
(2014) 01 MAD CK 0207
In the Madras High Court
Case No : O.P. No. 845 of 2013

Chennai Metro Rail Limited

APPELLANT

Vs

M/s. Lanco Infratech Limited and Others

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10 11 11(6) 11(8) 12 12 12

Citation : (2014) 2 ARBLR 341 : (2014) 2 CTC 427 : (2014) 2 LW 183 : (2014) 1 MLJ 779

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : R. Thiagarajan, for Mr. V. Ramajagadeesan, for the Appellant; V.T. Gopalan, for Mr. K. Ravindranath for Respondent-1, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a petition filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996, seeking the termination of the mandate of the third respondent as an Arbitrator and the mandate of the second respondent as President of the Arbitral Tribunal. I have heard Mr. R. Thiagarajan, learned Senior Counsel for the petitioner and Mr. V.T. Gopalan, learned Senior Counsel for the first respondent.

2. The petitioner entered into an agreement with the first respondent on 5.9.2011, for the construction of an Elevated Station at Meenambakkam. The agreement contained a clause for settlement of disputes through arbitration.

3. When disputes arose between the parties, the first respondent herein came up with two applications, one in O.A. No. 620 of 2013 and another in A. No. 3791 of 2013, praying inter alia (i) for an interim injunction restraining the applicant herein from invoking the bank guarantees and (ii) for directions to the applicant herein to return all the machineries and also to pay the amount due for the work performed towards the execution of the contract. The said applications were

disposed of by me by an order dated 17.9.2013.

4. In the meantime, the applicant terminated the contract by a communication dated 19.8.2013. Thereafter, the first respondent appointed an Arbitrator in terms of clause 20.6.3 of the FIDIC Conditions of Contract. On the very same day, the first respondent also communicated the factum of appointment of Arbitrator on their side, to the applicant.

5. Clause 20.6.4 of the Conditions of Contract requires the party on whom a notice of appointment of Arbitrator is served by the other party, to nominate their own Arbitrator, within 15 days of receipt of the nomination of the proposed Arbitrator. Clause 20.6.4 also stipulates the qualifications of a person to be appointed as Arbitrator.

6. By a communication dated 20.9.2013, the petitioner requested the first respondent to send the resume of the Arbitrator nominated by them, purportedly for verifying whether he fulfilled the qualifications prescribed under clause 20.6.4. Thereafter, the first respondent gave a letter dated 1.10.2013 to the Indian Council of Arbitration, requesting them to nominate an Arbitrator on behalf of the petitioner herein in terms of clause 20.6.5, on the ground that the petitioner failed to nominate their own Arbitrator, within 15 days in terms of clause 20.6.4.

7. Without knowing about the letter dated 1.10.2013 sent by the first respondent to the Indian Council of Arbitration, the petitioner sent a letter dated 5.10.2013, asking for attested copies of the credentials of the Arbitrator nominated by the first respondent. Accordingly, the first respondent sent attested copies of the resume and credentials of Thiru A. Jagannathan, the fourth respondent herein, who was nominated as the Arbitrator by the first respondent.

8. Before the petitioner could react, the Indian Council of Arbitration appointed one Thiru A.P. Radhakrishnan, who is the third respondent herein, by a communication dated 15.10.2013, on behalf of the petitioner herein. Interestingly, the petitioner also nominated their own Arbitrator on the same day viz., 15.10.2013.

9. Upon coming to know of the nomination made by the Indian Council of Arbitration, the petitioner sent a letter dated 22.10.2013 to the Indian Council of Arbitration, objecting to the nomination of Thiru A.P. Radhakrishnan, who is the third respondent herein. The petitioner also sent another letter to the first respondent on 24.10.2013, informing them of the appointment of Thiru G. Sivakumar on their side.

10. However, ignoring the protest lodged by the petitioner on 22.10.2013, the Arbitrator nominated by the first respondent on their side (Thiru A. Jagannathan, who is the fourth respondent herein) and the Arbitrator nominated by the Indian Council of Arbitration on behalf of the petitioner (Thiru A.P. Radhakrishnan, who is the third respondent herein), appointed as the Chairman of the Arbitral

Tribunal, one Mr. K.D. Arcot, who is the second respondent herein. The second respondent sent a letter dated 13.11.2013, calling upon the petitioner to appear before the Arbitral Tribunal on 27.11.2013 for a preliminary hearing. Aggrieved by the said communication, the petitioner has come up with the above petition under Sections 14 and 15 of the Act for the termination of the mandate of the second and third respondents herein.

11. The grievance of the petitioner is that under clause 20.6.3, either party to the contract may apply for arbitration and nominate his proposed Arbitrator and communicate the same in writing to the other party. Within 15 days of receipt of such nomination, the other party is obliged under clause 20.6.4, to nominate an Arbitrator on his side. If either party fails to appoint his own Arbitrator in accordance with clause 20.6.3 or 20.6.4, the other party is entitled to apply in terms of clause 20.6.5 to the Indian Council of Arbitration for the appointment of an Arbitrator. Once an application is made to the Indian Council of Arbitration and they make an appointment, the parties are bound by such appointment as per clause 20.6.5.

12. Within 15 days of the nomination of the second Arbitrator, both Arbitrators should agree upon the choice of a third Arbitrator as the Chairman under clause 20.6.6. The Chairman so appointed by the two Arbitrators, must be a qualified Chartered Civil Engineer of repute, of at least 20 years of relevant professional experience, of which 7 years must be related to dealing directly with claims, disputes, adjudication or arbitration.

13. In the context of the Scheme envisaged under clauses 20.6.3 to 20.6.6, for the Constitution of the Arbitral Tribunal, the grievance of the petitioner, as projected by Mr. R. Thiagarajan, learned Senior Counsel for the petitioner is two fold viz., (i) that even before the expiry of 15 days as prescribed by clause 20.6.4, the first respondent invoked clause 20.6.5 and got a second Arbitrator appointed through the Indian Council of Arbitration; and (ii) that the Arbitrator so nominated by the Indian Council of Arbitration does not possess the qualifications prescribed under clause 20.6.4. Consequently, the appointment of the Chairman by the two Arbitrators is also vitiated, according to the learned Senior Counsel for the petitioner.

14. Apart from refuting the above contentions on facts, Mr. V.T. Gopalan, learned Senior Counsel for the first respondent raises a preliminary objection to the very maintainability of the main petition. According to the learned Senior Counsel for the first respondent, the challenge now made by the petitioner to the Constitution of the Arbitral Tribunal, has to be made only before the Arbitral Tribunal in terms of Section 13(2) of the Act and that a petition u/s 14 or 15 of the Act, is not maintainable. Therefore, it is necessary for me first to go into the preliminary objection regarding the maintainability of the main petition, before considering the validity of the claim of the petitioner on facts. Hence, I shall take that question first.

MAINTAINABILITY:

15. Since the question of maintainability of the petition may have to be decided with reference to certain factual aspects, let us first see the relevant clauses in the FIDIC Conditions of Contract. Clauses 20.6.3, 20.6.4, 20.6.5 and 20.6.6 of the Conditions of Contract, read as follows:--

20.6.3 Application for Arbitration:

Subject to the dispute having been already subject to adjudication in accordance with Sub-clause 20.4 or the parties have agreed to waive adjudication, and a notice having been served pursuant to Sub-clauses 20.4 and 20.5, either party shall be entitled to apply for arbitration to resolve the dispute described in the notice.

However, save for steps to proceed with the arbitration necessary to avoid any time bar, no further steps shall be taken in the arbitration of any dispute until the earlier of any of the following:

- (a) Subject to the dispute having been already subject to adjudication in accordance with Clause 20.4, or
- (b) The parties have agreed to waive adjudication, or
- (c) Alleged substantial completion of the whole of the Works, or
- (d) Termination pursuant to Clause 15 or Clause 16, or
- (e) A declaration of the Indian Courts that the findings of the Dispute Adjudication Board on the dispute were procured by fraud or dishonesty, or
- (f) In the case of a dispute arising from the exercise by the Employer of any of the rights under Clause 12,

Within 90 days, either party may apply for adjudication, pay the arbitration fee if required, and nominate his proposed Arbitrator in writing to the other party.

20.6.4 Notification:

Within 15 days of the receipt of the nomination of the proposed Arbitrator under Clause 20.6.3, which nomination shall follow the date of any of the events described in Sub-Clause 20.6.3 (a) to (f), the other party shall advise in writing the party issuing the notice, of the Arbitrator he is appointing.

The Contractor's nominated Arbitrator must be professional/chartered Civil Engineer of repute, of at least 20 years of relevant professional experience.

The Employer's nominated Arbitrator shall be of the rank of Chief Engineer or higher serving in the Government of Tamil Nadu, or equivalent.

Should either party fail to advise the identity of his Arbitrator, the appointment shall be made in accordance with Clause 20.6.5.

20.6.5 Appointment:

In the event that either party fails to appoint his Arbitrator in accordance with Sub-clauses 20.6.3 or 20.6.4, the other party may apply to the Indian Council of Arbitration for the appointment of an Arbitrator, and the parties shall be bound by the appointment.

20.6.6 Chairman:

Within 15 days of the second Arbitrator being appointed by the parties, the Arbitrators shall attempt to agree on the appointment of the third Arbitrator as Chairman, who must be a professional/chartered Civil Engineer of repute, of at least 20 years of relevant professional experience, of which seven years must be related to dealing directly with claims, disputes, adjudication or arbitration.

16. If we have a look at the Arbitration and Conciliation Act, 1996, it is seen that the Act is divided into four Parts, with Part-I dealing with arbitration, Part II dealing with enforcement of certain foreign awards, Part III dealing with conciliation and Part IV dealing with supplementary provisions. Each Part is divided into separate Chapters. The provisions with regard to the composition of the Arbitral Tribunal are to be found in Chapter III of Part I. Chapter III of Part I has six Sections. While Section 10 provides that the parties to an Arbitration Agreement are free to determine the number of Arbitrators, Section 11 deals with the appointment of Arbitrators, Section 12 deals with grounds of challenge, Section 13 deals with the procedure for challenge, Section 14 deals with failure or impossibility to act and Section 15 deals with termination of mandate and substitution of Arbitrator.

17. In the case on hand, Section 10 may not be of any relevance, since the arbitration agreement itself provides for the number of Arbitrators. We are also not concerned with the provisions of Section 11, since the right to appoint Arbitrators is vested under the contract on the parties themselves, failing which upon the Indian Council of Arbitration. Therefore, what is of relevance to the case on hand, are only the provisions of Sections 12 to 15.

18. A careful reading of Sections 12 to 15 would show that the Act contemplates a march, step by step. Section 12 provides the grounds for challenging the appointment of an Arbitrator. Section 13 lays down the procedure for challenging the appointment of any Arbitrator. Section 14 deals with the failure or impossibility of the Arbitrators to act and Section 15 deals with termination of mandate and substitution. Interestingly, these four provisions from Sections 12 to 15, actually fall under two categories viz., (i) the challenge to the very appointment of a person as an Arbitrator and (ii) an objection to the continuance of an Arbitrator. While Sections 12 and 13 are primarily concerned with the very entitlement of a person to be appointed as an Arbitrator at the threshold, Sections 14 and 15 focus on the right of a person to continue to be an Arbitrator, post his appointment. If we have to understand the Scheme of Sections 12 to 15 in Constitutional Parlance, we may have to think of Sections 12 and 13 as

something similar to the right to seek a Writ of Certiorari and we may have to think of Sections 14 and 15 as enabling a person to seek a Writ of Quo Warranto.

19. If we have a careful look at these provisions one after another, the following picture would emerge:--

(i) u/s 12(3), the appointment of an Arbitrator can be challenged (A) either on the ground of existence of circumstances that give rise to justifiable doubts about his independence or impartiality (B) or on the ground that he does not possess the qualifications agreed to by the parties.

(ii) If an Arbitrator is challenged on any of the two grounds stipulated in Section 12(3), the challenging party should send a written statement of the reasons for the challenge to the Arbitral Tribunal u/s 13(2).

(iii) The provisions of Section 13(2) are clearly linked to the grounds of challenge indicated in Section 12(3).

(iv) u/s 14(1), the mandate of an Arbitrator may get terminated on any of the four grounds stipulated therein viz., (A) the Arbitrator has become de jure or de facto, unable to perform his functions (B) the Arbitrator failed to act without undue delay for other reasons (C) the Arbitrator withdrew from his Office and (D) the parties agreed to terminate his mandate.

(v) If the controversy concerning the first two of the four grounds stipulated in Section 14(1) remain unresolved, the challenging party is entitled to apply to the Court, to decide on the termination of the mandate.

(vi) In other words, the mandate of an Arbitrator may get terminated either in terms of clause (a) or in terms of clause (b) of sub-section (1) of Section 14. The Statute expressly provides a remedy u/s 14(2) only if the termination is in terms of clause (a) of sub-section (1) of Section 14. No remedy is provided to a party, if the mandate is terminated in terms of Section 14(1)(b). This is for the simple reason that once an Arbitrator withdraws from Office, no one can compel him to act as such. Similarly, if both parties agree upon the termination, no remedy is required for anyone and the Arbitrator cannot insist on his continuance.

(vii) Interestingly, Section 15(1) also speaks the same language as that of Section 14(1)(b). In a sense, Section 15(1) is redundant, since the two circumstances indicated therein, under clauses (a) and (b), are already found in Section 14(1)(b).

(viii) Sub-sections (2), (3) and (4) of Section 15 deal with substitution and are of no relevance to our case.

20. From a careful perusal of Sections 12 to 15, it could be seen that if the appointment of an Arbitrator is challenged on the grounds indicated in sub-section (3) of Section 12, a remedy is provided in express terms u/s 13(2). Similarly, if a party claims that the mandate of an Arbitrator stands terminated in terms of Section 14(1)(a), a remedy is provided in express terms u/s 14(2).

Therefore, to find an answer to the question of maintainability, all that one has to do is to see whether (i) the case on hand relates to the challenge of an Arbitrator or the termination of a mandate and (ii) the case on hand is relatable to Section 12(3) or to Section 14(1)(a). If the case on hand is simply a challenge to the very appointment of an Arbitrator and if such a challenge is made on the grounds available u/s 12(3), then the remedy of the petitioner is only u/s 13(2). On the other hand, if the case on hand is for the termination of the mandate and if the ground on which such termination of mandate is sought, could be traced to Section 14(1)(a), then the remedy is only u/s 14(2). Keeping this fundamental distinction in mind, let us now go back to the facts of the case.

21. As pointed out earlier, the dates on which the important events arose are as follows:--

- (i) On 19.8.2013, the contract was terminated.
- (ii) By a letter dated 5.9.2013, the first respondent informed the petitioner of the nomination of one Thiru A. Jagannathan as their Arbitrator.
- (iii) By a reply dated 13.9.2013, the petitioner requested the first respondent to submit documentary evidence in support of the qualifications of the nominated Arbitrator.
- (iv) By a rejoinder dated 20.9.2013, the first respondent sent the curriculum vitae of the nominated Arbitrator Thiru A. Jagannathan.
- (v) By a reply dated 5.10.2013, the petitioner informed the first respondent that the curriculum vitae of the nominated Arbitrator sent by the first respondent had not been attested by the Arbitrator.
- (vi) In the meantime, the first respondent sent a letter dated 1.10.2013 to the Indian Council of Arbitration, requesting them to nominate an Arbitrator on behalf of the petitioner, on the ground that the petitioner failed to nominate their own Arbitrator within 15 days as per Clause 20.6.4. Though this letter is dated 1.10.2013, this letter bears the acknowledgement and the rubber stamp of the Indian Council of Arbitration only on 3.10.2013. Necessary processing fee also appears to have been submitted to the Indian Council of Arbitration along with this application only on 3.10.2013.
- (vii) By a letter dated 10.10.2013, the first respondent sent the self attested curriculum vitae of Thiru A. Jagannathan nominated by them.
- (viii) But in the meantime, the Indian Council of Arbitration nominated one Thiru A.P. Radhakrishnan as the Arbitrator on the side of the petitioner herein, by a communication dated 15.10.2013.
- (ix) However on the same date viz., 15.10.2013, the petitioner nominated their own Arbitrator by name G. Sivakumar. Thus two communications, one from Indian Council of Arbitration nominating Thiru A.P. Radhakrishnan on the side of the petitioner and another by the petitioner nominating one Thiru G. Sivakumar

as their Arbitrator emanated on the same date and crossed each other.

(x) Consequently, the petitioner sent a letter dated 22.10.2013 to the Indian Council of Arbitration protesting against the appointment of Thiru A.P. Radhakrishnan as the Arbitrator on the side of the petitioner. The petitioner also sent a similar communication on 24.10.2013 to the first respondent.

(xi) However, Thiru A. Jagannathan, the Arbitrator nominated by the first respondent on their side and Thiru A.P. Radhakrishnan nominated by the Indian Council of Arbitration on behalf of the petitioner, joined together and appointed one Mr. K.D. Arcot as the Chairman of the Arbitral Tribunal, on 4.11.2013.

(xii) On 13.11.2013, the Chairman sent a communication to the parties to appear before the Tribunal on 27.11.2013.

(xiii) On 25.11.2013, the petitioner came up with the above main petition.

22. On the basis of the events described above, the contention of the petitioner is two fold viz., (i) that the approach made by the first respondent to Indian Council of Arbitration for nominating an Arbitrator on the side of the petitioner, even before the expiry of 15 days, was violative of the prescription contained in clause 20.6.4; and (ii) that the Arbitrator nominated by the Indian Council of Arbitration for and on behalf of the petitioner and the Chairman chosen by the two Arbitrators do not possess the qualifications as prescribed in clauses 20.6.4 and 20.6.6.

CONTENTION No. 1:

23. As seen from clause 20.6.4, the party upon whom a communication of nomination of Arbitrator by the other party is served, should nominate an Arbitrator on his side "within 15 days of receipt of the communication". Admittedly, the first respondent nominated their Arbitrator by a letter dated 5.9.2013. But unfortunately the said communication dated 5.9.2013 did not contain full details about the educational and experience qualifications of the proposed Arbitrator. Therefore, the petitioner sent a letter dated 13.9.2013, asking for the curriculum vitae of the proposed Arbitrator.

24. The demand made by the petitioner on 13.9.2013, calling upon the first respondent to furnish the details of qualification of the proposed Arbitrator, cannot be said to be irrelevant or unjustified. The contract between the petitioner and the first respondent dated 5.9.2011 shows that the petitioner was "the employer" and the first respondent was "the contractor". Clause 20.6.4 stipulates that "the Contractor's nominated Arbitrator must be a professional/Chartered Civil Engineer of repute, of at least 20 years of relevant professional experience". Therefore, the petitioner was well within its rights to make a demand vide their letter dated 13.9.2013 to see whether Thiru A. Jagannathan, nominated by the contractor (viz., the first respondent) was qualified as per clause 20.6.4 or not.

25. In response to the demand so made on 13.9.2013, the first respondent sent

a reply dated 20.9.2013, enclosing the Arbitrator's curriculum vitae. This curriculum vitae showed the academic qualifications, the work experience, the nature of the projects and assignments executed by the proposed Arbitrator etc., in great detail. Therefore, within 15 days from the date of receipt of the letter dated 20.9.2013, the petitioner should have nominated the employer's Arbitrator as per clause 20.6.4.

26. But unfortunately the petitioner sent a letter dated 5.10.2013, claiming that the curriculum vitae was not attested by the nominated Arbitrator. Therefore, naturally the first respondent looked at the said demand as a dilatory tactic.

27. But even before the letter dated 5.10.2013, despatched on 7.10.2013 by the petitioner, demanding attested copies of the curriculum vitae of the proposed Arbitrator, was received by the first respondent, the first respondent had already sent a letter dated 1.10.2013 to the Indian Council of Arbitration, requesting them to nominate an Arbitrator on the side of the petitioner as per clause 20.6.5. To be precise though the letter of the first respondent to the Indian Council of Arbitration is dated 1.10.2013, the same appears to have been handed over to Indian Council of Arbitration only on 3.10.2013. The necessary processing fee appears to have been handed over by a demand draft taken on 3.10.2013, but handed over on 4.10.2013 to the Indian Council of Arbitration. These details are borne out by the endorsements found on the letter dated 1.10.2013 sent by the first respondent to Indian Council of Arbitration.

28. Therefore, in effect, without waiting for the expiry of 15 days either from 20.9.2013 or from the date of receipt of the letter dated 20.9.2013, the first respondent has approached the Indian Council of Arbitration. Even if we take 20.9.2013 as the starting date and we take 4.10.2013 as the date on which a proper application enclosing necessary fee was made by the first respondent to Indian Council of Arbitration, the period of 15 days had not expired. Therefore, the inevitable and only conclusion that could be drawn under these circumstances is that the first respondent approached the Indian Council of Arbitration, invoking clause 20.6.5, calculating 15 days' time not from 20.9.2013, but from 5.9.2013. The first respondent could have waited for 15 days from the second letter dated 20.9.2013. As I have earlier recorded, the letter dated 5.9.2013 did not give full particulars as to whether the nominated Arbitrator on the side of the first respondent satisfy the qualifications prescribed by clause 20.6.4 or not. It was only under the letter dated 20.9.2013 that the first respondent gave full indication about whether their nominated Arbitrator satisfy the qualifications or not. Therefore, the first respondent could have waited for the expiry of 15 days from the date of service of their letter dated 20.9.2013 upon the petitioner herein, so as to approach the Indian Council of Arbitration. Since they did not do so, the first respondent is accused of rushing to the Indian Council of Arbitration without complying with the requirements under clause 20.6.4.

29. But unfortunately there are two points that would actually deprive the

petitioner, of any benefit arising out of the first respondent's above action. They are:--

(i) Immediately upon receipt of the letter dated 5.9.2013 from the first respondent nominating Thiru A. Jagannathan, the petitioner could have nominated their Arbitrator, even while questioning the credentials of the Arbitrator nominated by the first respondent. There is nothing in clause 20.6.4 to indicate that only after being satisfied with the credentials of the nomination of the proposed Arbitrator by the first party, the second party could nominate their Arbitrator. The nomination of Arbitrators by the employer and the contractor, are two independent events. The purpose of prescribing the time limit of 15 days is to ensure that no party protracts even the constitution of the Tribunal, after a dispute had arisen. As a matter of fact, the qualifications prescribed under clause 20.6.4 for the employer's Arbitrator are different from the qualifications prescribed for the contractor's Arbitrator. This can be seen from the following tabular form:-

Qualifications for Employer's Arbitration

Qualifications for Contractor's Arbitration

He shall be of the rank of Chief Engineer or Higher serving in the Government of Tamil Nadu or equivalent.

He should be a professional/Chartered Civil Engineer of repute, of at least 20 years of relevant professional experience.

Therefore there was absolutely no necessity for the petitioner to wait for the receipt of details from the first respondent about their Arbitrator, so as to nominate the employer's Arbitrator. The petitioner could have nominated Thiru G. Sivakumar even in the first instance. Simultaneously, the petitioner could have called upon the first respondent to furnish the curriculum vitae or the attested curriculum vitae of their Arbitrator. As a matter of fact, if the petitioner had nominated their own Arbitrator even while calling upon the first respondent to furnish the curriculum vitae of the contractor's Arbitrator and if the first respondent had still not furnished those details, the petitioner was at liberty to approach the Indian Council of Arbitration under clause 20.6.5. Such a remedy is provided by the last part of clause 20.6.4, which reads as follows:--

Should either party fail to advise the identity of his Arbitrator, the appointment shall be made in accordance with Clause 20.6.5.

The words "advise the identity of the Arbitrator" found in the last part of clause 20.6.4 make it clear that if one of the parties merely names an Arbitrator without disclosing his identity, the other party can ignore the same and go to the Indian Council of Arbitration. Therefore, it is clear that without waiting for full details of the contractor's Arbitrator and without waiting for curriculum vitae of the Contractor's Arbitrator, the petitioner was entitled to nominate their own Arbitrator. The nomination of the employer's Arbitrator was not made dependent

upon the qualifications of the Arbitrator proposed by the contractor. The time limit of 15 days, providing a link between the two nominations, does not have anything to do with the choice of the Arbitrator by the petitioner, but has relevance only for the purpose of speedy constitution of the tribunal. Hence, I am of the view that the petitioner was wrong in not nominating their own Arbitrator, immediately upon receipt of the letter dated 5.9.2013. The letter of the petitioner dated 13.9.2013 asking for details of the qualifications of the Arbitrator nominated by the first respondent and the subsequent communication calling for attested copies of the curriculum vitae, are all things which should not have postponed the nomination of an Arbitrator on the side of the petitioner. Therefore, the petitioner cannot today take advantage of the fact that the first respondent approached the Indian Council of Arbitration without waiting for 15 days.

(ii) In any event, despite the fact that the first respondent approached the Indian Council of Arbitration on 3.10.2013 (with their letter dated 1.10.2013) and despite the fact that this was within 15 days, the petitioner may not be entitled to take any advantage. The nomination of Thiru G. Sivakumar by the petitioner, as their Arbitrator, was done only by their letter dated 15.10.2013. Even if the date of service of the letter dated 20.9.2013 by the first respondent upon the petitioner is taken to be the starting date for calculating 15 days as per clause 20.6.4, the said period very clearly expired much before 15.10.2013. In other words, the petitioner clearly failed to nominate the employer's Arbitrator within 15 days from the date of receipt of the letter dated 20.9.2013 sent by the petitioner. The petitioner nominated the employer's Arbitrator only by a letter dated 15.9.2013, much beyond the date of receipt of the letter dated 20.9.2013 and that too on the very date on which the ICA also had nominated an arbitrator. Hence, the petitioner forfeited their right to appoint an Arbitrator on their side as per clause 20.6.4.

30. Therefore, despite the fact that the first respondent did not wait for the expiry of 15 days as per clause 20.6.4 to approach the Indian Council of Arbitration, the petitioner cannot claim any benefit out of the same, in view of the fact that the petitioner completely failed to nominate their Arbitrator within 15 days of receipt of the letter dated 20.9.2013 or at least before the Indian Council of Arbitration made a nomination on 15.10.2013. Hence, the first contention of the petitioner has to go.

31. Mr. R. Thiagarajan, learned Senior Counsel for the petitioner relies upon the decision of the Supreme Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., , to drive home the point that the parties are obliged to give effect to the terms of the agreement and that the contract had to be adhered to as closely as possible and that corrective measures have to be taken first, before approaching the Court as the last resort. In para 12 of the said decision, the Supreme Court held that the emphasis of Section 11 is on the terms of the agreement being adhered to, as closely as

possible and that the Court may be asked to do what had not been done.

32. Following the decision in Northern Railway Admn., the Supreme Court laid down 7 fundamental principles in Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., governing the right of a party to approach the Chief Justice u/s 11 and the power of the Chief Justice to act under the said Section.

33. But unfortunately for the petitioner, the decision in Northern Railway Admn., as amplified in Indian Oil Corporation, has no application to the case on hand for a host of reasons. They are:--

(i) The said decision deals with a situation where a party approaches the Chief Justice/Designated Judge for the appointment of an Arbitrator u/s 11(6) read with Section 11(8), upon the failure of the opposite party to act as per the procedure prescribed in the agreement. But the case on hand does not arise out of an application u/s 11.

(ii) The remedy of approaching the Chief Justice is a statutory remedy and not a contractual remedy. But in so far as the case on hand is concerned, the remedy of approaching the Indian Council of Arbitration, as provided in clause 20.6.5 of the agreement, is a contractual remedy. Therefore, the ratio laid down in para 12 of the decision in Northern Railway Admn., which applies only to the recourse to a statutory remedy, cannot be applied to a case where a party took recourse only to a contractual remedy.

(iii) Even if the decision in Northern Railway Admn., is applied *stricto sensu*, the first contention of the petitioner cannot be accepted. The first respondent was obliged under clause 20.6.4 of the agreement to nominate an Arbitrator who satisfies the qualifications prescribed therein. But there is no obligation to convince the other party viz., the petitioner herein, by producing all the credentials of the Arbitrator and convincing the petitioner to make their own nomination. After all, the first respondent did not go to Indian Council of Arbitration, immediately upon the expiry of 15 days from 5.9.2013, the earliest date on which the first respondent nominated their Arbitrator. On the other hand, the first respondent waited till 3.10.2013, to submit an application to Indian Council of Arbitration. In the interregnum, the petitioner sent a letter dated 13.9.2013, calling for the credentials of the Arbitrator and the first respondent supplied the same by another letter dated 20.9.2013. The petitioner again made an issue that the curriculum vitae was not attested. Therefore, it is clear that the first respondent acted as closely as possible to the terms of the agreement, as stipulated in Northern Railway Admn. But the petitioner did not do so.

34. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , the Supreme Court held that if the opposite party did not make an appointment within 30 days of the demand, as stipulated in the contract, the right to make appointment would not get forfeited, but would continue. However, such appointment, though made after 30 days, should have been made at least before the first party made an application u/s 11, seeking the appointment of an Arbitrator. The Court

further held that if no appointment has been made by the opposite party till the application u/s 11(6) has been made, the right of the opposite party to make an appointment ceases and is forfeited.

35. In *Punj Lloyd Limited v. Petronet MHB Limited* {2006 (2) SCC 638}, a three Judges Bench of the Supreme Court approved the ratio laid down in *Datar Switchgears*. It is interesting to note that in that case, Punj Lloyd, served a notice on Petronet, demanding the appointment of an Arbitrator. Since Petronet failed to act within 30 days, Punj Lloyd moved the Chief Justice u/s 11(6). The Designated Judge refused to appoint an Arbitrator and the matter reached the Supreme Court. Reversing the decision, the Supreme Court approved the view taken in *Data Switchgears* that if no appointment had been made by the opposite party till an application u/s 11(6) had been made, the right of the opposite party to make appointment would cease and get forfeited.

36. The aforesaid view was again reiterated by another 3 Judges Bench in *Deep Trading Company Vs. Indian Oil Corporation and Others*, . Therefore, if a case is covered by Section 11(6) of the Act, two principles have become well settled viz., (i) that the right of a party to make an appointment is not forfeited but would continue, even after the deadline stipulated in the agreement; and (ii) that the right would automatically cease and get forfeited, the moment a petition u/s 11(6) is filed.

37. We need not even go so far in this case. The first respondent nominated the Arbitrator by the letter dated 5.9.2013. The petitioner sent a reply dated 13.9.2013, calling for the details regarding the qualifications of the Arbitrator. By a communication dated 20.9.2013, the first respondent furnished those details. Till 15.10.2013, the petitioner did not nominate their Arbitrator. But in the meantime, the first respondent filed an application before the Indian Council of Arbitration on 3.10.2013 and they nominated an Arbitrator by a letter dated 15.10.2013. Therefore, even if we take it that the right of the petitioner to nominate an Arbitrator did not cease merely upon the expiry of 15 days from the date of service of the letter dated 20.9.2013, the right got extinguished or forfeited, the moment Indian Council of Arbitration nominated an Arbitrator by the letter dated 15.10.2013. The case on hand is covered by the ratio laid down in *Datar Switchgears*, as affirmed in *Punj Lloyd* and *Deep Trading*. Therefore, I hold that the petitioner forfeited their right to nominate an Arbitrator in terms of clause 20.6.4.

CONTENTION No. 2:

38. The second contention is with regard to qualifications of the Arbitrator nominated by the Indian Council of Arbitration, on the side of the petitioner. The Indian Council of Arbitration has nominated Thiru A.P. Radhakrishnan on the side of the petitioner, by their letter dated 15.10.2013. The qualifications of Thiru A.P. Radhakrishnan are not now known. The primary contention of the petitioner is that as per clause 20.6.4, the employer's Arbitrator should be of the rank of

Chief Engineer or higher, serving in the Government of Tamil Nadu or equivalent. Since it is not known whether Thiru A.P. Radhakrishnan nominated by the Indian Council of Arbitration for the petitioner satisfies these qualifications or not, the petitioner is objecting to his appointment. The petitioner is entitled to object to the Arbitrator nominated by the Indian Council of Arbitration, if he does not really possess the qualifications prescribed in the contract. This right to object to a particular Arbitrator, stands on a different footing and it is independent of the forfeiture of the right of the petitioner to nominate an Arbitrator. What is forfeited by the petitioner, as per my finding under contention No. 1, is only the right to nominate their own Arbitrator. That does not mean that the petitioner also forfeited the right to challenge the Arbitrator nominated by the Indian Council of Arbitration, on the ground of lack of qualifications. Keeping this in mind, let me get into greater details on the second contention.

39. As rightly contended by Mr. R. Thiagarajan, learned Senior Counsel for the petitioner, the appointment of an Arbitrator should be made only after having due regard to the qualifications, if any, stipulated in the agreement. The opinion rendered by the Supreme Court in Northern Railway Admn., that in the scheme of Section 11(8), the appointment of an Arbitrator shall have due regard to two aspects viz., (i) qualifications required of the Arbitrator by the agreement of the parties and (ii) other considerations as are likely to secure the appointment of an independent and impartial Arbitrator.

40. But the said objection cannot now be considered by me for two reasons viz., (i) that the qualifications of Thiru A.P. Radhakrishnan are not now known; (ii) that in any case, I do not know whether one can read the requirements of clause 20.6.4 into clause 20.6.5 or not.

41. While clause 20.6.4 prescribes the qualifications for the Arbitrators nominated by the employer and the contractor independently, clause 20.6.5 does not speak about the qualifications at all. I have already extracted clause 20.6.5. It merely says that in the event of either party failing to appoint his Arbitrator in accordance with clause 20.6.3 or 20.6.4, the other party may apply to the Indian Council of Arbitration for appointment of an Arbitrator and that the parties are bound by the appointment. In other words, clause 20.6.5 does not say in express terms that the qualifications prescribed for the contractor's Arbitrator and the employer's Arbitrator in clause 20.6.4 would apply mutatis mutandis even for the appointment of an Arbitrator by the Indian Council of Arbitration. There is a significant omission in clause 20.6.5 about the qualifications required for a person to be nominated by the Indian Council of Arbitration.

42. The absence in clause 20.6.5, of an indication regarding the qualifications of an Arbitrator appointed by the Indian Council of Arbitration assumes significance also for one more reason. If we have a look at clause 20.6.6, that deals with the appointment of a Chairman, it could be seen that the Chairman selected by the Arbitrators nominated by the contractor and employer should be a professional/Chartered Civil Engineer of repute, of at least 20 years of relevant professional

experience, of which 7 years must be related to dealing directly with claims, disputes, adjudication or arbitration.

43. A careful reading of clauses 20.6.4, 20.6.5 and 20.6.6 would reveal the following:--

(i) When the contractor nominates an Arbitrator in terms of clause 20.6.3 or 20.6.4, such a person should be a professional/Chartered Civil Engineer of repute, of at least 20 years of relevant professional experience.

(ii) When an employer nominates his own Arbitrator, either under clause 20.6.3 or under 20.6.4, he should be of the rank of a Chief Engineer or higher serving in the Government of Tamil Nadu or equivalent.

(iii) When the Arbitrators nominated by the employer and the contractor in terms of clauses 20.6.3 and 20.6.4 choose a third Arbitrator as Chairman under clause 20.6.6, he should be a professional/Chartered Civil Engineer of repute, of at least 20 years of relevant professional experience, of which 7 years must be related to dealing directly with claims, disputes, adjudication or arbitration.

(iv) Clause 20.6.5 which deals with the appointment of an Arbitrator by the Indian Council of Arbitration, is conspicuously silent about the qualifications.

44. In other words, when a nomination takes place under clauses 20.6.3 or 20.6.4 by the respective parties, they are bound to choose their own Arbitrators, who fulfil the qualifications prescribed in clause 20.6.4. Similarly, when the Arbitrators choose a third Arbitrator as Chairman under clause 20.6.6, they should satisfy themselves that such a third Arbitrator satisfies the qualifications stipulated separately in clause 20.6.6.

45. Unfortunately, clause 20.6.5 which is sandwiched between clauses 20.6.4 and 20.6.6, does not stipulate any qualifications or any restrictions upon the power of the Indian Council of Arbitration to nominate an Arbitrator. Despite being sandwiched between two clauses both of which speak about the qualifications in clear cut terms, clause 20.6.5 is silent about the qualifications.

46. Therefore, I do not know at the outset (i) whether Thiru A.P. Radhakrishnan satisfies the qualifications prescribed for an Arbitrator on the side of the employer or not; and (ii) whether the Indian Council of Arbitration is bound to appoint Arbitrators, only in accordance with clause 20.6.4. There are two options left open by me to decide the first issue. The first option is to direct the petitioner to challenge the appointment of Thiru A.P. Radhakrishnan before the Arbitral Tribunal itself in terms of Section 13(2). Alternatively, I should decide the same, u/s 14(2) and terminate his mandate. But the exercise of one option or the other by me depends upon whether the remedy available u/s 13(2) excludes the one u/s 14(2) or whether the remedy u/s 14(2) is wide enough to allow a party to circumvent Section 13(2) or not.

47. As I have pointed out earlier, Section 13(2) deals primarily with the challenge

to the very appointment of the Arbitrator. But Section 14(2) deals with a challenge to the continuance of a person as an Arbitrator. While Section 13(2) stands at the threshold, Section 14(2) stands after the entry point.

48. As per the express language of Section 13(2), a challenge to an Arbitrator, on the grounds specified in Section 12(3) has to be made only before the Arbitral Tribunal. Similarly, a controversy concerning the de jure or de facto inability of the Arbitrator to perform his functions or a controversy concerning the failure of the Arbitrator to act without undue delay in terms of Section 14(1)(a), can be agitated only before Court u/s 14(2).

49. In the case on hand, the dispute actually concerns with the qualifications of the Arbitrator nominated by the Indian Council of Arbitration. According to the petitioner, Thiru A.P. Radhakrishnan nominated by the Indian Council of Arbitration as the employer's Arbitrator, does not possess the qualifications prescribed under clause 20.6.4. Hence this is a case where the appointment of an Arbitrator is challenged very clearly in terms of Section 12(3)(a). Consequently, this dispute could be raised only u/s 13(2) before the Arbitral Tribunal.

50. But according to Mr. R. Thiagarajan, learned Senior Counsel for the petitioner, the case on hand would also fall under the "de jure or de facto inability to perform functions" u/s 14(1)(a) and that therefore a petition u/s 14(2) is maintainable. In addition, it is also his contention that the remedy u/s 14(2) does not stand excluded by the remedy provided u/s 13(2).

51. But at the outset, I shall point out that the first contention cannot be accepted. An objection relating to qualifications of the Arbitrator clearly stands on a different footing than a controversy relating to the inability to perform functions, either de facto or de jure. Inability to perform functions stands on a different footing from disability to perform functions. A person who does not fulfil the qualifications for discharging the functions of a post, is actually disabled from being appointed to the post. He may even be able to perform the functions like quack doctors or fake lawyers performing the functions. On the contrary, a person fully qualified may become unable to perform his functions, either de jure or de facto by subsequent events. While Section 12(3) uses the expression "does not possess the qualifications", Section 14(1)(a) uses the expression "becomes unable". The word "becomes" appearing in Section 14(1)(a) is of significance. This expression connotes a post facto event. Therefore, unless the petitioner says that Thiru A.P. Radhakrishnan was fully qualified at the time of his appointment and that this is not a case falling u/s 12(3)(b) and unless the petitioner contends that Thiru A.P. Radhakrishnan, who was originally entitled to be appointed, subsequently became unable to perform his functions due to various reasons, the petitioner cannot bring their case within the purview of Section 14(1)(a). If the petitioner cannot bring their case within the purview of Section 14(1)(a), they cannot maintain a petition before this Court u/s 14(2), in view of the express language of Section 14(2). Hence the first contention of Mr.

R. Thiagarajan, learned Senior Counsel for the petitioner that the case on hand would fall under the category of "de jure or de facto inability to perform functions" cannot be accepted.

52. De facto is an expression which means "in fact". The Law Lexicon defines the expression "de jure" to mean "of right; legitimate; lawful". P. Ramanatha Aiyer Advanced Law Lexicon (3rd Edition 2005) defines a "de facto Officer" as one whose acts, though not those of a lawful Officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons, where the duties of the Office are exercised, first, without a known appointment, but under such circumstances of reputation or acquiescence as were calculated to induce people to submit to or invoke his action, supposing him to be the Officer he assumed to be; second, under colour of a known and valid appointment, but where the Officer had failed to conform to some precedent requirement or condition, as to take a oath, give a bond, or the like, third under colour of a known appointment, void because the Officer was not eligible, or because there was a want, of power in the appointing body, or by reason of some defect or irregularity, want of power or defect being unknown to the public; fourth under colour of election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such".

53. The same Law Lexicon also defines the De jure Officer as "one who is regularly and lawfully elected or appointed and inducted into Office and exercises the duties as his right". Another definition for the expression "De jure Officer" is that of a person who has the lawful right to Office, but who has either been ousted from or never actually taken possession of the Office."

54. It is contended by Mr. R. Thiagarajan, learned Senior Counsel for the petitioner that the remedy provided u/s 13(2) does not exclude the remedy u/s 14(2). Both provisions, according to the learned Senior Counsel, are not mutually exclusive. In support of this contention, the learned Senior Counsel for the petitioner drew my attention to one decision of a Division Bench of the Gauhati High Court and two decisions of the Delhi High Court. I shall now take up for consideration, those decisions. In State of Arunachal Pradesh Vs. Subhash Projects and Marketing Ltd. and Another, , the Division Bench of the Gauhati High Court held that the width and the amplitude of Section 14, having regard to the precepts thereof are more comprehensive. The Court also held that the provisions of Sections 13 and 14 are not mutually exclusive so much so that a party not raising a challenge u/s 13 would be excluded from availing a remedy u/s 14, even if the ground urged is within the parameters of the said provision. The Division Bench of the Gauhati High Court drew a very interesting proposition to the effect that "though a party unsuccessful in his challenge u/s 13 would be debarred from carrying the same to any other Forum resting on some other provision of the Act except to the extent permissible u/s 34, such an impediment does not stare at a party omitting and/or failing to question the independence and impartiality of the Arbitrator u/s 13(2) within the time prescribed".

55. In other words, the view taken by the Division Bench of the Gauhati High Court was that the remedies under Sections 13 and 14 are concurrent and that if a party elected to approach the Tribunal u/s 13 and suffered an order therein, he would be debarred from taking recourse to Section 14.

56. After referring to the meaning of the expression "de jure" in Black's Law Dictionary and the Law Lexicon, the Division Bench of the Gauhati High Court held that the de jure inability referred to in Section 14 has to necessarily comprehend all conceivable legal shortcomings existing or acquired by an Arbitrator disqualifying him to discharge the role assigned under the Act. Holding that any restrictive interpretation on the expression "de jure" would immaculate the legal provision, of its efficacy and purpose, the Division Bench of the Gauhati High Court held that it is incomprehensible that in a given fact situation, exhibiting justifiable doubts about the independence and impartiality of the Arbitrator, his mandate would continue and the challenge to his authority would have to wait till the completion of the process, only because the party aggrieved had failed to act u/s 13(2). Ultimately, the Division Bench of the Gauhati High Court held (para 37 of the Report) that a party who had either abstained from or omitted to raise a challenge to the independence or impartiality of an Arbitrator u/s 13(2) would not be debarred from invoking Section 14 contending that the Arbitrator had become de jure unable to perform his functions.

57. While concurring with the view expressed by the Division Bench of the Gauhati High Court, that Sections 13 and 14 are not mutually exclusive, the Delhi High Court took the law to the next level in *M/s. Alcove Industries Ltd. v. M/s. Oriental Structural Engineers Ltd.* {2008 (3) R.A.J. 227 (Del.)}. The Delhi High Court held that even if a party had approached the Arbitral Tribunal u/s 13 and sustained an adverse order, he would still be entitled to invoke the remedy u/s 14. In paragraph 64, it was held by the Delhi High Court that once Section 14 confers on the Court, the power to decide the controversy, whether or not, the mandate of the Arbitrator stands terminated, the said power cannot be taken away by a decision of the Arbitrator u/s 13(2), which in no way is binding on the Court. In other words, the Delhi High Court was of the view that a party who unsuccessfully challenges an Arbitrator u/s 13(2) could thereafter come up before Court u/s 14. In fact, the Delhi High Court considered the remedy u/s 13 to be the first and effective alternative remedy that should be exhausted before the party came up before Court u/s 14.

58. The next decision of the Delhi High Court in *Sharma Enterprises Vs. National Building Construction Corporation Ltd. and Another*, relied upon by Mr. R. Thiagarajan, learned Senior Counsel for the petitioner, took the view that the Court is entitled to terminate the mandate of an Arbitrator u/s 14, if it finds that the arbitration, without intervention of the Court, had been invoked in respect of a long dead claim or a claim not arbitrable. These circumstances were held by the Delhi High Court to come within the purview of "de jure inability to perform".

59. From the aforesaid 3 decisions relied upon by Mr. R. Thiagarajan, learned

Senior Counsel for the petitioner, the following propositions are articulated by him:--

(i) that the expression "de jure inability" appearing in Section 14(1)(a) is wide enough to cover cases of this nature;

(ii) that Sections 13 and 14 are not mutually exclusive;

(iii) that as per the judgment of the Gauhati High Court, remedies under Sections 13 and 14 are concurrent, though an order passed u/s 13(2) dismissing the challenge to an Arbitrator would act as a bar for seeking the same remedy u/s 14; and

(iv) that however, as per the decision of the Delhi High Court, even if a challenge fails u/s 13(2), the losing party is entitled to approach the Court u/s 14.

60. But unfortunately the views expressed by the Gauhati as well as the Delhi High Court both on the scope and amplitude of Sections 13 and 14 and on the interpretation to be given to the expression "de jure unable to perform", do not appear to be in consonance with the scheme of the Act. If we carefully look at the scheme of 1996 Act, it will be clear that the legislature did not intend (i) either to provide multiple remedies; (ii) or to provide mutually exclusive concurrent remedies. Section 13 operates in a field that is completely different from Section 14. One has no connection with the other. This is why both Sections stipulate both the rights as well as the remedy.

61. Section 13(2) provides a right to challenge an Arbitrator. It also prescribes the Forum before which such a challenge is maintainable. Without stopping merely at prescribing a right and laying down the procedure, Section 13(5) also indicates the remedy available if the challenge u/s 13(2) is unsuccessful. To put it differently, Section 13 is a complete Code in itself in view of the following viz.:--

(i) that it confers a right to challenge an Arbitrator;

(ii) that it indicates the grounds on which such challenge could be made, by referring to Section 12(3);

(iii) that it prescribes the Forum where such a challenge can be made (viz., the Arbitral Tribunal); and

(iv) that it also indicates the one and only remedy available for a party whose challenge u/s 13(2) fails. Section 13(5) contains the remedy available.

62. It is a well settled proposition of law that where a provision in a Statute indicates the right, lays down the procedure for the legal enforcement of such a right, lists out the grounds available for seeking enforcement of the right, shows the Forum before which such a right could be enforced and delineates the remedy available to a person who fails in his attempt to enforce the right, such a provision in the Statute would act as a complete Code.

63. Similarly, all the attributes of Section 13 are also to be found in Section 14.

Section 14 also contains (i) the right to seek the termination of the mandate of an Arbitrator; (ii) the grounds on which one can seek the termination of the mandate of the Arbitrator; and (iii) the Forum before which the parties can seek the termination of the mandate of the Arbitrator.

64. Moreover, as I have pointed out earlier, Section 13(2) read with Section 12(3) gives a clear clue that the challenge contemplated therein is to the very appointment, while the remedy u/s 14 is as to the continuance of the Arbitrator.

65. The Division Bench of the Gauhati High Court has come to the conclusion that it did, after looking into great detail the principles of statutory interpretation. But, with great respect, neither the Division Bench of the Gauhati High Court nor the Delhi High Court had taken note of the UNICITRAL Model Law. There can be no dispute about the fact that the 1996 Act is based upon the UNICITRAL Model Law. The very preamble to the 1996 Act speaks in great detail about the UNICITRAL Model Law and the fact that the 1996 Act was enacted after taking into account the Model Law and Rules.

66. While adapting the UNICITRAL Model Law, our Parliament made certain additions, alterations, modifications and even deletions. In other words, the 1996 Act is not a cut and paste reproduction of the UNICITRAL Model Law. Therefore, wherever the 1996 Act deviated from the UNICITRAL Model Law, it is an indication that the lawmakers applied their mind and intended to adopt a modified version.

68. Keeping this in mind, let us now have a look at the comparative provisions of the UNICITRAL Model Law. Articles 12 to 14 of the UNICITRAL Model Law correspond to Sections 12 to 14 of the Act. For easy appreciation of the changes made by the Parliament while adapting the Articles 12 to 14 of the Model Law, they are presented in a tabular column, as follows:--

UNICITRAL MODEL LAW 1996 ACT

Article 12: Grounds for challenge.--

(1) When a person is approached in connection with his possible appointment as an Arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An Arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An Arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an Arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Section 12. Grounds for challenge.--(1) When a person is approached in

connection with his possible appointment as an Arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An Arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An Arbitrator may be challenged only if--(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an Arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13: Challenge procedure.--

(1) The parties are free to agree on a procedure for challenging an Arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an Arbitrator shall, within fifteen days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstances referred to in Article 12(2), send a written statement of the reasons for the challenge to the Arbitral Tribunal. Unless the challenged Arbitrator withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the Court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the Arbitral Tribunal, including the challenged Arbitrator, may continue the arbitral proceedings and make an award.

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

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

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

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

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

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

Article 14: Failure or impossibility to act.--

(1) If an Arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an Arbitrator withdraws from his office or a party agrees to the termination of the mandate of an Arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Section 14. Failure or impossibility to act.--(1) The mandate of an Arbitrator shall terminate if --

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his Office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an Arbitrator withdraws from his Office or a party agrees to the termination of the mandate of an Arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

68. It may be seen from Article 13(3) that the Model Law provided for a remedy of appeal to the Court, whenever a challenge to an Arbitrator made before the Arbitral Tribunal itself met with failure. But Sections 13(4) and 13(5) of the Act, clearly deviates consciously from Article 13.3 of the Model Law. The Parliament specifically excluded a remedy that was made available under Article 13(3) of the Model Laws. When the Parliament deliberately thought fit to exclude a remedy of

approaching the Court in the event of the failure of a party to successfully challenge an Arbitrator before the Arbitral Tribunal itself, the Courts cannot introduce such a remedy either by any stretch of imagination or by any rule of interpretation. Therefore, the decision of the Delhi High Court in Alcove Industries Ltd. may not be correct.

69. Similarly, the decision of the Division Bench of the Gauhati High Court also may not be correct in view of the fact that the Articles 13 and 14 of the Model Law contemplated two different situations and that is why provided for two independent remedial courses of action. Under Article 13 of the Model Law, a party is entitled to challenge an Arbitrator, by sending a written statement of the reasons for the challenge to the Arbitral Tribunal itself. Article 13(2) gives an option to the Arbitrator to withdraw from the Office or an option to the other party to concede the challenge. If both does not happen, the Arbitral Tribunal should decide on the challenge. If the challenge fails, the losing party can approach the Court to decide on the challenge.

70. Similarly, Article 14 speaks about the termination of the mandate, in the event of de jure or de facto disability to perform the functions. Whenever such a situation arises, the party has no remedy to go before the Arbitral Tribunal at all. On the contrary, the party has to come up only before the Court.

71. Therefore, it is clear that Articles 13 and 14 of the Model Law provided two independent tracks, one relating to the very appointment and another relating to the continuation. Hence, there is no scope for holding that Section 14 is wide enough to include a challenge to an Arbitrator even on the grounds specified in Section 12(3). After all, a party whose challenge to an Arbitrator is rejected by the Arbitral Tribunal u/s 13(4) is not left without a remedy. A remedy is specifically provided u/s 13(5).

72. As a matter of fact, I can go one step further. The Division Bench of the Gauhati High Court expressed concern as to what happens to a party who failed to take recourse to Section 13(2) within the time stipulated therein viz., 15 days. The concern of the Division Bench was that if the Arbitrator was biased and the party aggrieved by his appointment failed to make a challenge within 15 days, would he forfeit his right at all and would he get justice at the hands of the Tribunal?

73. But the answer to the above question can be found in Section 34(2)(a)(v). A careful look at Section 13(5) and Section 34(2)(a)(v) would show that if a party challenges an Arbitrator u/s 13(2) and suffers an order of rejection by the Arbitral Tribunal, he can include it as one of the grounds of challenge to the final award, in terms of Section 13(5). Independent of Section 13(5), Section 34(2)(a)(v) enables a party to seek to set aside the award on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. Therefore, it is not possible to hold that Sections 13 and 14 are not mutually exclusive. They are in fact, mutually exclusive, as per the scheme of the

Act.

74. In view of the above, the only remedy available to the petitioner is to challenge the Arbitrator in a manner prescribed by Section 13(2) before the Arbitral Tribunal itself. If the petitioner's challenge is accepted, then the petitioner can nominate its own Arbitrator and together with the Arbitrator of the first respondent, they can nominate the third Arbitrator. If the petitioner's challenge is rejected, then the only remedy open to the petitioner is to participate in the proceedings and defend itself. If an award is passed against the petitioner and the petitioner chooses to challenge the same u/s 34, it would then be open to them to include a challenge to the constitution of the Tribunal also as one of the grounds, by falling back upon Section 13(5). The appointment of Thiru A.P. Radhakrishnan by the Indian Council of Arbitration, by their communication dated 15.10.2013 has been challenged by the petitioner by a communication dated 22.10.2013 addressed to the Indian Council of Arbitration. Thus the nomination made by the Indian Council of Arbitration has been questioned within 15 days. Moreover, the appointment of the third Arbitrator as Umpire became known to the petitioner only when the Presiding Arbitrator issued a letter dated 20.11.2013. Therefore, it can be taken that the petitioner can be said to have become aware of the constitution of the Tribunal within the meaning of Section 13(2), only on 20.11.2013. Within 5 days, the petitioner approached this Court by filing the above original petition on 25.11.2013. Since I am rejecting the same now, the period between 25.11.2013 upto the date of issue of the copy of this order, has to be excluded for calculating the period of 15 days prescribed in Section 13(2). Therefore, in the result, the main petition is dismissed. However, the petitioner is given a time of 10 days from the date of receipt of a copy of this order, to move a petition before the Arbitral Tribunal u/s 13(2). There will be no order as to costs.