matrix of the matter obtaining therein. The question which arose for consideration in that case was handing over of certain articles in a dispute amongst the partners. It was in that context the aforementioned observation was made but it is clear that the Court had in mind the principle for grant of injunction as it was specifically stated that only those articles which had been admitted by the respondents to be partnership property could be directed to be handed over. As indicated hereinbefore, therein it was held that the application under section 9 of the Arbitration Act is not maintainable. The learned trial Judge unfortunately has not addressed himself from that angle. But as noticed hereinbefore, the disputes and differences by and between the parties have been crystallised. The appellants herein had been entered into a separate agreement with another party by rescinding the agreement dated 3rd September.,.1992. It is now beyond and cavil of doubt that an arbitration agreement although forms part of the main agreement, the arbitration clause would be a colateral one and any survive the termination of

agreement. In that view of the matter, if a dispute arises as to whether the termination of the agreement on the part of the appellants herein was proper or not, arbitration agreement could not be taken recourse to. As it is now become well settled in view of the decision referred to hereinbefore that the purport and object of section 9 of the said Act is to grant interim relief to a party, when the matter has been or are going to be referred to Arbitral Tribunal, question relating to prima facie case, balance of convenience and irreparable injury will have to be considered from that angle. If the Court finds that there does not exist any arbitration agreement or the arbitration agreement is not valid or if the Court finds that the application under section 9 of the Arbitration Act has been filed by the plaintiff without having any intention to refer the dispute to the Arbitral Tribunal, the Court will undoubtedly refuse to exercise its jurisdiction. While considering the prima facie case it may even go into the merit of the matter as has been done by the Delhi High Court in Suzuki Motor Corporation's case (supra) and come to the conclusion that the plaintiff would not be entitled to any injunction as has been prayed for. But where having regard to the dispute between the parties, the Court arrives at a conclusion that unless the injunction as prayed for is granted, the reference to the Arbitral Tribunal itself would become infructuous, the Court will not hesitate to grant interim protection to the parties. However, in our opinion, with a view to protect interest of the appellant, plaintiff can be put to terms which would be taken into consideration at a later part of the case. In this case if no interim protection is granted despite the order of injunction having been passed in relation to the agreement entered into by and between the appellants with the said Rajat Halt Pvt. Ltd., they would be free to enter into any other agreement with third party or start construction immediately. Thus, there not only exists a prima facie case but the balance of convenience is also in favour of grant of injunction. So far as the question of irreparable injury is concerned, we may observe that the same would mean a substantial injury. It is not that the injury which is likely to be suffered by the plaintiff may be compensated on mandatory terms but having regard to the explanation appended to section 10 of the Specific Relief Act, there cannot be any doubt that in relation to an immovable property presumption would be in favour of the plaintiff-respondent and not in favour of the defendants. If the plaintiff is entitled to specific performance of the said agreement, there cannot be any doubt

whatsoever that explanation appended to section 10 of the Act will be on his side and section 142 of the Specific Relief Act will not come as a bar in granting of such relief. The contention raised by Mr. Chatterjee to the effect that various clauses referred to in the development agreement would clearly show that the Court may refuse to grant a decree for specific performance of contract, having regard to the fact that it would not be in a position to supervise execution thereof having regard to the complication which may arise in relation thereto. But, in our opinion, that question does not arise at the present juncture. The Court cannot presume that there is dispute and difference with regard to the mode and manner of construction enforcement of the respective rights and obligations of the parties to the agreement, the quality of job or the materials or the like. The main question, as noticed hereinbefore which would fall for consideration/determination before the arbitral would be as whether action on the part of the appellants in terminating the said agreement is legal and in the event said question is answered in favour of the plaintiff-respondent, as to whether he is entitled to the specific performance of the said agreement. The decisions upon which strong reliance has been placed by Mr. Chatterjee in this regard, are not applicable in the facts of the present case.

13. In *State of West Bengal and Ors. v. Anil Kumar Bhuiya* reported in 1982(1) CHN 377, Anil Kumar Sen, J. as the Hon'ble Chief Justice then was, having regard to section 41(b) of the Old section held that the same would apply also to a grant of temporary injunction in that case. A contract was entered into between the parties for relaying and raising the water main under the Durgapur Interim Water Supply Scheme for a price of Rs. 57,144/-. It is in that situation held that as the plaintiff in the event of success can be compensated sufficiently on monetary terms the contract being one for certain construction work no injunction should be granted. Such is not the position here. In *Dr. S. Dutta v. University of Delhi* reported in AIR 1950 SC 1050, the apex Court was concerned with a service matter. It invoked second part of section 14(b) of the Specific Relief Act and held that contract of personal service cannot be specifically enforced. Yet again the said decision has no application in the instant case. The other two decisions relied upon by the learned counsel, namely AIR 1951 Punjab 426 and : AIR1963 Cal594 also relate to building contract and not a contract of this nature. So far as the appointment of arbitrator is concerned, it appears the learned trial Judge has

arrived at two contradictory conclusions. While at one place it held. 'In the present case, there was no reference earlier, but while the matter was brought before the notice of the Hon'ble Court then on 20.4.2000 they sent a letter that they applied for an arbitrator. The notice was not received by the respondents, even then they referred that such reference was made. The veracity of such statement has yet to be tested. There is no manifest intention and therefore, the order of injunction should not be passed.' It, however, appeared that although couched in the language as it is, the learned trial Judge was in substance had been noticing the arguments advanced by the learned counsel for the appellants. It held, 'but for the present when it is found that the petitioner has spent a lot for the purpose and had also Invested an amount for the purpose of development work, at least we find certain papers to the effect before us. and as also we find the plaintiff in possession to the suit property should it not be protected for certain days. Be it mentioned that this Court finds that there is a letter filed by the petitioner before this Court to show that they have referred them after to an arbitrator. So, it can not be said at this stage that they have no any intention to refer the matter to an arbitrator.'

14. Even if the appellants have not received a copy of the said letter the same can be served upon them and as submitted by Mr. Pal, the appointment of Justice Chatterjee may be treated to be his nomination as an arbitrator by the plaintiff.

15. The learned trial Judge however, in our opinion, was not correct in directing the defendant to appoint his own arbitrator, although submission of Mr. Pal to the effect that the same was done for the benefit of the defendants-appellants, cannot be accepted for more than one reason.

16. In *M.M.T.C. Limited v. Sterlite Industries (India) Ltd.* reported in : (1996)6SCC716 the apex Court while dealing with the case where two Arbitrators were appointed prior to coming into force of the new Act held that old Arbitration agreement did not become otio, but the same has to be considered in the light of the new Act. Referring to the provision of sections 7,10 and ,11 of the New Act it held--

'The question is whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act come into force and therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire of the third arbitrator before proceeding with the reference, the requirement of sub-section (1) of section 10 is satisfied and sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of section 7 of the Act and, therefore, is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by section 11 of the New Act.

In view of the fact that each of the two parties have appointed their own arbitrators, namely, Justice M.N. Chaundurkar (Retd.) and Justice S.P. Sapra (Retd.). section 11(3) was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by section 11(4)(b) of the New Act. Since the procedure prescribed in section 11(3) has not been followed the further consequences provided in section 11 must follow.

Accordingly, we direct that the Chief Justice of the High Court is to appoint the third arbitrator under section 11(4)(b) of the New Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator within thirty days from the date of their appointments. Direction given by the Chief Justice of the High Court is substituted to this effect.'

17. If by reason of this judgment it is directed that the plaintiff-respondent should be deemed to have appointed Chatterji, J. as its arbitrator, in the event, the defendants appellants do not appoint their own arbitrator in terms of section 11(4)(a), such an appointment can be made by the Chief Justice under section 11(4) thereof. It has been placed on record that the respondent has appointed his arbitrator and in terms of the order dated 31st July, 2000 referred the dispute to the arbitrator by letter dated 26th August, 2000. A copy of the said letter, therefore, must be served upon the learned Advocate-on-Record for the appellants herein

within one week from date. In the event, second arbitrator is appointed by the appellants-defendants or by the Chief Justice in exercise of his power under section 11(4) as the case may be, if the two arbitrators fail to agree on a third arbitrator in terms of section 11(4)(b) of the Act, then again at the request of any of the parties, Chief Justice may appoint a third arbitrator.

18. However, we must, having regard to the decision of the apex Court In Sundaram Finance Ltd. 's case (supra) also considered the loss which may be sustained by the appellants herein in the event the arbitral award is made against the plaintiff-respondent. With a view to protect the interest of the appellants, we are of the opinion that the plaintiffs-respondents should be put to terms by asking them to furnish adequate security by way of Bank Guarantee to the extent of Rupees Fifty Lacs before the learned trial Judge. Such Bank Guarantee may be accepted by the learned trial Judge upon arriving at his own satisfaction. Such Bank Guarantee of a nationalised bank shall be furnished within two weeks from date and shall be kept renewed from time to time until disposal of the arbitral proceeding. In this connection, it will be open to the learned trial Judge to issue any other or further direction as may be found necessary whereof the parties will be at liberty to mention. There cannot be any doubt that the parties having regard to section 9 of the said Act itself may approach the appropriate Court for other or further directions as may be found to be necessary in the facts and circumstances of this case.

19. For the reasons aforementioned, this appeal is allowed in part and to the extent mentioned hereinbefore. In the facts and circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order be supplied on priority basis.

Liberty is given to the parties to communicate this order to the concerned authority.

Let plain copy of operative part of this judgment duly countersigned by Assistant Registrar (Court) be given to the learned counsel for the parties for communication and all concerned including the learned trial Judge are directed to act in terms

thereof.

P. K. Ray, J.--I agree.

20. Appeal allowed in part

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