
(2006) 08 DEL CK 0146

In the Delhi High Court

Case No : Arb.P. 217 of 2005 and 219 of 2005

HBHL-VKS (J.V.)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-08-2006

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 1(2), 11, 11(10), 11(11), 11(12)

Constitution of India, 1950 — Article 136, 141

Citation : (2007) 1 ARBLR 252

Hon'ble Judges : Swatanter Kumar, J;Pradeep Nandrajog, J;A.K. Sikri, J

Bench : Full Bench

Advocate : Sandeep Sharma, in Arb.P. 217/2005 and 219/2005 and Bishwajit Singh, in Arb.P. 213/200, for the Appellant; Geetanjali Mohan and Ashish Mohan, Damandeep and Kamlesh Verma, in Arb.P. 217/2005 and 219/2005 and Aeltemsh Rein in Arb.P. 213/2005, for the Respondent

Final Decision : Disposed Off

Judgement

Swatanter Kumar, J.—Making arbitration more responsive to contemporary requirements and to ensure that economic reforms become fully effective, with these two objects in mind, the Law Commission of India recommended radical changes in the then existing arbitration law. This resulted in the enactment of the Arbitration and Conciliation Act, 1996. The new law provides for definite and effective measures for settlement of both domestic and international commercial disputes, through the process of arbitration. The United Nations Commission on International Trade Law adopted model law and rules which were intended to deal with international commercial arbitration and conciliation. The law relating to domestic arbitration, thus, was also required to be in comity to this concept. One of the basic objects of 1996 Act was to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration. While reducing the court intervention during the pendency of arbitral tribunal proceedings, the object sought to be achieved by enactment of new law

was expeditious finalization of disputes through the forum of arbitration.

2. Judicial interpretation of Statutes is a known process for development of law. Legislature may amend the laws while the judicial pronouncements may fill the lacunas left by the legislature, which may be necessary for achieving the object of the Statute. Various provisions of 1996 Act have been subjected to judicial interpretation which clarified certain aspects of the Act, but still the questions relating to ambit and scope of provisions of Section 11(6) of the Act needs to be settled by the court more authoritatively in view of the fact that by interpretative process, various High Courts as well as different Benches of this Court have pronounced divergently. The statutory procedure for appointment of Arbitral Tribunal in terms of the Act has to be understood in its clear terms and normally would not be controlled by the parties. The failure by any of the parties to the agreement in relation to appointment or its procedure, the Statute gives right to the party to make an application to the court for that purpose. The arbitration agreement may provide for appointment of an Arbitral Tribunal by consent, power of appointment may be exercisable by a third party known as "Appointing Authority" and in the event this does not bring result, then by making an application for appointment of an Arbitral Tribunal to the court of competent jurisdiction in accordance with the provisions of the Act. The time may be specified in the agreement and it is of greater essence when it is spelled out in the provisions of law itself. The arbitration agreement often specifies a time within which an Arbitrator must be appointed failing which a party may lose the right to appoint one. In absence of the agreement the time limit is provided in the Statute. (Russell on Arbitration 20th Edition). The extent of loss of right and consequence of default could be provided contractually or statutorily. Loss of a right contractually stated may vary but loss of right in terms of Statute would be uniform.

3. The provisions of Section 11 of the Act has been subject matter of some legal controversy in the recent past. Its various Sub-sections operate in different situations with somewhat different consequences. On failure of a party to act for appointment of an Arbitrator as per the agreed procedure, certain consequences would follow in law. The extent and scope of such ramifications have to be examined in view of the underlining object of the relevant legal provisions while keeping in mind the facts and circumstances of the case. Courts have taken divergent views in this regard which persuaded one of us (Mr. Swatanter Kumar, J.) to refer the matter to a larger Bench for setting at rest the legal controversies arising in the present case. The order of reference reads as under:

1. This order will dispose of the above three cases as common question of law falls for consideration in all these cases based on somewhat similar facts. For the purposes of convenience, it will be sufficient to make the reference only to the facts giving rise to the filing of Arb.P.217/2005 (HBHL-VKS (J.V.) v. The General Manager and Anr.).

2. The petitioner which is a registered partnership concern through its registered

partner Sh. B.K. Bassi has filed the present petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 praying for a direction to the respondents to file the original arbitration agreement in Court and for appointment of an independent sole arbitrator for adjudication of the disputes/claims detailed in para 7(xxiii) of the petition. The petitioner is carrying on the business of Engineers and Contractors. The respondents invited the tender for the work under the name and style "Construction of single line Br. No. 9 at Km 7.512 over sewer outlet near sector-47 consisting of super structure of pre-stressed concrete box girder center to center bearing 4x31.5m and sub structure with RCC abutment and piers on well foundations and other allied works on Chandigarh Morinda Ph-I, Section of Chandigarh-Ludhiana new B.G. Rail Link." The petitioner submitted its tender which was opened on 13.3.2001. The respondents vide their letter dated 7.6.2001 informed the petitioner that the tender of the petitioner for the work in question had been accepted and the parties entered into an agreement dated 24.4.2002. Clause 64 of the agreement contemplates resolution of disputes by reference to arbitration. According to the petitioner, the work was required to be completed within a period of 18 months from the date of issue of the award with an approximate cost of Rs. 2,50,49,729.07/-. The petitioner geared up the entire resources and mobilized them to the site of the work. It is also stated by the petitioner that after GAD was made available to it, it started excavation for placement of cutting edge on A1 and also taken layout etc. for starting the work. It was noticed that the drawings given by the respondents were not the same as in the case of Bridge No. 8 and other bridges and the work done by the petitioner was wasted. The respondents vide their letter dated 22.1.2002 pointed out that the drawings for casting of well curb, well staining etc. have already been provided to the petitioner and as such they should start the work. This resulted in delay and certain recoveries towards security were made by the respondents contrary to the guidelines and policy framed by the Railway Board. The petitioner requested for release of the excess amount of security recovered. The petitioner requested the respondents to provide for the detailed drawings and to do the needful but instead of acceding to the genuine request, a notice dated 25/26.7.2002 was issued. The notice was more intended to cover up own faults of the respondents. Despite the fact that the hindrances were caused by the respondents, they did not agree to the request of the petitioner fully but extended the time up to 30.7.2003 vide their letter dated 20.12.2002 without levy of penalty but without PVC also. Certain other disputes also arose between the parties with regard to rate of cement and steel and payments in that behalf. The petitioner vide its letter dated 18.5.2004 refuted the allegations made by the respondents and raised its claims to the extent of Rs. 90 lacs which have been detailed in paragraph 7(xxiii) of the petition. The petitioner served a notice upon the respondents dated 5.7.2005 by which it invoked the arbitration clause feeling that its request to the respondents would be no consequence. In the letter/notice dated 5.1.2005/5.7.2005, the petitioner had detailed all the disputes, its claims and had specifically called upon the respondents that it is invoking clause No. 64 of the general conditions of agreement, the arbitration clause and in the event no

steps are taken within 30 days, it would take action in accordance with law. The notice dated 5.7.2005 was served upon the respondents by speed post. Despite service and grant of opportunity, no reply was filed in this case and Arb.P. 219/2005. However in the other connected case i.e. Arb.P. 213/2005, reply was filed.

3. learned Counsel appearing for the respondents, during the course of hearing of the cases, had handed over a letter to the counsel appearing for the petitioners requiring them to give their choice of arbitrator out of the panel of arbitrators stated in that letter. There is hardly any controversy or dispute to the facts stated in the petition. The parties have argued the case primarily on the question of law. According to the petitioners, in view of judgment of the Supreme Court in the case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , the respondents have lost the right to appoint an arbitrator in terms of Clause 64 of the contract as despite service, they failed to act within a period of 30 days or even prior to the filing of the petition.

4. On the other hand, learned Counsel appearing for the respondents have contended that firstly the Datar Switchgear's case does not apply to the facts of the present case and secondly despite filing of the petition, the respondents do not loose the right to make appointment of the arbitrator in accordance with Clause 64 of the general terms and conditions of the agreement and in fact, the Court would have also to direct appointment of the arbitrator only from the panel proposed by the respondents.

5. Before the Court proceeds to examine the merit or otherwise of the contentions raised by the parties, it will be appropriate to refer to the arbitration clause contained in the general terms and conditions of the agreement executed between the parties:

64 (1) (i) Demand for Arbitration.- In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway falls to make a decision within 120 days, then and in any such case, but except in any of the "expected matters" referred to in Clause -63 of these conditions, the contractor, after 120 days but with in 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference by referred to arbitration.

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

64(1)(ii) (a) - the Arbitration proceeding shall be assumed to have commenced

from the day, a written and valid demand for arbitration is received by the Railway.

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

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

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

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

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

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

64(3)(a)(ii) In cases not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. Officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager up to 2 names out of panel for appointment as contractor's nominee. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be

necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

64(3)(a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

64(3)(a)(iv) The arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay.

64(3)(a)(v) While appointing arbitrator(s) under Sub clause (i), (ii) and (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servants (s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64(3)(b)(i) The arbitral award shall state itemwise, the sum and reasons upon which it is based.

63(3)(b)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of a specific point of award to tribunal within 30 days of receipt of the award.

64(3)(b)(iii) A party may apply to tribunal within 30 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

64.4 In case of Tribunal, comprising of three members, any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64.5 Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which

the award is made.

64.6 The cost of arbitration shall be borne by the respective parties. The cost shall inter alias include fee of the arbitrator (s) as per the rates fixed by the Rly. Administration from time to time.

64.7 Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules there under any any statutory modification thereof shall apply to the arbitration proceedings under this clause.

6. The arbitration clause as afore referred contemplates reference to a sole Arbitrator who shall be the General Manager or Gazetted Railway Officer nominated by him, if the claim is below Rs. 5 lacs to two Arbitrators. The different moods of appointment of Arbitrator and mode to be followed in their appointment is prescribed under the arbitration clause executed between the parties. Admittedly, the claims in the present case are in excess of Rs. 5 lacs and as such Clause (ii) shall apply to the present case. The two Arbitrators are to be appointed who shall be Gazetted Railway Officers and depending on the nature of the controversy the General Manager has to nominate one Arbitrator while the other person has to be one suggested by the Contractor out of the list given by the department for appointment as contractor's nominee. The arbitration clause is comprehensive and clearly provides for appointment of an Arbitrator for determination of disputes which has arisen between the parties. There is no dispute to the fact that disputes had arisen between the parties and the petitioner had served upon the respondents letter cum notices dated 5.1.05 and 5.7.05 invoking Clause 64. The basic question, thus, comes up for consideration of the Court is that to what extent the respondents have lost their rights for appointing an Arbitrator in terms of the arbitration clause between the parties.

7. We may also notice here that during the course of the hearing of this case, a panel of Arbitrators was given by the respondents which was not acceptable to the petitioners who contended that the respondents have lost their rights to make any appointment and the petitioners are entitled to appointment of a sole Arbitrator on the basis of the various judgments relied upon by them. Though according to the respondents, Datar's case is not applicable to the facts and circumstances of the present case as that was a case of a sole Arbitrator and not three arbitrators as contemplated under Clause 64 of the Act. It is also their contention that the "loss of rights" as referred to in the Datar's case is merely loss of making offer i.e is the panel but still the procedure for appointment of an Arbitrator would continue to be the same and the terms of the arbitration clause between the parties are no way effected. As is clear from the contentions raised on behalf of the parties that both are relying upon Datar's Switchgears case the petitioners rely upon the following paragraphs:

The above decision has no application to the facts of this case as in the present case, the arbitrator was already appointed before the appellant invoked Section 11 of the Act. The counsel for the appellant contended that the arbitrator was

appointed after a long lapse of time and that too without any previous consultation with the appellant and Therefore it was argued that the Chief Justice should have appointed a fresh arbitrator. We do not find much force in this contention, especially in view of the specific words used in the arbitration clause in the agreement, which is extracted above. This is not a case where the appellant requested and gave a notice period for appointment of an arbitrator and the latter failed to comply with that request. The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the arbitration clause in the agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and settling the dispute. It is pertinent to note that the appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. Under such circumstances, it cannot be said that there was a failure of the procedure prescribed under the contract.

In all the above cases, Therefore, the appointment of the arbitrator was not made by the opposite party before the application was filed u/s 11. Hence, all the above cases are not directly in point. In the present case, the respondent made the appointment before the appellant filed the application u/s 11 but the said appointment was made beyond 30 days. Question is whether in a case falling u/s 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand

So far as cases falling u/s 11(6) are concerned-such as the one before us- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed u/s 11(4) and Section 11(5) of the Act. In our view, Therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court u/s 11, that would be sufficient. In other words, in cases arising u/s 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application u/s 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, Therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator u/s 11(6) is forfeited.

In the present case the respondent made the appointment before the appellant filed the application u/s 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days

from the date of demand.

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."

8. On the other hand, the learned Counsel appearing for the respondents have relied upon the following paragraphs of the same judgment:

learned Counsel for the appellant, Shri V.A. Mohta argued that the order passed by the Chief Justice is amenable to Article 136 of the Constitution of India. Even if it is an administrative order as decided by a three-Judge Bench in *Konkan Rly. Corporation Ltd. v. Mehul Construction co*; it is amenable to Article 136. Learned Senior Counsel for the 1st respondent Shri R.F. Nariman, however, stated that in this case we need not go into this controversy and we made decide the matter on merits on the assumption that Article 136 is attracted. In view of the above stand taken for the respondents, we are not deciding the question of maintainability.

The Arbitration and Conciliation Act, 1996 made certain drastic changes in the law of arbitration. This Act is codified in tune with the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL). Section 11 of the Act deals with the procedure for appointment of an arbitrator. Section 11(2) says that the parties are free to agree to any procedure for appointing the arbitrator. If only there is any failure of that procedure, the aggrieved party can invoke Sub-sections (4), (5) or (6) of Section 11, as the case may be. In the instant case, the arbitration clause in the lease agreement contemplates appointment of a sole arbitrator. If the parties fail to reach any agreement as referred to in Sub-section (2), or if they fail to agree on the arbitrator within thirty days from receipt of the request by one party, the Chief Justice can be moved for appointing an arbitrator either under Sub-section (5) or Sub-section (6) of Section 11 of the Act.

Sub-section (5) of Section 11 can be invoked by a party who has requested the other party to appoint an arbitrator and the latter fails to make any appointment within thirty days from the receipt of the notice. Admittedly, in the instant case, the appellant has not issued any notice to the 1st respondent seeking appointment of an arbitrator. An application under Sub-section (6) of Section 11 can be filed when there is a failure of the procedure for appointment of an arbitrator. This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to appoint the arbitrator or where two appointed arbitrators fail to appoint the third arbitrator. If the appointment of an arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of an arbitrator. The appellant in his application does not mention under which Sub-section of Section 11 the application was

filed. Evidently it must be under Sub-section (6)(a) of Section 11, as the appellant has no case that a notice was issued but an arbitrator was not appointed or that there was a failure to agree on a certain arbitrator. The contention of the appellant might be that the first respondent failed to act as required under the procedure.

Therefore, the question to be considered is whether there was any real failure of the mechanism provided under the lease agreement. In order to consider this, it is relevant to note the arbitration clause in the agreement. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the Court has to respect the terms of the contract entered into by parties and endeavor to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause. Therefore, we do not think that the first respondent in appointing the second respondent as the arbitrator, failed to follow the procedure contemplated under the agreement or acted in contravention of the arbitration clause. Lastly, the appellant alleged that "nomination" mentioned in the arbitration clause gives the 1st respondent a right to suggest the name of the arbitrator to the appellant and the appointment could be done only with the concurrence of the appellant. We do not find any force in the contention.

9. Besides the fact that both the parties are relying upon different paragraphs of Datar Switchgear's case (supra), the contention of the respondents is that there is an agreed procedure under the agreement between the parties for appointment of an arbitrator in terms of Clause 64 which has to be adopted. The loss of right is limited in its operation and the Court would direct the parties to act in terms of the appointment procedure contained in the arbitration clause. It is also contended that the scope of the word "necessary measures" appearing in Section 11(6) of the Act does not empower the Court to make an independent appointment of an arbitrator. The Chief Justice has merely to take necessary measures for enforcing the procedure laid down in the arbitration clause under Sub-section (6) of Section 11 and the parties would still be bound and would have to respect the terms and conditions of the contract entered into between the parties. Distinguishing Datar Switchgear's case which according to the respondents has no application to the facts of the present case, they have also relied upon the judgments in the cases of National Thermal Power Corporation Ltd. Vs. Raghul Constructions (P) Ltd., , J.L. Prasad v. The General Manager, Southern Railway, Chennai 2002 (1) Arb.L.R. 584 (Karnataka), Essel Shyam Communication Ltd. Vs. Union of India and Others, and Modi Korea Telecommunications Ltd. v. Deptt. Of Telecommunications 2001(1) RAJ 289.

10. On the other hand, the petitioners while heavily relying upon Datar Switchgear's case (supra) contended that the forfeiture or loss of right is

absolute and the Court is obliged to appoint an independent arbitrator. The scope of Section 11(6) is squarely answered by the Court in the Datar Switchgear's case. As such, the Court should appoint an independent arbitrator and not permitting the respondents to take advantage of their own default and continue to take recourse to the arbitration clause as it exists. They have relied upon the judgments in the cases of National Thermal Power Corporation, Korba Super Thermal Power Station Vs. Gauri Shankar Agarwal and Co., Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited, , L.K. Verma Vs. H.M.T. Ltd. and Another, , Skanasha Cementation India Ltd. v. Union of India and Ors. Arb.P. 179/2004 decided by this Court on 12th October, 2004, Indian Oil Corporation Ltd. v. Kiran Construction Co. and Anr. CW Nos. 1710, 1719/2002 decided by this Court on 27.9.2002 and Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, . The reference to the referred cases would show that not only different High Courts but even the same High Court particularly different Benches of this Court have taken different view in regard to effect and scope of Section 11(6) of the Act in face of the judgment of the Supreme Court in Datar Switchgear's case. In the judgment of the Constitutional Bench of the Supreme Court in the case of S.B.P. and Co. v. Patel Engineering Ltd. and Anr. 2005 (3) Arb.L.R. 285, the Supreme Court developed the principle and settled the law mainly in regard to whether the power exercisable by the Chief Justice and his nominee under the Act was merely an administrative and was not a judicial power. The Supreme Court also clarified the scope of questions which the Court will and can go into before making a reference. This judgment of the Supreme Court, in no way, touched upon the ambit of the provisions of Section 11(6) particularly in regard to the concept of forfeiture/loss of right to make appointment in terms of arbitration clause. Much can be argued on both sides and as already noticed there are judicial precedents taking divergent views. In face of the judgment of the Supreme Court in Datar Switchgear's case, the High Court could hardly have an option and the only exception would be what is the scope of Section 11(6). Is the Court only to administratively act and called upon the defaulting party to act in accordance with the arbitration clause and thus take necessary steps for that purpose or the Court can appoint an independent arbitrator irrespective of the language of the arbitration clause. The argument raised on behalf of the respondents that what they have defaulted in doing by not appointing an arbitrator within 30 days or even before filing of the petition u/s 11(6), the jurisdiction of the Court would only be to take necessary steps or to appoint arbitrator in terms of the clause, appears to be a submission quite contrary to law. It is too far-fetched for the respondents to argue that if they default in making an appointment of an arbitrator in terms of the arbitration clause within the time afore-indicated, the Court will step in only to perform what they have failed. In other words, the Court would only be able to act and require the parties to adhere to the arbitration agreement. In that event, the entire concept of default would be ineffective and inconsequential. The view taken by the High Courts of Kerala and Karnataka as well as some of the Benches of this Court at least ex facie appears to be not in comity to the judgment of the Supreme Court in Datar Switchgear's

case. This is a question which arises more than often and in number of cases. Keeping in view the divergent views of this Court as well as the other High Courts, in my humble opinion, the cases deserve to be referred to a larger and preferably a full bench as there are DB judgments of this Court as well as the other High Courts and of course a number of Single Bench Judgments taking divergent views.

11. One of the essential facets of this case would be the application of the principle of stare decisis as the Supreme Court in Datar Switchgear's case has clearly spelled out the principle of law i.e. forfeiture or loss of right in the event of default. Once the default is committed and the other party approaches the Court then this accrued benefit can hardly be taken away on the basis that the Court would only act to require the parties to follow the arbitration agreement and the procedure provided therein and still same persons would be appointed as arbitrators. In fact and interestingly, the learned Counsel appearing for the respondents also argued that the loss of right is only depriving the respondents to offer the panel of arbitrators through the contractor requiring him to choose his nominee arbitrator. Even if it is assumed that it is not a complete loss of right but is a partial loss as contended, even then the whole arbitration clause i.e. Clause 64 can hardly be effectively completed. It will not be possible to accomplish the final appointment of the arbitral tribunal. The judicial propriety would require that the views of the Supreme Court in Datar Switchgear's case being a law of the land as contemplated under Article 141 of the Constitution of India should be applied without carving out exceptions and the consequences of default by forfeiture or loss of right may be led to enforce uniformly. The following two specific questions of law need to be considered by the larger Bench:

1. Whether the decision of the Supreme Court in Datar Switchgear's case does not lay down unambiguously that in the event of default of a party making appointment of an arbitrator in terms of the arbitration clause within 30 days or prior to the institution of the petition by the other side, the loss or forfeiture of right would be absolute"

2. Whether on the interpretation of provisions of Section 11(6) of the Act, the Chief Justice or his nominee while discharging judicial functions as spelled out in the case of SBP Co.(Supra) by the Constitution Bench of the Supreme Court, has jurisdiction only to take "necessary measures" for enforcing the procedure laid down in the arbitration clause"

12. The above two questions are important questions of law which come up for consideration of the Court on number of occasions and are even questions of public importance. There are divergent views of this Court which would make it necessary that they are considered by a larger Bench to clarify and settle the position of law in such cases.

13. For the above reasons, it is directed that the papers be placed before Hon"ble the Acting Chief Justice for constitution of a larger Bench and preferably

a Full Bench for consideration.

14. List the matters subject to and after obtaining orders of Hon"ble the Acting Chief Justice on 12th May, 2006.

4. There is discern distinction in the power and procedure provided for appointment of an arbitrator through the intervention of Court as contemplated under Chapter III of The Arbitration Act, 1940 on the one hand and the Act of 1996 on the other. The provisions of Section 20 of the Former Act vest the Court with wide powers in relation to filing of an agreement in Court, making reference of disputes between the parties to the arbitrator mutually agreed, and where the parties cannot agree, to an arbitrator to be appointed by the Court. However, under the New Act, the power and jurisdiction of the arbitral tribunal is much wider and it can determine issues including an issue of its own jurisdiction. Even if the contract is held to be null and void, it shall not entail ipso jure the invalidity of the arbitration clause. The parties could agree and are free to determine the number of arbitrators provided that such number shall not be an even number. The parties are also free to agree on procedure for appointment of the arbitrators in terms of Sections 11(2) and 11(3) of the New Act. Where the parties fail to act in accordance with the prescribed procedure despite notice, any party is free to request the Chief Justice or any person or institution designated by him for appointment of an arbitrator in terms of Sections 11(4) and 11(5) of the Act. Unlike the scheme of provisions of Section 20 of the Old Act, Section 11 contemplates certain consequences of failure of a party to act in terms of the arbitration agreement including the procedure for appointment of arbitrator. The provisions of Section 20 did not provide for any period of limitation or otherwise within which a party is expected to act in response to a request made by the other as per the terms of arbitration clause. But the provisions of Section 11(6) clearly spell out the consequences that shall flow as a result of default by any party to the arbitration clause. Once the party other than the defaulting party invoke the process of Court for appointment of an Arbitrator, then the right of the defaulting party stand forfeited. The forfeiture or loss of right was not contemplated under the provisions of the Old Act. There is considerable variation in the mechanism provided under the provisions of the New Act in relation to appointment of Arbitrator and interference with the proceedings of the Arbitral Tribunal. The parties to the arbitration agreement are expected to act within limitation specified under different clauses of Section 11. It stands clarified by various judicial pronouncements that whenever the party fails to act and appoint an Arbitrator in terms of Arbitration Agreement, within thirty days and in any case prior to the institution of the petition, there is loss of that right to the party which was available to the defaulting party in terms of the arbitration clause before that period. The objects behind enactment of 1996 Act by the Legislature appears, to minimise the judicial intervention and control of the Courts over Arbitral Tribunal and its proceedings. The parties should abide by the terms of the arbitration agreement, there should be expeditious resolution of the disputes between the parties and the award of the Arbitral Tribunal should attain finality.

Thus the provisions of the New Act have to be interpreted and construed independently and not with reference to the provisions of 1940 Act. In certain situation, such an approach may even lead to misconstruction. "In construing a codifying Statute, the proper course, in the first instance, is to examine its language and to ask what is its natural meaning; it is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view..."(refer to Halsbury's Laws of England Vol. 44, 4th Ed.). Even in the case of R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), , the Supreme Court clearly stated the principle that the Court has to ascertain "the intent of them that make it" to interpret the statutory provisions. The literal construction then has, in the general and prima facie preference. It was also stated that what was the defect in the previous law that was sought to be remedied by the law framers and the reason for providing such remedy, are again relevant consideration for interpreting a Statute. In the case of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., , their Lordships of the Supreme Court reiterated the principle that provisions of 1996 Act are very different from 1940 Act and they should be construed and interpreted independently and without being influenced by the principles underlying 1940 Act.

5. Now, we may refer to the provisions of Section 11 of the Act which have necessitated this reference to the larger Bench.

11. Appointment of arbitrators.

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

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

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

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

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

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in Sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from

receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

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

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

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

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

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

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

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

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

(b) Where the matters referred to in Sub-sections (4), (5), (6), (7), (8) and

(10) arise in any other arbitration, the reference to "Chief Justice" in those Sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principle Civil Court referred to in Clause (e) of Sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

6. The bare reading of the above provision shows that the radical changes made in law relating to arbitration are intended to bring it in comity to the international arbitration and trade practices and to ensure expeditious settlement of disputes without much Court's intervention. The object obviously is not to permit the parties to take advantage of their own wrong and frustrate the very object of the Statute. An interpretation which would result in permitting the parties to take advantage of their own wrong or default should be avoided and an interpretation or meaning which would further the objects underlying the provisions should be preferred. The procedure of appointing arbitrator particularly more arbitrators than one itself is a cumbersome and time consuming process. After a party has defaulted despite service of a notice to act in conformity with the procedure agreed between the parties for appointment of Arbitral Tribunal then it may not be just and fair to interpret these provisions so as to place the defaulting party in an advantageous position by requiring that party to take recourse to the methodology for appointment of Arbitral Tribunal which may be cumbersome and time consuming. Like the present case the process can be appointment of a departmental arbitrator, giving notice containing panel of arbitrators out of which the other party is expected to exercise a choice and give two names out of which the department would appoint one arbitrator as arbitrator of the contractor and then to name and appoint third arbitrator/Umpire. All these appointments including the number of Arbitrators again are relatable to the quantum of claim raised by the parties. Before we really get into the process of answering the questions referred to the larger Bench, it will be more appropriate for the Court to refer to the different decisions cited before us by the respective parties. These are judgments of the different High Courts which have taken divergent views. Both the parties have even relied upon the judgment of the Supreme Court in the case of *Datar Switchgears Ltd. v. Tata Finance Ltd.* and Anr. 2000 (3) Arb.L.R. 447.

7. There are two different schools of thought. One which supports the proposition that a party is entitled to make a request to the Chief Justice or a person designated by him u/s 11(6) of the Act to take "necessary measures" as a result of default of other party and in accordance with the procedure provided under the arbitration clause and various Sub-sections of Section 11 of the Act. According to this view, the Chief Justice or the person designated by him cannot appoint an arbitrator but can merely take necessary measures to require the parties to appoint arbitrators in accordance with the arbitration agreement and the procedure provided therein. In simple language, the power of the Court is restricted to direct the parties to take "necessary measures" to appoint an arbitrator in terms of the prescribed procedure. This view was taken in the cases

of B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd. v. Konkan Railway Corporation Ltd. and Anr. 1998 (Suppl.) Arb.L.R. 189, J.L. Prasad v. the General Manager, Southern Railway, Chennai 2002 (1) Arb.LR 584 (Karnataka), National Thermal Power Corporation Ltd. Vs. Raghul Constructions (P) Ltd., , Vindhya Telinklinks Ltd. v. Department of telecommunications and Ors. 2001 6 AD (Delhi) 885 , Bel House Associates (P) Ltd. Vs. General Manager, Southern Railway, Subhash Projects and Marketing Ltd. v. South Eastern Coalfield Limited 1998 (Suppl.) Arb.L.R. 357, Ashok Coal Depot v. South-Eastern Coal Fields Ltd. 2000 (2) Arb.L.R. 286 (MP), Kamala Solvent Vs. Manipal Finance Corporation Ltd., Manipal and Others, and Essel Shyam Communication Ltd. Vs. Union of India and Others, .

8. The other school of thought has taken a divergent view to the effect that provisions of Section 11(6) have to be interpreted so as to couch the Court with wide powers and the expression "necessary measures" is referable and includes seeking appointment of an arbitrator through the Court. This power of court cannot be given a restrictive meaning, as such an interpretation would frustrate the very object of the provision and work to the disadvantage of the party approaching the Court. The other High Courts including some Benches of this Court have taken the view that the Court can appoint an arbitrator on a petition u/s 11(6) and the party in default cannot take advantage as it had abdicated its right to appoint the arbitrator under the terms of the contract. After filing of the petition, the Arbitrator can only be appointed by the Court as it is obligatory upon the Court to appoint an independent Arbitrator in terms of Sub-sections 6 and 8 of Section 11. The Courts have even taken the view that the appointment made during the pendency of a petition is no appointment in the eyes of law and in fact is non est and the aggrieved party has every right to approach the Court for seeking appointment of an independent and impartial arbitrator. Reference in this regard can be made to the judgments in the cases of Deepak Galvanising and Engineering Industries Pvt. Ltd. v. Govt. of India and Anr. 1997 (Suppl.) Arb.LR 635, Naginbhai C. Patel v. Union of India 1999 (2) Arb.L.R. 343, Continental Construction Ltd. v. National Hydroelectric Power Corporation Ltd. 1998 (1) Arb.L.R 534, B.W.L. Ltd. v. M.T.N.L. and Ors. 2000 (2) Arb.L.R. 190 and Marine Container Services (South) Pvt. Ltd. v. Atma Steels Ltd. 89 (2001) DLT 355.

9. It will be useful to discuss at this stage itself, the judgments relied upon by both the petitioner and the respondent before the court. B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd. v. Konkan Railway Corporation Ltd. and Anr. 1998 Supp Arb.L.R. 189, Subhash Projects and Marketing Ltd. v. South Eastern Coalfield Limited 1998 Suppl Arb.L.R. 357, Ashok Coal Depot v. South-Eastern Coal Fields Ltd. 2000 (2) Arb.L.R. 286 , Essel Shyam Communication Ltd. Vs. Union of India and Others, , Deepak Galvanising and Engineering Industries Pvt. Ltd. v. Govt. of India and Anr. 1997 (Suppl.) Arb.LR 635, Naginbhai C. Patel v. Union of India 1999 (2) Arb.L.R. 343, Continental Construction Ltd. v. National Hydroelectric Power Corporation Ltd. 1998 (1) Arb.L.R 534 and B.W.L. Ltd. v.

M.T.N.L. and Ors. 2000 (2) Arb.L.R. 190 (Delhi, are the judgments relied upon by both parties which were prior to the pronouncement of the judgment of the Supreme Court in the case of Datar Switchgear" case (supra). The judgments in the cases of Vindhya Telelinks Ltd. v. Department of telecommunications and Ors. 2001 6 AD (Delhi) 885 , Bel House Associates (P) Ltd. Vs. General Manager, Southern Railway, , Kamala Solvent Vs. Manipal Finance Corporation Ltd., Manipal and Others, and Marine Container Services (South) Pvt. Ltd. v. Atma Steels Ltd. 89 (2001) DLT 355, are the ones which were pronounced post Datar Switchgear"s case (supra) but the respective High Courts have not considered the said judgment while deciding the issue. The High Courts of Karnataka and Kerala in the cases of J.L. Prasad v. the General Manager, Southern Railway, Chennai 2002 (1) Arb.LR 584 (Karnataka) and National Thermal Power Corporation Ltd. Vs. Raghul Constructions (P) Ltd., respectively had referred to the judgment of the Supreme Court in Datar Switchgear"s case (supra) and had taken the view that the Court is not vested with the power to appoint an independent arbitrator in terms of Section 11(6) of the Act.

10. In our view, the judgment of the Supreme Court in Datar Switchgear"s case (supra) has a material bearing on the matter in issue before us. In fact both the parties have heavily relied upon the said judgment. The respondents have relied upon para Nos. 13,14, 17, 18, 19 and 23 while the petitioners have heavily relied upon para Nos. 19, 20, 21 and 27 of the Datar Switchgear"s judgment. It also needs to be noticed at this juncture that the view taken by the Supreme Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., was overruled by a larger Bench of the Supreme Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . The majority view of the Supreme Court which overruled the Konkan Railway"s case recorded its conclusion inter alias as under:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India u/s 11(6) of the Act is not an administrative power. It is a judicial power.

(iv)The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(ix)In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Railway Corporation Ltd. and anr. v. Rani Construction Pvt. Ltd.* JT 2000 (Suppl.2) SC 150 and orders u/s 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus so far made, are to be treated as valid, all objections being left to be decided u/s 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications u/s 11(6) of the Act.

(xii) The decision in *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.* (supra) is overruled.

11. The relevance to mention this aspect is primarily for the reason that the various High Courts while defining the power of the Court u/s 11(6) had heavily relied upon the observations of the Supreme Court in the case of *Konkan Railway Corporation Ltd.* (supra). In the case of *M/s. SBP and Co.* (supra), the Supreme Court has clearly altered the law as it stood after the judgment of the Supreme Court in *Konkan Railway's* case (supra) in its administrative and legal application. The law enunciated in *Konkan Railway's* case (supra) being no longer a good law, the provisions of Section 11(6) would have to be construed in the light of and by correct application of the principles stated by the Supreme Court in cases of *M/s. SBP and Co.* and *Datar Switchgear* (supra).

12. As the judgments of the Supreme Court in cases of *M/s. SBP and Co.* and *Datar Switchgear* (supra) have a material bearing on the matter in controversy before us and in our opinion they are substantially applicable to the facts and circumstances of the present case, reference can be usefully made to the principles governing the field of precedent.

13. It is a settled canon of interpretation of Statutes that there exists a presumption as regards the constitutionality of a Statute as well as that every provision of the Statute is meaningful and intends to achieve the object of the Act. Once the provisions are free from vagueness or ambiguity, they must be given their plain meaning while certainly not loosing the intent of the framers of law. Doctrine of *stare decisis* requires the Court to pin-point its attention to the ratio of the cases and once the principle is settled by the highest Court of the land, then other Courts have to apply the same in its correct ratio to the cases involving the same question. The Supreme Court in the case of *Suganthi Suresh Kumar Vs. Jagdeeshan*, stated that a judgment of the Supreme Court laying down a legal proposition is binding on the High Court and it is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the legal proposition without considering any other point. Placing emphasis on the application of judicial precedent, the Supreme Court reiterated the need not to place reliance upon the decisions without discussing the factual situation which would attract application of principles stated in the judgment relied upon by the party. It was said "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations

of Courts are not to be read as Euclid's theorems nor as provisions of the Statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as Statutes. To interpret words, phrases and provisions of a Statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret Statutes, they do not interpret judgments. They interpret words of Statutes, their words are not to be interpreted as Statutes. (Refer Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, . Even in the case of Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, , with great emphasis, the Supreme Court said that the High Court could not ignore the judgment of the Supreme Court merely by recording that the relevant provisions were not brought to the notice of the High Court particularly when the decision had direct bearing on the case. The judgment has to be read and understood as it is written. Interpretation of a judgment is not a well-accepted concept of judicial discipline. A decision is authority for what it actually decides. It must be read as applicable to the facts without assumptions. Enunciation of the reasons and the principles on which a question before the Court has been decided, is binding. Once a clear finding or a conclusion is recorded by the Court for the reasons recorded therein, then, it would cover such issue before the Court on the strength of principle of ratio decidendi and Article 141 of the Constitution of India. It is even said that the precedent by long recognition may mature into rule of stare decisis. (refer Union of India (UOI) and Others Vs. Dhanwanti Devi and Others,

14. The above principles are, in no way, derivative but have been inculcated from established principles which relate to judicial propriety in its hierarchy. These principles are not Apices Jurisdiction Non Sunt Jura but are substantive principles of interpretative process and judicial discipline. Thus, the foremost consideration may be to state what is the dictum of the Supreme Court in the cases of M/s. SBP and Co. and Datar Switchgear (supra). The material issues of the present cases have to be examined and decided in the light of these decisions as they have materially altered the legal principles relating to jurisdiction of Courts and arbitral tribunal under the Arbitration and Conciliation Act, 1996.

15. The facts in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. (supra) were that appellant before the Supreme Court had entered into a lease agreement with the first respondent in respect of certain machineries. Disputes arose between the parties and the first respondent had sent a notice to the appellant on 5.8.99 demanding payment of Rs. 2,84,58,701/- within 14 days and in the notice, it was also stated that in case of failure of payment of the said amount, the notice be treated as one issued under Clause 20.9 (arbitration clause) of the lease agreement. The appellant did not pay the amount while respondent No. 1 did not appoint the Arbitrator in terms of that clause within 30 days. The respondent in fact, filed an Arbitration Petition u/s 9 on 26.10.1999 claiming interim protection. On 25.11.99 respondent no.1 appointed respondent no.2 as sole Arbitrator by invoking Clause 20.9 of the lease agreement and the

Arbitrator in turn issued a notice to the appellant asking them to make their appearance before him on 13.3.2000. In the meanwhile, the appellant also filed an arbitration application before the Chief Justice of Bombay High Court and prayed for appointment of another Arbitrator which was opposed by the first respondent. The prayer of the appellant was rejected by the Chief Justice holding that the Arbitrator had already been appointed, there was no default on the part of the respondent and thus the petition was not maintainable. Considering the rival contentions raised by the learned Counsel appearing for the parties, the Supreme Court also considered the effect of the provisions of Sub-sections 4, 5 and 6 of Section 11. The arbitration clause contemplated appointment of a sole Arbitrator whose award will be final and binding between the parties. According to the appellant, there was a default on the part of the respondents as they did not appoint Arbitrator within 30 days, as such they made a prayer before the Court for appointment of an independent Arbitrator. Their Lordships of the Supreme Court observed that when the parties have entered into a contract and settled a procedure, due importance has to be given to such procedure and parties are bound by the arbitration agreement. It may be noticed that various Sub-sections of Section 11 were the matter of consideration before the Supreme Court. In Paragraph 18 of the judgment, the Court formulated a question in relation to application and scope of provisions of Section 11(6) which reads as under:

18. In the present case the respondent made the appointment before the appellant filed the application u/s 11 but the said appointment was made beyond 30 days. Question is whether in a case falling u/s 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand

16. While answering the above question and discussing various Sub-sections of Section 11, the Supreme Court held that the respondents in that case were not in default and had complied with the procedure and appellant was not entitled to the relief prayed for, still enunciated the principles of law as under:

19. So far as cases falling u/s 11(6) are concerned " such as the one before us " no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed u/s 11(4) and Section 11(5) of the Act. In our view, Therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court u/s 11, that would be sufficient. In other words, in cases arising u/s 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application u/s 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

17. The above decision of the Supreme Court is neither obiter nor per incuriam

as contended by the respondents. In this judgment, the Court has considered the arguments raised, the law on the subject and thereafter has recorded its conclusions as to when the right of the defaulting party to appoint arbitrator in accordance with the terms of the arbitration clause, shall cease. The Court has considered the extent, time and consequences of such defaults. This decision, thus, clearly settles a principle of law which is to be followed by the Courts.

18. In the case of M/s. SBP and Co. v. M/s. Patel Engineering Ltd.(supra), the Supreme Court has categorically held that the powers exercised by the Chief Justice or a person designated by him u/s 11(6) are not administrative powers but are judicial powers. Of course, it was also stated that once the matter reaches the Arbitral Tribunal or the sole Arbitrator, the High Court could not interfere with the orders of the Arbitral Tribunal and leave the parties to approach the Court under Sections 37 and 34 of the Act. The Arbitral Tribunal which has been constituted in terms of Section 11(6) would have complete jurisdiction and powers to decide all matters as contemplated u/s 16 of the Act. The view taken by the Supreme Court in the case of Konkan Railway Corporation. Ltd. and Anr. v. Rani Construction Pvt. Ltd. (supra) was specifically overruled. The majority view of the Supreme Court in the case of M/s SBP and Co.(supra) has far-reaching ramifications inasmuch as the entire law relating to scope of power and jurisdiction of the Chief Justice or a designated Judge in terms of Section 11(6) stands radically changed. Exercise of judicial powers can hardly be equated to administrative powers. They operate in diverse fields and have entirely different limitations and distinct consequences. The exercise of judicial power unlike an administrative power, judiciously determines the right and liabilities of the parties to a lis and it has to be in consonance with the procedural law. Power of the Court available to it under the provisions of law or enunciated principles by judgments of Superior Court can hardly be circumscribed by interpretative process.

19. The arbitration agreement and proceedings of arbitral tribunal are based on mutuality and confidence. The parties enter into an agreement and expect that independent and neutral person would act as arbitrator in which both of them would have confidence. That is the precise reason as to why the law gives liberty to the parties not only to appoint arbitrator but even specify the procedure which they wish mutually to follow while appointing an arbitrator. There are different procedures for appointing an arbitrator. The arbitrator could be appointed by agreement of parties, which is one of the most satisfactory ways of composition of arbitral tribunal. Where arbitration clause provides for appointment of arbitrator as well as the procedure for such appointment and the parties do not agree or fail to act, then in some cases the control may pass to an appointing authority and if there is default by that authority or even otherwise, the control in relation to appointment of arbitrator may pass to the Court. Statutory appointment procedure is a well- known and accepted principle in the modern arbitration jurisprudence. In such cases, the Statute may control the procedure and appointment of arbitral tribunal. Failure of a party to comply with the

conditions referred to in the provisions of law, itself may compel the parties to take recourse to statutory provisions for appointment of arbitrator, by approaching the court of law. The break-down of any appointment procedure can easily be resolved by an application to the Court in accordance with law. Time for appointment of arbitrator can also be the essence by way of contract and more particularly when it is specified in a Statute. (Russell on Arbitration, 22nd Edition).

20. There can be cases where the arbitration agreement itself specifies the time within which an arbitrator must be appointed. It could also state that in default, a party may lose its right to select him. In other cases, in addition or otherwise, different time limits may be provided by the provisions of law themselves.

21. The bare reading of provisions of Section 11 of the Act shows that failing any agreement as contemplated under Sub-section (2), each party to the arbitration may appoint one arbitrator and the two arbitrators may appoint the third arbitrator who shall act as the presiding arbitrator. If the parties acting under Sub-section(3) do not appoint an arbitrator within 30 days from the date of the request received or the two arbitrators so appointed fail to agree on the third arbitrator within 30 days, then the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

22. Sub-Sections (1) and (2) of Section 11 indicate the freedom available to the parties in regard to number and procedure for appointing the arbitrators and no fetter has been put on the parties to an arbitration agreement. The parties are expected to adopt a procedure which is practical and does not offend any substantive law. Parties may name a sole arbitrator, they may agree that a third person or an institution would appoint arbitrator or may detail any other valid mechanism for appointment and adjudication of the disputes which have arisen between the parties. This freedom is subject to the limitation imposed under the provisions of the Act and particularly under Sub-Sections (3) to (12) of Section 11 itself. The Statute itself provides the consequences, if a party refuses to act or does not act as per the agreed procedure and within the time specified under these provisions. A defaulting party could hardly be permitted to insist that the arbitrator should be appointed as per the procedure indicated in the arbitration clause as it may amount to giving premium on default. The agreed procedure or mechanism gets exhausted with the default of a party which refuses to act or does not act or appoint the arbitrator despite a notice and particularly prior to the presentation of a petition before the Court. Of course, default and/or failure of a party would be a pre-requisite for invoking the relevant provisions of Section 11 and to a prayer for appointment of an arbitrator by Court.

23. An arbitration clause primarily is the result of a mutual agreement between the parties and should have ingredients of a valid contract. Once the parties fail to adhere to the procedure provided for appointment of an arbitrator, their default is likely to bring the subject from realm of contract to the provisions of a Statute. Cessation of a right to appoint an arbitrator is the result of a default.

This is a binding principle of law. To argue that the Court would have no jurisdiction to appoint an arbitrator while entertaining an application u/s 11(6) of the Act and where default of a party is established, would amount to curtailing a power which even otherwise would be vested in the Court in accordance with the provisions of the Statute and practice of the Court. The dictum of the Supreme Court settles the law beyond ambiguity that there is loss of right to appoint an arbitrator for the defaulting party. An interpretation which would curtail the jurisdiction of the Court should not be adopted and particularly when the provisions of the Statute do not specifically provide for such curtailment of power. The words of a Statute are first understood in their natural, ordinary or popular sense. They should be construed according to their grammatical meaning unless such meaning would lead to absurd results. Justice G.P. Singh in his book "Principles of Statutory Interpretation" Ninth Edition") has noticed the following established principles of interpretation of Statutes.

The true way"`, according to LORD BROUGHAM is, `` to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered"; and in the words of VISCOUNT HALDANE, L.C., if the language used ``has a natural meaning we cannot depart from that meaning unless, reading the Statute as a whole, the context directs us to do so."` In an oft-quoted passage, LORD WENSLEYDALE stated the rule thus:

In construing wills and indeed Statutes and all written instruments, the grammatical and ordinary sense of the word is adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, and inconsistency, but no further.

24. Remedial or welfare legislations should normally be construed liberally as they must give benefit to the persons or class of persons for whom they are enacted and the mischief is remedied and not perpetuated. Strict construction may lead to curtailment of application of law. Where the legal thrust of an enactment yields a beneficial result, the interpretative factors may, on balance, indicate that the Court should widen its application, thus leading to the application of principles of liberal construction. Unlike a penal Statute, procedural and remedial provisions upon liberal construction should be given a meaning or interpretation which would help in advancing the cause of the Statute, rather than creating impediments in expeditious resolution of disputes.(Francis Bennion on Statutory Interpretation, Third Edition).

25. In a liberal construction of a Statute, its meaning can be extended to matters which come within the spirit or reason of law or even the evils which the law seeks to suppress or correct. It is equally true that a Statute cannot be given a meaning inconsistent with or contrary to the language used by the legislature. It is also the duty of the Court to avoid any clash between two Sections of the Act

and to construe the provisions which appear to be in conflict with each other in such a manner so as to harmonise them while keeping in view the purpose of the Act.

26. The language of Section 11(6) clearly postulates, "failure on the part of the parties including an institution to adhere to the procedure or any function entrusted to it for appointment of an arbitral tribunal". Such default is sine qua non for passing of any orders by the Chief Justice or a person designated by him upon presentation of a request in accordance with law. The expression "necessary measures" cannot be given a restrictive meaning. This expression has to be read in conjunction with the heading of the Section which is "appointment of arbitrators". The wider interpretation of this expression can also be justified with reference to Section 11(8) of the Act where the Court may require the parties or make queries with regard to the qualification acquired by an arbitrator or other considerations which are likely to secure an appointment of an independent and impartial arbitrator. Section 11 is a complete procedure in itself which gives right to a party to move the Court, provides for consequences of default as well as the authority or forum before which such a petition would lie. The expression "necessary measures" cannot be read so as to exclude from its ambit and scope, the power to pass an order appointing an arbitrator. There is nothing in the language of Section 11(6) which by specific language or by necessary implication requires exclusion of an order appointing an arbitrator. This expression needs to be construed liberally and in fact would take within its ambit an order appointing an arbitrator. The judicial power of the Court as contemplated u/s 11(6) cannot be circumscribed by such limitations which are not ousted by use of specific language of the provision. As per settled principles, neither *Actus legitiminon non recipient modum* nor *Jus Ex injuria non oriundus*. To read limitations into jurisdiction of the Court and to give advantage to a defaulting party, would be an approach not in consonance with the spirit of the law. Under the terms of arbitration agreement, a right vests in a party to appoint an arbitrator solely or in accordance with the prescribed procedure under the contract. Once the party commits a default, then its right suffers from a defect which gives a legal right to the other party to approach and make a request to the Chief Justice or the person designated by him for taking necessary measures which obviously would include appointment of an arbitrator. Unless the Court in its discretion directs an institution to secure the appointment of an arbitrator in accordance with the agreement provided, only if such institution is not a defaulter within the meaning of Section 11(6) of the Act. The provisions of Section 11(6) deal only with the freedom of the parties to enter into an arbitration agreement, procedure for appointment of an arbitrator and ultimately appointment of arbitrator by the Court in the event of default. To read provisions of Section 11(6) in conflict with the heading of the Section or to unnecessarily restrict the scope of the power of the Court, would not be permissible. To say that the Court has to request a party in default to adopt the procedure prescribed under the contract for appointment of an arbitrator, would certainly

tantamount to putting a premium on default. It would further inordinately delay the commencement and conclusion of proceedings before the arbitral tribunal. Neither of these appear to be the intent of the Legislature. The "other means of securing the appointment" if provided under the agreement obviously cannot refer to condensation of default of a party to the arbitration agreement. It has to be a party or institution other than the defaulting one. For example, in some cases, the parties have to appoint arbitrators and in default of their agreement, an institution may be called upon to appoint an arbitrator(s) as postulated under the agreement. If parties commit such default and do not even approach the institution, then in such case, the Court may in its discretion not appoint an arbitrator itself and direct the said institution to make appointment of an arbitrator. But on no prudent principles of interpretation, it can be construed that though there is cessation or complete loss of right of the defaulting party but the Court will still have no jurisdiction to pass an order directing appointment of an arbitrator.

27. We have already noticed that the judgments which have been pronounced without taking notice of the above two judgments of the Supreme Court, need not be commented upon by us in this judgment. The judgments of various Courts declaring contrary view and which are prior to the pronouncement of the judgment of the Supreme Court in Datar Switchgear's case also cannot be said to be good law. The judgments which have followed the judgments of the Supreme Court in the said cases and have taken the view which we have taken, obviously call for no further analysis. However, in regard to the judgments of different Courts which have discussed the judgment of the Supreme Court in Datar Switchgear's case but have given two different conclusions, we consider it our pious duty to refer to these judgments and deal with them in some detail.

28. In the case of Datar Switchgear (supra), the Supreme Court was concerned with the provisions of Section 11(6) and after taking due notice of those provisions, the Court had enunciated the law in regard to the situation in which right of the opposite party ceases. It may be noticed that their Lordship's of the Supreme Court clearly denied the relief to the petitioner for the reason that there was no default on the part of the party as contemplated u/s 11(6) of the Act. Appointment had been made prior to filing of the petition and the Court also held that merely because 30 days period had lapsed would not forfeit the right of a party to appoint an Arbitrator. The stringent condition of 30 days as contemplated under Sub section 4 and 5 of Section 11 of the Act was not applied *stricto sensor* to the provisions of Sub section 6 but was extended till prior to the presentation of the petition but once that condition was satisfied, loss of right was complete and definite.

29. In the case of M/s Bel House Associates Pvt. Ltd. (supra), the *Ld. Single Judge* of the Kerala High Court had taken the view that Court cannot appoint an arbitrator and has to implement the laid down procedure. While arriving at this conclusion, the Court had differed from the view taken by Andhra Pradesh High

Court, Bombay High Court and Delhi High Court and had preferred to rely upon the view taken by the Madhya Pradesh High Court and gave narrower interpretation to the expression "necessary measures". It may be noticed that the entire reasoning of the learned Judge was based upon the judgment of the Supreme Court in Konkan Railway Corporation Ltd's case. (supra) wherein it had been held that the Chief Justice discharges an administrative function while entertaining a request u/s 11 of the Act. The said view being no longer a good law, the view taken by the Kerala High Court in that case can hardly be followed.

30. A Division Bench of Kerala High Court in the case of National Thermal Power Corporation Ltd. Vs. Raghul Constructions (P) Ltd., , had also taken the similar view. The Division Bench on the one hand took a view that decision in the case of Datar Switchgear Ltd's case. (supra) was inapplicable to the facts of that case and said that the Court has to give due importance to the procedure agreed to between the parties and on the other hand while again relying upon the judgment of the Supreme Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., , concluded that the Single Judge of that Court should have taken necessary measures for securing appointment on the basis of prescribed appointment procedure. With respect, we are unable to contribute to the view taken by the Division Bench. We are of the considered view that the judgment of the Supreme Court in Datar Switchgear's case (supra) applies to such cases by virtue of ratio decidendi and there is no necessity for us to interpret or clarify the judgment of the Supreme Court, which is unambiguous and explicit in its language. The Single Bench of the Karnataka High Court in the case of J.L. Prasad v. The General Manager, Southern Railway, Chennai (supra), has also taken the same view for the reason that the term "necessary measures" will refer to the enforcement of the appointment procedure and not ignoring the appointment procedure. While stating that the Court will have to adopt the stated procedure for appointment of arbitrator in a petition u/s 11(6), it also held that the decision of the Supreme Court in Datar Switchgear's case was of no assistance to determine the scope of the words "necessary measures" appearing in Section 11(6) of the Act. In our humble opinion, both the stated reasons are contrary to the spirit as well as the specific language of the judgment of the Supreme Court in Datar Switchgear's case. In fact, the judgment of the Karnataka High Court has completely ignored the concept of loss of right and its consequences. Thus, we can also not contribute to the view taken in this judgment. The Bombay High Court, High Court of Andhra Pradesh and various Benches of this Court have given wider interpretation to the provisions of Section 11(6) and held that the Court has the power to appoint an Arbitrator. Different Benches of this Court even without or while referring to the judgment of the Supreme Court in Datar Switchgear's case have taken the view that a party, who has defaulted to appoint an arbitrator despite service of notice and even prior to filing of the petition, cannot seek any advantage before the Court and the Court should appoint an Arbitrator while taking note of various conditions indicated by the framers under these provisions.

31. We may also refer to the judgment of the Supreme Court in the case of *Shin Satellite Public Co. Ltd. v. Jain Studios Limited* JT 2006 (2) SC 89 where the Court while applying the principle of "substantial severability" and not "textual divisibility" observed that even if some terms of the agreement, though executed as valid agreement, to the knowledge of parties were invalid, to the extent the agreement is valid and lawful, while leaving the offending part, can be enforced before the Court of law. The Court while declining to give benefit to the defaulting party of its mistake in appointing arbitrator, held as under ;-

34. Finally, it was submitted by the respondent that if this Court is not upholding the objection of the respondent and is inclined to grant the prayer of the petitioner, some time may be granted to the respondent to make an appointment to an arbitrator. It was not done earlier because according to respondent Clause 23 was not enforceable. The learned Counsel for the petitioner objects to such a prayer. According to him, a letter/notice was issued and in spite of request by the petitioner, the respondent had failed to exercise his right to appoint an arbitrator. At this belated stage, now, the respondent cannot be permitted to take advantage of its own default. In my opinion, since there is failure on the part of the respondent in making an appointment of an arbitrator in accordance with the agreement, the prayer cannot be granted.

32. These legal principles clearly demonstrate that a party cannot be permitted to take advantage of its own wrong and in any case, the Court cannot come to the aid of such defaulting party much less it would perform on behalf of the defaulting party in terms of the arbitration agreement. There is complete loss of right of the defaulting party and it cannot be permitted to plead that despite default, the procedure of arbitration clause would still subsist, unless in the opinion of the Court it was possible to appoint an arbitrator by recourse to other measures not attributable to the defaulting party.

33. It is argued on behalf of the respondent with some vehemence that:

(a) the judgment of the Supreme Court in *Datar Switchgear's* case (supra) does not annunciate any principle of law. The same in any case is an obiter and/or per incuriam and thus cannot apply to the facts of the present case.

(b) the judgment of the Supreme Court, even if applicable, it is only the right of the respondent that ceases but the procedure to appoint remains intact and thus is enforceable leaving the Court with no option to appoint an independent arbitrator.

(c) the contract relates to technical work and as such, it would be just and expedient to follow the procedure provided for appointment of technical arbitrator and the Court would not appoint an arbitrator.

34. We would deal with last contention first. The contention is without merit and in fact completely ignores the provisions of Section 11(8) of the Act. The Court while appointing an Arbitrator or taking necessary measures for appointment of

an arbitrator in terms of Section 11(8) shall have due regard to any qualifications required for the arbitrator by agreement between the parties as well as other considerations, to secure appointment of independent and impartial arbitrator. The essence for exercise of this power is to secure appointment of an independent and impartial arbitrator, who may be best suited keeping in view the nature of dispute between the parties. Reference can also be made to the provisions of Section 26 of the Act where even an arbitrator or an arbitral tribunal has the power and authority to appoint an expert to help the tribunal on a specific issue unless it is otherwise specifically agreed by the parties. The discretion of the arbitral tribunal to seek assistance on technical subjects, thus, is well accepted under the provision itself. In face of these statutory provisions, learned Counsel appearing for the respondent have not been able to demonstrate as to how the contract between the parties would impinge upon the power of the Court as contemplated u/s 11(6) of the Act. We, thus, find no merit in this contention.

35. The other two contentions raised on behalf of the respondent can be dealt with together. We have already held that there is complete and definite loss/cessation of right in the event a party defaults in appointing an arbitrator within 30 days or at best prior to filing of a petition before the Court u/s 11(6) of the Act. Now we need to dilate only on the contention that where there is cessation of right, whether the Court in the facts and circumstances of the case, would have a right to appoint an independent and impartial arbitrator itself or not.

36. Clause 64 of the General Terms and Conditions, which was accepted by the parties, deals with appointment of an arbitrator and procedure to be adopted for that purpose. The fine distinction sought to be created between the power to appoint and procedure to appoint can hardly hold the ground. In cases of default or forfeiture or loss of right to appoint an arbitrator would normally take away the power to appoint an arbitrator. Consequently in those cases, it would also render the prescribed procedure uncertain and ineffective. The dissection of power and procedure would hardly be permissible for the reason that they are inter-dependent and so intermingled that their severability would hardly be possible. The contention of partial forfeiture or loss of right can hardly be justified in view of the scheme of the Act and the purpose sought to be achieved by the legislature.

37. The power to appoint cannot be read de hors the procedure prescribed for exercise of such powers. They have to be read and construed together so as to give complete effect to the provisions relating to appointment of Arbitrators. As already noticed, Clause 64 deals with demand for arbitration and appointment thereof. It also spells out the procedure. The object of Clause 64 shows that parties are intending to expeditious commencement and conclusion of arbitration proceedings as it even provides time for filing of claims, counter claim and time limitation for appointment of an arbitrator. Under Clause 64 (3)(a)(i), Arbitral Tribunal consists of a sole arbitrator, who shall be either the General Manager or

a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in this behalf. The Arbitral Tribunal has to be appointed within 60 days from the date when written request is received from the contractor provided the claim do not exceed Rs. 10 lakhs. Under Clause 64(3)(a)(ii), where the claims exceed the said amount of Rs. 10 lakhs, a panel of three arbitrators is to be appointed. For that purpose after receiving the request from the contractor, the Railway has to send a panel of three names or more to the contractor who suggests up to 2 names out of the panel and the General Manager has to appoint at least one out of them as contractor's nominee and remaining arbitrators would be appointed by the General Manager and he has also to indicate as to who will be the presiding arbitrator. The right thus available to the respondents including the General Manager of Railway is one composite right and is incapable of being severed. The contention of the respondents that there is a distinction between power and procedure as contemplated under the arbitration clause is without merit. It is apparent that loss of power is bound to affect the procedure.

38. learned Counsel appearing for the respondents argued that they had only lost the right to appoint and the procedure will still be enforceable. Once the right to offer a panel is lost, which has an inbuilt element of discretion and choice with the respondent then rest of the prescribed procedure cannot be implemented. It is a composite procedure and loss of right would make the procedure a non-starter.

39. Admittedly, notices were served upon the respondents stating the disputes and request was made for appointment of arbitrator. There is no dispute that in Arb. P. No. 217 and 219 of 2005 no steps were taken by the respondents. However, in Arb. P. No. 213/2005 after the petition was filed and the respondents had appeared, they had offered a panel of arbitrators, which was not accepted by the petitioner in view of the stand taken before the Court. The default on the part of the respondents, thus, in fact was not even in dispute. Despite such default, if jurisdiction of the Court is said to be only to take measures to request the defaulting party to follow the procedure provided for appointment of arbitrator under the terms of the agreement, then it would not only be travesty of justice but would defeat the very purpose and object of the Act as well as the arbitration clause i.e. Clause 64. This arbitration clause provides various time limits for performance of different steps to ensure expeditious completion of arbitral proceedings. The loss of right, in the facts of the present cases, thus, arises both from default of contractual terms and non-compliance to the statutory provisions. There is no justification before us explaining the default of the respondents though in view of the settled principles of law, it would hardly be material. The order of the court directing the party to take recourse to the prescribed procedure would be unfair as it will be an exercise which will spread over months and would unduly delay completion of the proceedings. The arbitration process and objectivity of the amended law for expeditious resolution of dispute would be rendered ineffective. In face of loss of right, the compliance to the remaining procedure of the clause would become impracticable. If all that

the Court has to do is to call upon the respondents to follow all over again the procedure for appointment of arbitrator in their own discretion, then it would not only cause delay and bring stalemate in implementation of the clause but would also provide advantage to the respondents for their own default and thus would frustrate the very object and essence of the Arbitration and Conciliation Act, 1996. Under the procedure, choice of arbitrators, choice of panel and appointment of arbitrators even after option exercised by the contractor, entirely vests in the respondent authority. Restoring this choice to the respondents on the pretext that they have only lost the right to make appointment but the procedure for appointment would still have to be adopted and followed strictly, would raise a question as to what right in fact the respondents have lost" Cause of action for making a petition u/s 11(6) arises only when a party or an institution fails to comply with its obligation under the terms of the arbitration clause. The respondents certainly cannot be placed in a better position than what they were despite their default. Therefore, acceptance of respondents' contention would lead to adverse and absurd consequences.

40. Thus, we record our answer to the two questions referred to the larger Bench as follows:

(i) Once the party, which has been served with the demand notice in terms of arbitration clause, fails or refuses to act in making appointment in terms of arbitration clause within 30 days or in any case prior to institution of a petition by the other side u/s 11(6) of the Act, then its right to make such appointment ceases or is forfeited. Such cessation is absolute in terms of the judgment of the Supreme Court in Datar Switchgears" case (supra) and cannot be revived.

(ii) The court has jurisdiction to take necessary measures in terms of Clause 11(6) of the Act and this expression would take within its ambit and scope, the power to make appointment of independent and impartial arbitrator with reference to the accepted arbitration clause, unless the court in its discretion directs an institution specified in the arbitration clause not in default, to make such an appointment.

41. Having answered the posed questions, now we direct that these cases be placed before the learned Single Judge for disposal in accordance with law.