
(2006) 04 DEL CK 0109

In the Delhi High Court

Case No : Arbitration Petition 217 and 219 of 2005

HBHL-VKS (J.V.)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-04-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(2), 11(4), 11(5), 11(6)
Constitution of India, 1950 — Article 136, 141

Citation : (2006) 2 ARBLR 331 : (2006) 90 DRJ 181

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Vivekanand, Sandeep Sharma, Dalip Kapoor and Biswajit Singh, for the Appellant; Gitanjali Mohan and Aeltemesh Rein Advs., for the Respondent

Final Decision : Disposed Off

Judgement

Swatanter Kumar, J.—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 another).

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 of 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(1)(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 alia 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. Corpn. 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) AL.R. 584 , 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) AL.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 12thMay, 2006.