

(2013) 04 BOM CK 0060

In the Bombay High Court

Case No : Arbitration Application No. 51 of 2013

Afcons Infrastructure Limited

APPELLANT

Vs

Konkan Railway Corporation Ltd. and Others

RESPONDENT

Date of Decision : 22-04-2013

Acts Referred:

Arbitration Act, 1940 — Section 8
Arbitration and Conciliation Act, 1996 — Section 11, 11(6)
Constitution of India, 1950 — Article 136

Citation : (2013) 04 BOM CK 0060

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Iqbal Chagla and Janak Dwarkadas, with Mr. Gaurav Joshi, Mr. Naushad Engineer, Mr. Vikash Kumar instructed by Anil T. Agarwal, for the Appellant; Kiran Bhaglia, Advocate, for the Respondent

Judgement

Anoop V. Mohta, J.—Applicant has invoked Section 11 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), to constitute an independent "Standing Arbitral Tribunal" (SAT) (The Tribunal) as contemplated in their agreements dated 24th November, 2004 and 28th February, 2012, between the parties. The contesting respondent no. 1 has filed a reply affidavit and resisted the prayers on all counts. The applicant filed the rejoinder and added more reason to support the prayers. Mr. Iqbal Chagla, the Senior Counsel appearing for the applicant, on instructions, states that considering the agreements between the parties and nature of work, and without prejudice to their contentions, they are restricting their submissions to nominate a retired Judge of Supreme Court, as a Presiding Arbitrator to complete the constitution of the Tribunal. The learned counsel appearing for respondent no. 1 resisted even the same and contended that as per the agreement the Tribunal should consist of all the technical experts. Therefore, there is no question of appointment of such other Presiding Arbitrator as sought by the applicant.

2. The specific averments are as under:

4.6. Without prejudice to the aforesaid, it is submitted that the Presiding Arbitrator has by his letter dated 21st September, 2012 indicated his inability to act as an arbitrator. As per Clause 6.5.4 of the Arbitration Agreement, the Managing Director of Respondent No. 1 required to appoint another presiding arbitrator in his place. Even after a lapse of over 3 months, the Managing Director of Respondent No. 1 has failed to appoint a Presiding arbitrator. The Applicant submits that the Managing Director of Respondent No. 1 having failed to appoint a Presiding arbitrator within a reasonable time, the Applicant strongly apprehends that the Respondent No. 1 will once again appoint an Officer from the Railways who will be reluctant to discharge the duties of an Arbitrator due to reasons of prior professional commitments and/or lack of time to devote to Arbitration work, thereby infinitely delaying the constitution of the Arbitral Tribunal. The Applicant submits that vide its letter dated 27th August 2012, CBPU had submitted a set of claims to the Respondent No. 1's Chief Engineer from inception of the project in the year 2005 up to 31st March, 2012, in terms of Clause 6.5.6 "Reference to Arbitration" of the Arbitration Agreement. Applicant states that it was incumbent upon the Respondent No. 1 to determine the claims within one month of such reference and in the event the same is refuted or payment not made within one month a dispute would have been deemed to have arisen between the parties. The Applicant further submits that the dispute is pending resolution by reason of Arbitral Tribunal yet to be constituted and since the further half yearly claims as per the Arbitration Agreement are now due for reference to the Respondent No. 1, any further delay in constitution of the Arbitral Tribunal will entail derailment of the dispute resolution mechanism. It is quite evident from the aforesaid facts that the dispute resolution mechanism envisaged by the Respondent No. 1 and CBPU in the Arbitration Agreement has completely failed; hence, the Applicant is approaching this Hon'ble Court for appointment of an independent Arbitral Tribunal in place of the present incomplete panel.

(B) The following un-controverted averments are also made in Rejoinder dated 2nd April, 2013:

The Applicant has been a victim of the delays arising from this ineffective arbitration mechanism provided in the Arbitration Agreement in one of its projects, the illustrative facts relating to the same are narrated hereinafter.

i) In case of the tender issued by the Respondent No. 1 for construction of Katra-Laole section of Udhampur-Srinagar-Baramulla Rail Link Project, the same was awarded to the Applicant and an agreement was signed between the Applicant and the Respondent No. 1 on 12th December, 2005. The project involved construction of Tunnels in the State of Jammu and Kashmir for the Respondent No. 1. There are certain long pending with respect to the wrongful deductions made by the Respondent No. 1 from the payments due to the Applicant. The said disputes were referred to Arbitration. The said disputes are pending resolution since the Respondent No. 1 did not constitute the Arbitral Tribunal.

ii) Since the Respondent No. 1 had initially delayed the constitution of the Arbitral Tribunal for 5 (five) years even though it was a term of the Arbitration Agreement to appoint a tribunal upon signing of the Arbitration Agreement on 10th April 2007 (supplementary agreement). The Respondent No. 1 had constituted the tribunal only on 15th May, 2012, comprising Railway Officers viz. Shri Alok Kansal as Presiding Arbitrator, Smt. Manika Jaiswal and Shri G.P. Garg. Pertinent to note that the Respondent No. 1 did not forward any names of the persons who would be nominated as the arbitrator to the Applicant but unilaterally imposed a panel upon the applicant.

iii) In the aforesaid project the Co-arbitrator Shri G.P. Garg resigned and withdrew from the Tribunal vide his letter dated 28th May 2012. Shri Garg by the said letter did not accept the appointment as the Arbitrator citing his pre-occupations and further advised the Respondent No. 1 to take his consent prior to making future appointments. Significantly a person was sought to be appointed as an arbitrator even without his consent.

iv) Subsequently, the Respondent No. 1 appointed another Railway official Mr. Satya Pal in place of Mr. G.P. Garg. Mr. Satya Pal accepted his nomination on 18th June 2012. Co-arbitrator Smt. Manika Jaiswal resigned from the Arbitral Tribunal vide her letter dated 21st June, 2012, citing work pressure and inability to handle additional work of Arbitration.

v) The Respondent No. 1 appointed another Railway Officer viz. Smt. Neelam Sanghi in place of Smt. Manika Jaiswal on 18th July, 2012. However, soon thereafter on 21st August, 2012, Respondent No. 1 intimated the Applicant that Smt. Neelam Sanghi has expressed unwillingness and had withdrawn from the Arbitral Tribunal. Respondent No. 1 appointed Smt. Manjusha Jain in place of Smt. Sanghi.

vi) The Applicant was constrained to approach the Jammu and Kashmir High Court for appointment of arbitrators and the same is pending before the Hon'ble High Court. The above is only an illustration of the poor experience that the Applicant has had. There is cause for sufficient and reasonable doubt that the present constitution of Arbitral Panel which comprises of serving/ former officers of Railways will also be fraught with inordinate delays in entering into reference on account of Railway Officer's preoccupation with other official assignments and / or unwillingness to accept the arbitration work on some pretext or the other thereby defeating the very purpose of a speedy dispute resolution mechanism envisaged by the parties at the time of executing the Arbitration Agreement.

The regular frequency with which the railway officers reject or not accept the appointment as arbitrators as per the arbitration clause is also due to the marginal fees fixed by the railways to be paid to the arbitrators. The need and urgency to decide or act as an arbitrator may not exist with the current fee structure vis-a-vis the sheer complexity, nature, volume and amount of claims to

be adjudicated by the Arbitral Tribunal resulting in inordinate delays in taking up arbitration appointments and deciding the same much to the prejudice of the contractors.

4. It is submitted that a period of over three months had elapsed since the disputes were referred to arbitration. It was incumbent upon the Respondent No. 1 to constitute the Arbitral Tribunal within a reasonable period of time having not constituted an Arbitral Tribunal within the reasonable period of time, the Respondent No. 1 has forfeited its right under law to appoint or constitute the Arbitral Tribunal and hence the Applicant was entitled approach this Hon''ble Court u/s 11 of the Act for appointment of an independent Arbitral Tribunal.

3. The following clauses have been newly added. These clauses were not, in the main contract dtd. 24th January, 2004. The parties have signed new agreement on 28th February, 2012 to settle their all disputes through the Tribunal.

6.5 Standing Arbitral Tribunal:

6.5.1 The Standing Arbitral Tribunal (hereinafter referred to as the "TRIBUNAL") shall be established after signing of THIS AGREEMENT.

6.5.2 The Arbitral shall consist of a panel of Gazetted Railway Officer not below JA grade and upto two retired railway officers who would have retired as General Manager or Member Railway Board or Chairman Railway Board and in entire conformity with relevant guidelines in this regard of retired officers. The Corporation will send a panel of more than 3 (Three) names of Gazetted Railway Officers of one or more departments of the Railway, which will also include the name(s) of retired Railway Officers empanelled to work as Railway Arbitrator to the Contractor. Within two weeks from the receipt of the list, the contractor shall intimate in writing two names from the said list to the Managing Director, KRCL. The Managing Director/ KRCL shall appoint at lease one out of them as the contractor's nominee and will, also simultaneously appoint one more person from the said list as Corporation's nominee and also appoint the third member, duly indicating the presiding Arbitrator from amongst the 3 (Three) Arbitrators to appointed. While nominating the Arbitrators, it will be necessary to ensure that one out of them is from the Accounts Department.

6.5.3 If the contractor fails to select the members from the approved panel within 14 (fourteen) days of the date of the receipt of the said approved panel, the Corporation shall immediately in writing inform this fact to the MD/KRCL. On receipt of this information, the Managing Director, KRCL shall within two weeks, appoint one Arbitrator as the Contractor's nominee from the list of arbitrators given to the contractor.

6.5.4 If one or more of the Arbitrators appointed refuses to act as Arbitrator, withdraws from his office as Arbitrator, or vacate his office or is unable or unwilling to perform his functions as Arbitrator for any reason whatsoever without undue delay, the Managing Director shall terminate the mandate of such

Arbitrator and thereupon new Arbitrator shall be appointed in the same manner, as the outgoing Arbitrator had been appointed.

6.5.5 In the specific cases of any misconduct by any of the members of the TRIBUNAL, the parties shall have the right to specifically bring it to the notice of the TRIBUNAL such conduct, through a statement filed with necessary documents in proof of such misconduct and the TRIBUNAL after taking NOTICE of such conduct initiate the replacement of the member concerned, in the same manner, the member to be replaced was appointed.

6.5.6 Reference to Arbitration.

6.5.6. 5CHS 1476 The said claims of the contractor so referred to ARBITRAL TRIBUNAL so far it relates to the disputed claims, shall be treated as Statement of Claims of the Contractor and the ARBITRAL TRIBUNAL shall call upon the KRCL to submit its reply. The ARBITRAL TRIBUNAL after giving an opportunity of being heard to both the parties, decide the dispute within a period of two months from the date of communication of the dispute under clause 6.5.6.3 above. The Arbitral Tribunal will pass a reasoned award in writing, while deciding the Dispute. Once the award is declared, the Arbitral Tribunal cannot review the same except what is permissible in terms of provisions contained in Arbitration and Conciliation Act, 1996. The parties shall be entitled to the remedies under the Arbitration and Conciliation Act, 1996 or any amendment thereof.

4. The following background facts are also relevant to consider the peculiar situation and the grievances. The applicant, respondent nos. 2 and 3 entered into a joint venture agreement on 24th November, 2004, which provided that the project would be executed in the name and style of "Chenab Bridge Project Undertaking" (CBPU). Based upon the tender invited by respondent no. 1, CBPU's bid was accepted in the year 2004. The contract was accordingly entered into between the parties on 24th November, 2004. However, there was no agreement to set up the Standing Arbitral Tribunal (SAT). There arose certain disputes between the parties. Even the time was extended for completion of the Project in the year 2009. The applicant alongwith other requested respondent no. 1 to constitute SAT with independent members as adopted by other governmental organizations.

5. On 15th March, 2011, respondent no. 1 informed CBPU that the competent authority granted in principle approval for appointment of two retired railway officers in the arbitral tribunal. Respondent no. 1 provided a copy of the draft arbitration agreement. On 16th August, 2011, CBPU conveyed their acceptance to have the disputes settled through SAT instead of dispute resolution board. CBPU suggested certain changes. On 21st September, 2011, respondent no. 1 informed CBPU that the changes sought were not acceptable. On 29th September, 2011, CBPU accepted the draft supplemental agreement. On 28th February, 2012, the supplemental agreement styled as "Arbitration Agreement" signed by the parties. Clause 6.5 pertains to Constitution of the Tribunal (SAT).

On 18th April, 2012, in terms of Clause 6.5.2 and 6.5.3, a panel of officers including retired officers was forwarded to CBPU. CBPU was called upon to suggest two names out of the panel. On 30th April, 2012, CBPU requested respondent no. 1 to furnish background information of the panel of officers and enlarge the panel of officers would experience in dealing with complex issues similar to the one in the project. On 10th May, 2012, respondent no. 1 stated that the officers names were communicated as per the requirements of clause 6.5.2. Respondent No. 1 suggested that name of one officer viz. G.P. Garg. On 28th May, 2012, letter from G.P. Garg to the Respondent No. 1 conveying his inability to assume the responsibility of an arbitrator owing to his prior commitments. On 9th July, 2012, CBPU submitted a revised completion scheduled. On 18th July, 2012, CBPU communicated the names of two officers from the Panel for constitution of the SAT.

6. On 27th August, 2012, CBPU lodged their claims in terms of clause 6.5.6 "reference to arbitration" with the Chief Engineer of Respondent No. 1. Respondent No. 1 has neither refuted the admissibility of the claims nor has made payment against the claims. The claims are therefore deemed to have been rejected by the Chief Engineer of Respondent No. 1 in terms of sub-clause 6.5.6.4 of the arbitration agreement and therefore a dispute has arisen. On 12th September, 2012, respondent No. 1 communicated the Constitution of the SAT to CBPU. On 21st September, 2012, the Presiding arbitrator informed the parties that he was not willing to act as an arbitrator owing to the exigencies of his present post. On 25th September, 2012, the CBPU informed Respondent No. 1 its apprehensions regarding the functioning of the SAT in view of the frequent resignation of arbitrators. On 29th September, 2012, Mr. R. Rajamani, one of the co-arbitrators, called upon the Managing Director of Respondent No. 1 to appoint a presiding arbitrator in place of Mr. Pradeep Kumar who had resigned from the arbitral tribunal. On 8th October, 2012, CBPU informed Respondent No. 1 that the mechanism sought to be adopted by Respondent No. 1 had failed and that in the interest of natural justice and equity, it should appoint an independent arbitral tribunal. On 19th November, 2012, the letter from Respondent No. 1 to the parties including to the presiding arbitrator giving details of revised fee structure despite, the presiding arbitrator having already communicated his unwillingness to act as an arbitrator. On 6th December, 2012, Mr. R. Rajamani once again called upon the managing director of the Respondent No. 1 to appoint the presiding arbitrator in place of Mr. Pradeep Kumar. On 28th January, 2013, Arbitration Application u/s 11(6) came to be filed; served on 30th January, 2013. A letter from Respondent No. 1 appointing Shri Anirudh Jain (PCE/Western Railway) as the presiding Arbitrator, dtd. 30th January, 2013.

7. The learned counsel appearing for the Respondent resisted even these contentions/ submissions of the Applicant and pointed out the affidavit-in-reply to show that they took steps to nominate the presiding officer within reasonable time, and denied the allegations against the high ranking railway officers. Those events as averred are recorded as under:

28.2.2012: the agreement for standing arbitral Tribunal was signed by both the parties.

i. 18.4.2012: KRCL send a panel of 4 names of Gazetted Railway Officers.(under the agreement KRCL is required to send a panel of more than 3 Gazetted Railway Officers).

ii. 30.4.2012: The Joint Venture-CBPU requested for more names.

iii. 10.5.2012: Though KRCL was not bound to, one more name was sent in addition to the panel of 4 names sent earlier.

iv. 18.7.2012: The Joint Venture of CBPU took more than two months to select two names from the panel. The Joint Venture thus took three months to select Arbitrator from the time a panel of officers was sent by KRCL.

v. 12.9.2012: The Arbitral Tribunal was in place.

vi. 21.9.2012: Unfortunately, the Presiding Arbitrator, Mr. Pradeep Kumar expressed in ability to continue.

vii. 01.10.2012: In order to avoid delay, the Managing Director, KRCL requested Mr. Pradeep Kumar to continue.

viii. 09.10.2012: Mr. Pradeep Kumar refused to continue.

ix. 19.11.2012: The KRCL revised the fee structure of the Arbitral Tribunal.

x. 22.1.2013: KRCL took up the issue of Arbitral Tribunal with Northern Railway and a revised panel was intimated by Northern Railway.

xi. 30.01.2013: Mr. Anirudh Jain has been nominated as the Presiding Arbitrator in the place of Mr. Pradeep Kumar.

8. The Senior Counsel appearing for the applicant has cited the judgments:

(i) Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.,

(ii) Union of India (UOI) Vs. Singh Builders Syndicate,

(iii) Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another,

9. The learned Counsel appearing for respondent no. 1 has cited judgments/orders:

(i) Union of India (UOI) Vs. Premier Files Ltd.,

(ii) Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited,

(iii) You One Engineering and Construction Co. Ltd. and Another Vs. National Highways Authority of India (NHAI),

(iv) Supreme Court of India Petition(s) for Special Leave to Appeal (Civil) No.

17996/2012, M/s. Gammon India Limited vs. Deputy Chief Engineer, Anji Konkan R.C. Limited.

(v) High Court, Bombay O.O.C.J. Arbitration Application No. 122 of 2012 Gammon India Ltd. vs. Deputy Chief Engineer/ Anji Konkan Railway Corporation Limited.

10. In the present case, in view of the above, it is necessary to decide whether the Chief Justice or his designate u/s 11 of the Arbitration Act can ignore the appointment procedure under the arbitration agreement and can appoint an independent Presiding arbitrator, as prayed.

11. The Supreme Court in Indian Oil Corporation Ltd., (supra) has elaborated the scheme of section 11 of the Arbitration Act, considering the present scenario of having arbitration agreement to refer the matter before the employees or the experts of employer's choice.

48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an Arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under Sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under Sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under Sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under Sub-sections (4) & (5), such a time bound requirement is not found in Sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time limit prescribed by the arbitration agreement, or in the absence of any prescribed time limit, within a reasonable time, will enable the aggrieved party to file a petition u/s 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under Clauses (a), (b) or (c) of Sub-section (6) has not arisen, then the question of Chief Justice or his designate exercising power under Sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under Sub-section (6) is that.

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators), failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

12. The Supreme Court has summarized the above issues by discussing and referring to the earlier Judgments in *Ace Pipeline Contracts (P) Ltd.*, (supra); *Union of India vs. Bharat Battery Mfg. Co. (P) Ltd.*, (supra) and *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, . In *Indian Oil Corporation Ltd.* (supra) the Supreme Court has also observed in para 45 as under:

45. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named Arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted to for valid reasons.

13. The Supreme Court in *Union of India* (supra) has expressed concern with regard to the delays and frequent changes in the Arbitral Tribunal itself, in view of such clause of arbitration agreement, which provide/nominate designate officers of the concerned employer as the arbitrator. The basic paras as under:

14. It was further held in *Northern Railway Case* that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of Sub-section (8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the Arbitrators in the

manner provided for in the arbitration agreement. But where the independence and impartiality of the Arbitrator/s appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.

15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise power u/s 11 of the Act, can step in and pass appropriate orders.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole Arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.

21. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

14. In *Datar Switchgears Ltd. (supra)*, the Supreme Court has observed in paras 21 and 22 as under:

21. We need not decide whether for purposes of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not.

22. While interpreting the power of the court to appoint an arbitrator u/s 8 of the Arbitration Act, 1940, this Court in *Bhupinder Singh Bindra v. Union of India* in para 3 held as under: (SCC p.330)

3. It is settled law that court cannot interpose and interdict the appointment or an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc., is pleaded

and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause of revocation.

15. In *Union of India* (supra), as the department had appointed arbitrator as per the terms of the agreement prior to filing of Section 11 Petition, the appointment of the arbitrator to decide the dispute between the parties was set aside. In *Ace Pipeline Contracts* (supra), the Supreme Court expressed "that the choice of arbitrator can go beyond the designated persons or institutions in appropriate cases, but court should normally adhere to terms of arbitration clause except in exceptional cases for reasons to be recorded" " In the *Indian Oil Corporation Ltd.* (supra), the Supreme court has dealt and distinguished with this authority and other Supreme Court cases in paras 41 to 43 and thereby reiterated the proposition. In *You One Engineering & Construction Co. Ltd.*, (supra), the Supreme Court, considering the facts, refused to entertain section 11(6) application as the appointment procedure specified under the agreement was correctly followed. In *Gammon India Ltd.*, (supra), considering the peculiar circumstances, agreed arbitrators were nominated and permitted to nominate an Umpire expeditiously and accordingly the Arbitral Tribunal was constituted by consent of the parties.

16. The Arbitration Clauses itself mandate respondents No. 1 to take steps within the prescribed period to appoint/constitute the Arbitral Tribunal. The Tribunal could not commenced the work within the prescribed time. The clauses of appointing in-house arbitrators itself contemplate to proceed fast. The situation here is otherwise. There is delay at every stage right from the basic appointment and the constitution of the tribunal. There was no clause of constitution of such tribunal in the main contract. A submission that respondent No. 1 took steps within reasonable time is also unacceptable in view of agreed clause itself. The tribunal is supposed to give award within two months from the date of the communication of the dispute. There is a specific clause where in case the contractor failed to appoint within 14 days, the respondent is under obligation to appoint a nominee on their behalf.

17. It is settled that parties are bound by the terms and conditions so also the Tribunal, but in case of dispute or differences and even objection to the constitution of the Tribunal of this nature, the Chief Justice or the designate u/s 11 is empowered to consider the rival contentions based upon peculiar facts read with the agreed clauses. There is no total bar or prohibition to overlook the agreed clauses, if the case is made out, so far as the nomination/appointment of the arbitrator is concerned. The basic requirement is to note the scheme/project/intention of the parties to settle their dispute within the agreed period/ time. It is always necessary to consider before ignoring the agreed clauses between the parties, the exceptional circumstances, which are required to appoint/constitute a fresh or new arbitral tribunal, other than as agreed.

18. Any sort of delay in early disposal of the dispute in such type of contract will

affect and hamper the whole ongoing project. The disposal of disputes and differences need to be settled at earliest, is a must. The delayed constitution of tribunal itself in the present circumstances would hamper the effective steps to proceed fast with the arbitration. Considering the averments so made and the admitted position so recorded above, there is no certainty that the issue of constitution of tribunal itself will be settled at the earliest and or permanently. Even if it is settled temporarily, there are uncertainties, in-house arbitrators appointment. The resignation and/or withdrawal from the job, and or retirement, will always hamper the arbitral proceedings even in future.

19. The Supreme Court, as recorded above, has noted in number of such matters, the consequences and reasons for delay in arbitration, where in-house arbitrators are appointed in such type of project/contract basically where government/public undertakings/public enterprises are involved. Indian Oil Corporation [supra]. This is not in the interest of any arbitration proceedings at national or international level.

20. In the present case, the learned Senior Counsel appearing for the petitioner as recorded fairly conceded that they are restricting their submissions only for the appointment of Presiding Officer, who should be an independent and impartial arbitrator, having judicial mind to consider the rival and complicated contentions between the parties would be of great help and assistance to expedite the matter within a fixed or reasonable time. I am inclined to observe that there is nothing wrong in this approach. The importance of expert arbitrator can not be denied. So also the experienced Judicial mind/person to decide the contentious and complex issues on facts, as well as, on law. Both if are available to decide such issues, it will be in the interest of all. The early, effective and fruitful decisions from the arbitration tribunal is the idea and motive to have settlement of such disputes through the arbitration mechanism. The petitioner would definitely suffer if there is delay in arbitration proceeding for want of desired constitution of the arbitral tribunal itself.

21. Another issue in the matter is the name of Presiding Officer, which they have suggested on 30th January, 2013, is certainly after filing of the petition by the petitioner on 28th January, 2013. In spite of request even by the Arbitrator, respondent no. 1 failed to take steps within the time prescribed in the agreement itself. The reasonable time so referred and relied upon through the averments made in the reply, itself shows that there was delay in taking steps under the contract terms itself, apart from uncertainty as noted. I am inclined to observe therefore in the present facts and circumstances, respondent no. 1 has also lost their right to appoint the Presiding Officer as reiterated by the Supreme Court in *Dakshin Shelters P. Ltd. Vs. Geeta S. Johari*, . "Once a party files an application u/s 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter". The court cannot be stated to have re-writing the terms of the contract. There is no bar that the parties cannot challenge the constitution of the tribunal. The earliest challenge would

save the further delay and future litigation. The petitioner even otherwise is not willing to accept the name so suggested by the respondents after filing of the present petition. The respondents are also opposing the restrictive contentions so raised in the petition. This itself means that there is a dispute with regard to the appointment of Presiding Officer of the Tribunal. The designate/Judge Court has to pass appropriate order to nominate the Presiding Officer in the matter. The parties cannot be rendered remediless. The petitioner expressed their willingness to bear the cost and fees of the Presiding Officer throughout.

22. The learned counsel appearing for the respondents even opposed the suggestion/submissions so made by the learned Senior Counsel appearing for the petitioner that they will bear the cost of the Presiding Officer's fees and expenditure throughout, till the arbitral tribunal passes appropriate order with this regard. The cost is also one of the factor, which is relevant for respondent no. 1 to appoint their in-house arbitrators. Respondent No. 1 is not even ready to accept the proposal as suggested to nominate any retired Supreme Court Judge and/or retired High Court Judge as Presiding Arbitrator. Considering the nature of the work and stake's so involved and as the petitioner is willing to bear their cost till the conclusion of the arbitration proceeding, I am inclined to observe that there is no reason to overlook the submissions so made to appoint the Presiding Officer, having judicial experience and mind to adjudicate the disputes between the parties arising out of the contract.

23. The Arbitral Tribunal needs to pass appropriate order, with regard to cost and/or expenditure in such arbitration matter. The other Arbitrators may bound by the fee structure as per the agreements between the parties, but in view of above, the parties may settle or negotiate the fee structure also. Even otherwise u/s 11, the Court is not bound to decide their fee structure and cost of such arbitration proceedings.

24. Therefore, taking overall view of the matter as the case is made out with regard to the appointment of the Presiding Officer, and as there is no bar to appoint and/or nominate arbitrator, or Presiding Arbitrator, by ignoring the terms and conditions of the contract and also to avoid further delay in the matter and to expedite the arbitration proceedings, I am inclined to appoint Justice Shri G.N. Roy (Retired Supreme Court Judge), as a Presiding Officer of the Tribunal, as suggested by the Senior Counsel appearing for the petitioner. The learned counsel appearing for the respondent no. 1 even objected to the same by further contending that the panel arbitrators can be directed to nominate the Presiding Officer from the department. For the above reasons recorded, I am inclined to appoint the Presiding Officer as nominated/suggested by the petitioner. It is made clear that the Arbitral Tribunal to proceed with the matter in accordance with agreed rules and without influenced by the observations made in this petition.

ORDER

25. Resultantly,

(a) the application is partly allowed.

(b) Justice Shri G.N. Roy (a Retired Supreme Court Judge) is appointed as the Presiding Officer of the Tribunal to decide the dispute between the parties as per agreed terms and conditions of the agreement.

(c) The cost, expenses and fees of the Presiding Officer to be borne by the petitioner throughout the arbitration proceedings. However, subject to adjustment, if any, at the time of final award by the learned Arbitral Tribunal.

(d) The parties and the arbitral Tribunal members are at liberty to settle the fee structure, if any.

(e) There shall be no order as to costs.

(f) The office to inform the learned Presiding Officer at the earliest, apart from private notice/intimation by the parties.

(g) The parties to act on the basis of authenticated copy.

(h) No costs.

The learned counsel appearing for respondent No. 1 seeks stay of operation of this order for a period of six weeks from today. Considering the facts that I have appointed the Presiding Arbitrator by this Judgment/order, I am inclined to grant the same for six weeks

Certified copy is expedited.