
(2015) 04 KL CK 0067

In the High Court Of Kerala

Case No : Arbitration Request Nos. 67, 68 and 69 of 2014

IVRCL Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 11(6), 11(8)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

Citation : (2015) 04 KL CK 0067

Hon'ble Judges : P. Bhavadasan, J

Bench : Single Bench

Advocate : K.L. Varghese, Senior Advocate, Santha Varghese, Rahul Varghese and Ranjith Varghese, for the Appellant; N. Nagaresh, Assistant Solicitor General and S. Krishnamoorthy, CGC, Senior Panel Counsel, Advocates for the Respondent

Final Decision : Disposed off

Judgement

P. Bhavadasan, J—The applicant has approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of an Arbitrator to resolve the dispute between the petitioner and the respondent.

2. The petitioner had contracted for three works relating to Ezhimala Naval Academy and they are, Agreement No. 7/2005-06 which gives rise to A.R. No. 69 of 2014, Agreement No. 8/2007-08 which gives rise to A.R. No. 67 of 2014 and Agreement No. 9/2005-06 which gives rise to A.R. No. 68 of 2014. Agreement No. 7/2005-06 relates to the work of the main building, Agreement No. 8/2007-08 relates to large scale construction and Agreement No. 9/2005-06 relates to residential quarters, each valued at Rs. 125 Crores, Rs. 32.65 Crores and Rs. 62.76 Crores respectively. The time for completion of the work was 24 months with respect to Agreement Nos. 7/2005-06 and 8/2007-08 and 18 months with respect to Agreement No. 9/2005-06.

3. The petitioner would aver that during the work, several deviations and

changes were incorporated by the respondent and large number of revisions of drawings had to be made in all these cases. This has caused the work to go beyond the stipulated period and several extensions had to be given. Several other factors intervened and delayed the progress of the work which has been specified in each of the petitions. It is not necessary for the purpose of these applications to narrate them in detail in this order.

4. The petitioner would contend that the economic viability of the agreement would depend upon the completion of the work. The inordinate delay in completing the work, mainly due to the conduct on the part of the respondent, resulted in considerable increase of cost of construction. According to the petitioner, usually in these types of contracts, an escalation clause will be provided. But for reasons best known to the respondent, it was conspicuously absent in the agreements on hand. The petitioner would assert that as per the various decisions of the various High Courts and Apex Court in such cases, the contractor is entitled to enhanced rate especially when the period for completion of work has been extended by the other party. The various communications sent to the respondent are produced in these applications. It is pointed out by the petitioner that as far as Agreement No. 7/2005-06 is concerned, there were 1250 revised drawings and Agreement No. 8/2007-08 is concerned, there were 75 revised drawings. In Agreement No. 9/2005-06, there were 70 revised drawings. With respect to Agreement No. 7/2005-06, 92% of the work had been completed and with respect to Agreement No. 8/2007-08, the entire work has been completed and with respect to Agreement No. 9/2005-06, 84% of the work had been completed. With respect to Agreement No. 7/2005-06, Bank Guarantee worth Rs. 6.20 Crores was furnished, while in Agreement No. 8/2007-08, Bank Guarantee worth Rs. 40 Lakhs was furnished and with respect to Agreement No. 9/2005-06, Bank Guarantee worth Rs. 1.08 Crores was furnished.

5. The complaint of the petitioner is that without justification, Agreement No. 7/2005-06 was terminated on 29.11.2014 and on 19.7.2014 Agreement No. 9/2005-06 was terminated.

6. Since disputes and differences arose between the parties with regard to each of the work, it had to be resolved through arbitration going by Clause 70 of the General Conditions. The relevant document is produced as Annexure A10 in A.R. No. 68 of 2014. But that clause contains several restrictions and qualifications and also provided that the right for arbitration arises only on alternative arrangement being made by the respondent under condition No. 54 relating to cancellation of contract.

7. The respondent resorted to take coercive steps against the petitioner arbitrarily. Petitioner is given to understand that the respondent is taking steps to have the Bank Guarantees encashed.

8. The petitioner would point out that on cancellation of the contracts, it is possible to take recourse to arbitration clause on mutual consent. The

communication relating to Agreement No. 7/2005-06 is Annexure A11 and that relating to Agreement No. 9/2005-06 is Annexure A12. In the petitions, the petitioner has narrated the various claims settled through arbitration. Annexure A22 in A.R. 69 of 2014 and Annexure A14 in A.R. 68 of 2014 are the relevant requests made under the Arbitration and Conciliation Act. There was no response from the respondent.

9. As far as Agreement No. 8/2007-08 which gave rise to A.R. 67 of 2014, the work had been completed, but the final bill could not be submitted due to omission and certain circumstances which arose out of the conduct of the respondent. The respondent did not furnish necessary data and documents which resulted in inability of the petitioner to present the final bill. He, therefore, made request as per Annexure A8 to refer the matter for arbitration.

10. In none of the above cases, the respondent responded favourably and that had driven the petitioner to approach this Court under Section 11 of the Act.

11. In each of these petitions, the respondent has filed a counter affidavit. It is disputed that any of the circumstances have arisen which call for arbitration request in any of these cases. The department has not failed to perform any function and that has not resulted in the delay of work. The various requests made as per the Annexures could not form basis for arbitration request in the strict sense. The work was delayed only due to the conduct on the part of the petitioner. As far as the payments are concerned, payments have been made commensurate with the progress of the work. They disputed that with respect to one of the contracts, work has been completed. Due to the lethargy or inaction on the part of the petitioner, the respondents were constrained to terminate two of the contracts. As per Clause 70 of the General Conditions which forms part of the contract, unless alternative arrangements have been made and finalized by the respondent to get the work completed through another agency, reference to arbitration is not possible. Further, even assuming that an arbitration request is possible, that can be only in terms of Clause 70 of General Conditions which provides the manner in which an arbitration request is to be dealt with and the court is bound to act as per those provisions.

12. With regard to the complaint regarding inability to submit the final bill, it is pointed out by the respondent that they have no role to play in the submission of the final bill and it is for the contractor to submit the final bill as per the contract. He has raised unnecessary contentions with regard to the same and it is not pointed out in the petition as to what were the failures on the part of the respondent which made it impossible for the contractor to submit the final bill. It is, therefore, contended that the request is not maintainable.

13. A reply affidavit has been filed in each of these cases by the petitioner pointing out that stand of the respondent that the request for arbitration is premature cannot be countenanced. The petitioner also produced Annexure A14 in A.R. 68 of 2014 and other similar documents in other Arbitration Requests

which according to the petitioner would meet the requirements of a valid arbitration request. The petitioner also in detail narrated the various failures on the part of the respondent which resulted in delay in completion of the work and also the inability on the part of the petitioner to submit final bill for the work completed.

14. From the above contentions, it becomes clear that the main contention raised by the respondent is that even assuming that all what the petitioner says is true, the request for appointment of an arbitrator is premature. They rely on Condition No. 70 of General Conditions. According to them, even assuming that there is termination of contract, the cause of action for raising dispute arises only on re-tendering of the work by the department. In the two cases in which the work was terminated, no rearrangement has been made and therefore, no cause of action has arisen for seeking resolution of dispute by arbitration. It is further contended by the respondent that even assuming that arbitration request is maintainable, the court is obliged to follow the procedures and methods prescribed under Condition No. 70 and it is incumbent on the part of the court to comply with that condition strictly.

15. As far as the failure on the part of the contractor to submit final bill is concerned, the contention is that it was due to his own fault and the department has nothing to do with the same.

16. The contention is that mere termination by itself cannot give rise to cause action to the petitioner. Petitioner has to wait till the contingency in Condition No. 70 arises and since that contingency has not arisen, the requests are not maintainable.

17. It is also contended on behalf of the respondent that the procedure and method for appointment of an arbitrator is contained in Condition No. 70 of General Conditions. Parties have entered into agreement with open eyes and settled the terms and conditions and both of them cannot resile from the said conditions. Even assuming that an arbitrator can be appointed under Section 11 of the Act, it has to be in consonance with the terms of contract. The appointment cannot be at the discretion of Chief Justice or his designate. They too are bound by the agreement with reference to the method and procedure provided in the contract.

18. The contention with reference to the inability to submit final bill, the stand of the department is that the department has nothing to do unless and until the final bill is submitted by the contractor. It is only after the submission of the final bill, it has to be verified and pass orders passed thereon. The department has nothing to do with the submission the final bill and that is the sole obligation of the contractor. It is erroneous to say that there are laches on the part of the department which made it impossible for the contractor to submit the final bill. The department had no opportunity to verify the claims made though the final bill, so there is no question of any dispute arising in that regard. Therefore, it is

contended that the requests are only to be dismissed. For the above proposition, learned counsel for the respondent relied on the decision reported in Union of India (UOI) and Others Vs. Master Construction Co., (2011) 2 ARBLR 105 : (2011) 2 CompLJ 520 : (2011) 5 JT 244 : (2011) 3 RCR(Civil) 526 : (2011) 5 SCALE 165 : (2011) 12 SCC 349 : (2011) 5 SCR 853 : (2011) 2 UJ 1870 : (2011) AIRSCW 4610 : (2011) AIRSCW 2669 : (2011) 3 Supreme 441 : (2011) 3 Supreme 443 . With reference to the method and manner of appointment of the arbitrator even assuming, it may be done, learned counsel relied on the decisions reported in National Thermal Power Corporation Ltd. Vs. Raghul Constructions (P) Ltd., AIR 2005 Ker 115 : (2005) 2 ARBLR 606 : (2005) 1 ILR (Ker) 475 : (2005) 1 KLT 763 , Deep Trading Company Vs. Indian Oil Corporation and Others, (2013) 4 AD 281 : AIR 2013 SC 1479 : (2013) 2 ARBLR 105 : (2013) 114 CLA 18 : (2013) 177 CompCas 475 : (2013) 2 CompLJ 271 : (2013) 2 CTC 888 : (2013) 8 JT 159 : (2013) 171 PLR 675 : (2013) 2 RCR(Civil) 953 : (2013) 5 SCALE 96 : (2013) 4 SCC 35 : (2013) AIRSCW 1891 : (2013) 3 Supreme 487 , Coastal Engineering Vs. Southern Railway, (2014) 4 ARBLR 207 : (2014) 3 ILR (Ker) 890 : (2014) 3 KLJ 358 : (2014) 3 KLT 447 and Union of India (UOI) and Others Vs. Master Construction Co., (2011) 2 ARBLR 105 : (2011) 2 CompLJ 520 : (2011) 5 JT 244 : (2011) 3 RCR(Civil) 526 : (2011) 5 SCALE 165 : (2011) 12 SCC 349 : (2011) 5 SCR 853 : (2011) 2 UJ 1870 : (2011) AIRSCW 4610 : (2011) AIRSCW 2669 : (2011) 3 Supreme 441 : (2011) 3 Supreme 443 and Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence, AIR 2012 SC 817 : (2012) 1 ARBLR 99 : (2012) 107 CLA 183 : (2012) 3 CTC 90 : (2012) 1 JT 53 : (2012) 3 RCR(Civil) 611 : (2012) 1 SCALE 73 : (2012) 2 SCC 759 : (2012) 1 UJ 519 : (2012) AIRSCW 685 .

19. At the time of hearing of these petitions, it is contended by the learned counsel for the respondent that as regards the inability to submit the final bill is concerned, there is no plea regarding the laches on the part of the department. Merely by saying that final bill could not be submitted due to want of details from the respondent cannot suffice. In fact in the notice calling upon the department to appoint an arbitrator, there is no whisper about the facts and details which made it impossible for the contractor to submit the final bill. It is contended by the respondent that one cannot take advantage of one's own laches or folly and that there is no dispute to be arbitrated upon.

20. Meeting the above contention raised by the learned counsel for the respondent, learned Senior Counsel for the petitioner, Shri. K.L. Varghese, contended that there is no substance in the contention that cause of action had not arisen. The Clause relied on by the department cannot have any application to the facts of the case. Once there is complaint of illegal termination or breach of contract, the limitation for the relief begins to run from the date of breach. That cannot be extended by the terms of the contract. Further, Condition No. 70 relied on by the department is only an enabling provision which enables the department to claim damages on the happening of an event. If one is to accept the contention, the contractor will be at the mercy of the department and if the

department deliberately delays the rearrangement of work, that may affect the right of the contractor and it is likely that the claim of the contractor would become time barred. Relying on the decision reported in *Delta Foundations and Constructions Vs. Kerala State Construction Corporation Ltd.*, AIR 2003 Ker 201 : (2003) 1 KLT 626 , it was contended that the above contention has no legal sanction.

21. Learned Senior Counsel appearing for the petitioner contended that the scope and ambit of Section 11 of the Act is considerably limited. The provision does not envisage a roving enquiry into the dispute which is not within the jurisdiction of the person exercising power under Section 11 of the Act. Highlighting the limited jurisdiction available under Section 11 of the Act, learned Senior Counsel relied on the decisions reported in *State of Goa Vs. Praveen Enterprises*, AIR 2011 SC 3814 : (2011) 3 ARBLR 209 : (2011) 112 CLT 659 : (2011) 8 JT 359 : (2011) 7 SCALE 131 : (2012) 12 SCC 581 : (2011) 10 SCR 1026 : (2012) AIRSCW 3879 and *Anil Kumar Vs. B.S. Neelkanta and Others*, AIR 2010 SC 2715 : (2010) 6 JT 255 : (2010) 5 SCALE 742 : (2010) 5 SCC 407 : (2010) 5 UJ 2570 : (2010) AIRSCW 2971 : (2010) AIRSCW 3715 : (2010) 3 Supreme 124 .

22. As regards the contention regarding method and procedure to be followed in the appointment of an arbitrator exercising the power under Section 11 of the Act, according to the learned counsel, the issue is no longer *res integra*. Even though initially the courts had taken the view that the person exercising power under Section 11 of the Act is bound by the procedure and method stipulated in the contract, that is no longer good law. Learned counsel fairly conceded that normally such procedure is to be followed. But that does not prevent a departure in a given case if situation so warrants. If the court is satisfied that an impartial and independent arbitrator is to be appointed for resolving the disputes, nothing prevents the court from doing so. If the court is of the opinion that the named arbitrator or the procedure results in unreasonableness and injustice, the court is empowered to appoint an arbitrator of its choice. For the above proposition, learned counsel relied on the decisions reported *Reva Electric Car Company P. Ltd. Vs. Green Mobil*, AIR 2012 SC 739 : (2012) 106 CLA 1 : (2012) 4 RCR(Civil) 574 : (2011) 13 SCALE 169 : (2012) 2 SCC 93 : (2012) 1 UJ 224 : (2012) AIRSCW 472 , *Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence*, AIR 2012 SC 817 : (2012) 1 ARBLR 99 : (2012) 107 CLA 183 : (2012) 3 CTC 90 : (2012) 1 JT 53 : (2012) 3 RCR(Civil) 611 : (2012) 1 SCALE 73 : (2012) 2 SCC 759 : (2012) 1 UJ 519 : (2012) AIRSCW 685 , *Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL)*, (2012) 3 ARBLR 1 : (2012) 110 CLA 388 : (2012) 5 SCALE 545 : (2012) 6 SCC 384 and *Coastal Engineering Vs. Southern Railway*, (2014) 4 ARBLR 207 : (2014) 3 ILR (Ker) 890 : (2014) 3 KLJ 358 : (2014) 3 KLT 447 . Regarding the sequence of pleadings in an arbitration request, learned counsel relied on the decision reported in *Mohammed Mamdouh Matwally Ghali Vs. Kerala Automobiles Ltd.*, (2011) 3 ILR (Ker) 283 : (2011) 3 KLJ 391 .

23. Before embarking on a consideration of the rival contentions, it will be useful to refer to the statutory provisions and the power that is to be exercised by the court. For the above purpose, it is useful to refer to Section 11 of the Act which reads as follows:

"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 appoint 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 qualification required for 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 subsections (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 principal 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."

Section 11 contemplates two contingencies. Section 11 sub sections (3)(4) and (5) applies when the parties have not agreed on the procedure for appointment of an arbitrator. Section 11(6) deals with a situation when there is an agreed procedure. Appointment of arbitrator under Section 11(6) arises under three circumstances, they are (a) a party fails to act as required under the agreed procedure, (b) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure and (c) a person including an institution fails to perform any function entrusted to him. If any one of the above circumstances arises, recourse to Section 11 of the Act can be taken.

24. Now coming to yet another aspect. It is necessary to ascertain the scope and ambit of the power that is to be exercised under Section 11 of the Act. Leaving apart, the details one needs to know the nature of the probe that is to be made under Section 11 of the Act. While appointment of an arbitrator under Section

11(6) may not be automatic on a petition filed for that purpose, at the same time, detailed probe to ascertain the various aspects of the dispute is not warranted. This aspect was considered in the decision reported in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, AIR 2006 SC 450 : (2005) 3 ARBLR 285 : (2005) 128 CompCas 465 : (2006) 2 CompLJ 7 : (2005) 5 CTC 302 : (2005) 9 JT 219 : (2005) 9 SCALE 1 : (2005) 8 SCC 618 : (2006) 1 UJ 156 : (2005) AIRSCW 5932 : (2005) 7 Supreme 610 , Hanuman Prasad and Others Vs. State of Rajasthan, (2008) 13 JT 200 : (2009) 1 SCC 507 : (2008) 1 UJ 94 , State of Goa Vs. Praveen Enterprises, AIR 2011 SC 3814 : (2011) 3 ARBLR 209 : (2011) 112 CLT 659 : (2011) 8 JT 359 : (2011) 7 SCALE 131 : (2012) 12 SCC 581 : (2011) 10 SCR 1026 : (2012) AIRSCW 3879 and Reva Electric Car Company P. Ltd. Vs. Green Mobil, AIR 2012 SC 739 : (2012) 106 CLA 1 : (2012) 4 RCR(Civil) 574 : (2011) 13 SCALE 169 : (2012) 2 SCC 93 : (2012) 1 UJ 224 : (2012) AIRSCW 472 . It will be sufficient to refer the decision reported in Reva Electric Car Company P. Ltd. Vs. Green Mobil, AIR 2012 SC 739 : (2012) 106 CLA 1 : (2012) 4 RCR(Civil) 574 : (2011) 13 SCALE 169 : (2012) 2 SCC 93 : (2012) 1 UJ 224 : (2012) AIRSCW 472 wherein all previous decisions of the Apex Court were considered and in paragraph 22 it was held as follows:

"22. On the other hand, Ms. Tasneem Ahamadi, has submitted that the MOU having come to an end by efflux of time, there was no question of any termination as claimed by the petitioner. She further submits that the notice invoking arbitration was sent only as a counterblast to the summons received by the petitioner from the Brussels Commercial Court. Learned counsel further submitted that the disputes which form the basis of the claim in the Brussels Commercial Court pertained to a period subsequent to the period covered by the MOU. The arbitration clause in the MOU relates only to disputes which relate to the test and trial period. Hence, an arbitrator cannot be appointed for settlement of disputes which occurs/relate to a period after 31st December, 2007. The disputes raised before the Commercial Court at Brussels are not covered by the arbitration clause in the MOU."

Also, in paragraph 27, it was held as follows:

"27. In matters, where the intervention of the Chief Justice of India has been sought for appointment of a sole arbitrator under Section 11(4), (5) and (6) of the Arbitration Act, 1996, the Chief Justice or his designate will have to decide certain preliminary issues. It would be apposite to notice here the relevant observations made in Para 22, which are as follows :--

"22.....This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have

to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

"These observations were further reiterated by this Court in the case of A.P. Tourism Development Corporation Ltd. v. Pampa Hotels Ltd."

25. Having thus understood the nature and scope of Section 11 of the Act, one may now go into the rival contentions in these three cases. One of the contentions raised by the respondent is that the arbitration request is premature. They rely on Condition No. 70 of the General Conditions and pointed out that unless and until the department rearranges the work, the cause of action does not arise for adjudicating any claim by the arbitrator. Condition No. 70 of the General Conditions reads as follows:

"70. Arbitration - All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. Or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an [Serving Officer having degree in Engineering or equivalent or having passed final/direct final examination of sub-Division II of Institution of Surveyor (India) recognised by the Govt. of India.] to be appointed by the authority mentioned in the tender documents.

Unless parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the

Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the government's right of recovery from the contractor as provided in Condition 676 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, ex-parte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute.

The Arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

26. Learned Senior Counsel appearing for the petitioner contended that that is only an enabling provision and that does not fetter the rights of the petitioner to seek relief on termination of contract which adversely affects him.

27. According to the learned Senior Counsel, the period of limitation for making a claim based on breach of contract begins to run from the date of breach of contract and it is not postponed to a future date. Learned Senior Counsel also contended that if it was otherwise, by delaying the rearrangement of the work, the department could easily defeat the claim of the petitioner.

28. There seems to be considerable force in the above submission. It is true that going by Condition No. 70 of the General Conditions that rearrangement of work seems to be a condition for seeking a reference to arbitration. But as rightly

pointed out by the learned Senior Counsel for the petitioner, it is only an enabling provision which enables the department to raise their claims in respect of the loss caused as a result of rearrangement. That cannot be treated as a fetter on the right of the petitioner to seek remedies on breach of contract. It could not be said that cause of action for the petitioner arises only on rearrangement of the work by the department. One need not labour much on this aspect. In the decision reported in *Delta Foundations and Constructions Vs. Kerala State Construction Corporation Ltd.*, AIR 2003 Ker 201 : (2003) 1 KLT 626 wherein an identical question was considered, it was held that going by Article 55 of the Limitation Act, the time begins to run from the date on which the contract is broken and not when the rearrangement is made. In paragraphs 4 and 5, it was held as follows:

"4. For disposal of this case, we are not concerned with the facts of the case. The only question raised is whether the suit was hit by the law of limitation. Suit was instituted for realisation of money. Plaintiff is a public limited company engaged in construction contracts. First defendant is a partnership firm and defendants 2 and 3 are its partners. First defendant undertook some work for which agreement was entered into between the parties on 24.3.1987, but the work was terminated on 22.4.1988. Suit was instituted by the Corporation on 7.11.1991 claiming damages of Rs. 1,92,839.66. The suit was resisted by the defendant contending that the suit was barred by the law of limitation. Issue No. 3 was raised by the trial court and the trial court held as follows: Issue No. 3: The suit is essentially one for the loss sustained by the plaintiff consequent to the rearrangement of the work. The contract with the defendants was terminated as per Ext. A8 dated 22.4.1988. It was contended by the learned counsel appearing for the plaintiff that his party could assess the loss only on rearrangement of work which was done on 9.11.1988 and the cause of action could be reckoned only from that date in which case the suit is within the time. It was further urged that the amounts claimed and sought to be recovered is in the nature of compensation and that Article applicable is to the instant case Art. 113 of the Limitation Act.

The ascertainment of the amount of damages in the suit is quite distinct from the very occasion of ascertainment, which in fact is the real cause of action. The article provides for the breach as the starting point. The amount now sought to be recovered is not compensation in its strict sense. The argument do not stand to merit in view of the specific averments in the plaint regarding the nature of claim. As per Art. 55 of the Limitation Act time begins to run from the date contract is broken. So the present suit which is filed after three years from the date of accrual of cause of action is barred by limitation.

On the above mentioned findings the suit was dismissed by the trial court holding that the same was barred by the law of limitation. Aggrieved by the same plaintiff had approached this court by filing A.S. No. 739 of 1996. Contentions of the parties were more or less the same as in the suit. Counsel

appearing for the review petitioner submitted that while applying Art. 55 the court committed a mistake which is liable to be reviewed. We may extract the order of the Division Bench which reads as follows:

"Art. 55 of the Limitation Act relates to the suit for compensation for the breach of any contract express or implied and not otherwise specially provided for. The starting point of limitation is when the contract is broken or the breach in respect of which the suit is instituted, occurs and the period provided is three years. To the extent the court below has held that a suit for compensation for breach of contract, it is Art. 55 of the Limitation Act that applies, the trial court may be correct. But the question is whether on the terms of the contract between the parties a cause of action could be said to have arisen in favour of the Corporation for recovery of the amount due from the firm as compensation for the breach. Obviously the Corporation could decide whether it had in fact suffered damages by the breach of contract committed by the firm only on re-tendering the work and finding that the re-tender has cost the Corporation more. In fact if it were a case of the amount being less than the amount for which the firm had tendered for the work, normally the Corporation could not recover any amount by way of compensation for the breach. In such a situation, it appears to us that the starting point for recovery of such determined compensation based on the re-tendering of the work would arise only on the work being re-tendered and it being determined that the difference between the two would amount to a loss to the Corporation. Apparently the contract in this case was admittedly entered into on 9.11.1988. It is only on that date that the Corporation was in a position to judge whether it had incurred a loss and whether it could claim any compensation from the firm on the plea that the firm had committed a breach of the contract. The suit was filed on 7.11.1991, within three years of the entering into a fresh contract in respect of the balance work to be completed. We are of the view that in such a case time would start to run only on the fresh contract being entered into leading to a quantification of the liability of the original contracting party which was allegedly in breach."

We are of the view while applying Art. 55 court has committed an error which is apparent on the face of the record. The court having held that Art. 55 would apply the court held that the starting point for recovery of such determined compensation based on the re-tendering of the work would arise only on the work being re-tendered and it being determined that the difference between the two would amount to a loss to the Corporation. We may in this connection refer to Art. 55 of the Limitation Act, which reads as follows:

This is a case where contract stood terminated alleging breach on 22.4.1988. Claiming compensation for breach of contract period of limitation fixed under Art. 55 is three years. Time from the period begins to run is when the contract is broken. Contract was broken when it was terminated on 22.4.1988. Consequently suit ought to have been filed within three years from the said date.

5. We are of the view while applying the said Article the Bench has committed an

error in holding that the plaintiff could decide whether it had in fact suffered damages by the breach of contract committed by the defendant only on re-tendering the work and finding that the re-tender had cost the Corporation more. The Bench held that the starting point for recovery of such determined compensation based on the re-tendering of the work would arise only on the work being re-tendered and it being determined that the difference between the two would amount to a loss to the Corporation. In our view the error is writ large on the face of the record. At the moment breach occurs, time begins to run, and the starting point of limitation for suit for compensation for breach of contract is when the contract is broken. Bench has taken the view that only when the work is re-tendered plaintiff would be able to consider the damages caused. We are of the view that would be going against the law of limitation. The Supreme Court in *M/s. Essar Constructions Vs. N.P. Rama Krishna Reddy*, (2000) 5 JT 505 : (2000) 4 SCALE 328 : (2000) 6 SCC 94 : (2000) 2 UJ 1107 held that statute of imitations assumes the existence of a cause of action and does not define or create one. In our view Bench has committed an error in interpreting Art. 55 which is an error apparent on the face of the record, which in our view is liable to be reviewed. Counsel appearing for the review petitioner also submitted that while reversing the decision of the trial court on the point of limitation, the Division Bench has relied on three decisions such as, *Eastern Traders (I) Ltd. Vs. Punjab National Bank Ltd.* and *Another*, AIR 1966 P&H 303 , *Lala Shanti Swarup Vs. Munshi Singh and Others*, AIR 1967 SC 1315 : (1967) 2 SCR 312 and *Bell Alloy Steels Pvt. Ltd. v. National Small Industries Corp. Ltd.* (Legal Surveyor 1980 (1) Madras 85). Counsel submitted that these decisions were not put to the review petitioner. Consequently he was not in a position to explain that those decisions would not apply to the facts of the case. Counsel submitted that review petitioner is entitled to get an opportunity so as to explain that those decisions are not applicable to this case. There is an additional ground according to the counsel available under O. XLVII R. 1 C.P.C. for reviewing the judgment. Counsel appearing for the Corporation on the other hand contended that no grounds for review have been made out. Counsel submitted that assuming that the decision is erroneous in law the remedy is to file an appeal."

Therefore, the contention that the cause of action has not arisen for the petitioner to seek arbitration cannot be accepted.

29. As a corollary to the above contention, a contention was raised by the respondent that if one is to accept the case of the petitioner, then the department would be precluded from preferring their claim in arbitration proceedings. The loss or damage suffered by the department consequent on the termination of the contract or due to the rearrangement of work can be assessed on rearrangement of work only and if it is to be accepted that while in the case of the contract the time begins to run from the date of breach, that would seriously affect the right of the department to realise the loss or damage sustained by them.

30. Here one has to notice that when recourse is made for arbitration of the dispute between the parties to be considered by the arbitration tribunal, the court normally does not laid down any terms of reference. Usually, the entire dispute as a whole is referred for arbitration. In the decision reported in State of Goa Vs. Praveen Enterprises, AIR 2011 SC 3814 : (2011) 3 ARBLR 209 : (2011) 112 CLT 659 : (2011) 8 JT 359 : (2011) 7 SCALE 131 : (2012) 12 SCC 581 : (2011) 10 SCR 1026 : (2012) AIRSCW 3879 , the above aspect was considered in detail and it was held as follows:

"What is "Reference to arbitration"

10. "Reference to arbitration" describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate.

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of arbitrator/s as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes."

31. Of course, any claim made after the period of limitation is to be summarily rejected by the Tribunal. As far as additional claims are concerned, it is the date of notice seeking arbitration that is the guiding factor. The decision thus lays down the remedies available to a party to arbitration proceedings.

32. Coming to the present claims, while the petitioner would complaint of illegal termination, the department would put the blame on the petitioner. The definite stand of the department is that as per Condition No. 70, only after rearrangement of work, any one of the parties get a right to seek arbitration.

33. As already noticed, the above contention cannot be countenanced. At the risk of repetition, one may notice the period of limitation. As far as the petitioner is concerned, the time commences to run from the date of breach of contract. It also does not stand to reason to hold that cause of action will commence only on a particular act being done by the respondent. As already noticed, the said clause is intended for the benefit of the department and cannot be taken as a ground to postpone the remedies i.e., to seek reference by the contractor on breach of contract. If one is to accept the contention of the respondent, in case the department decides not to make rearrangement for the work, or delays the same deliberately either the claim of the contractor would become barred or it would never arise.

34. There is nothing in Condition No. 70 which is relied on by the department to show that they were bound to take steps for rearrangement of the work within a stipulated period. It is difficult to understand how the period of limitation against the petitioner could be postponed by an act depending on the whims and fancies of the department which is essential to assess the damage or loss sustained by the department as a consequence of the rearrangement of the work.

35. It is significant to notice that the entire claim made by the contractor and the claim that is expected to be raised by the department consequent on the act of the petitioner are distinct and different. May be that when the claim is referred to the Arbitration Tribunal, the department may not be able to prefer a counter claim. Apart from the fact that such a contingency has already been referred to, it does not stand to reason also. Therefore, the department can have no grievance.

36. Finally, one has to consider the most serious contention pursued by the learned counsel for the respondent.

37. Shri. S. Krishnamoorthy, learned counsel appearing on behalf of the respondent, contended that Condition No. 70 of the General Conditions provides the procedure and method for appointment of an arbitrator and the court cannot close its eyes to the said Condition. Parties with open eyes had entered into the contract and they are bound by the terms of contract. The petitioner cannot be heard to say that he is not bound by the said Condition.

38. In the unreported decision in W.P.(C). 10520 of 2004, a similar situation

arose for consideration and the Division Bench of this Court, after referring to quite a few decisions of various High Courts and Apex Court, held as follows:

"9. We are of the view, learned Single Judge has committed error in appointing a person which is not contemplated in the arbitration clause before taking appropriate measures contemplated under Section 11(6) of the Arbitration and Conciliation Act, 1996. In such circumstances, we have no alternative but to set aside the order of the learned Single Judge and direct the authority to appoint arbitrator as provided in clause 70 within a period of one month from the date of receipt of a copy of this judgment. Judgment of the learned Single Judge is set aside and the appeal is allowed."

39. In the decision reported in National Thermal Power Corporation Ltd. Vs. Raghul Constructions (P) Ltd., AIR 2005 Ker 115 : (2005) 2 ARBLR 606 : (2005) 1 ILR (Ker) 475 : (2005) 1 KLT 763 , relying on the decision in Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd., AIR 2005 SC 214 : (2004) 5 CTC 442 : (2004) 9 JT 335 : (2004) 9 SCALE 205 : (2005) 9 SCC 686 , it was held as follows:

"We may also refer to the recent decision of the Supreme Court in Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd., AIR 2005 SC 214 : (2004) 5 CTC 442 : (2004) 9 JT 335 : (2004) 9 SCALE 205 : (2005) 9 SCC 686 , wherein the Court held as follows:

"If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference- both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard".

In a case where party has approached the Chief Justice and made a request for appointment of an arbitrator other than the person agreed to between the parties, the Chief Justice or the designated Judge would make an effort to secure the appointment as per the agreed procedure, not to bypass or annihilate it. Endeavour must be given to effect to the agreed procedure failing which an independent arbitrator can be appointed. In our view, learned Single Judge should have taken necessary measures for securing appointment on the basis of the appointment procedure. We may further indicate, as far as the present case is concerned, there is a further stipulation in the arbitration clause, which reads

as follows:

"It is also a term of the contract that no person other than a person appointed by CMD NTPC Ltd. as aforesaid should act as Arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all."

Therefore parties have agreed that no person other than a person appointed by CMD, NTPC should act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all, but then could be resolved only by a Civil Court, These are the terms and conditions agreed to between the parties and hence learned Judge was not justified in appointing third party as the sole arbitrator to resolve the dispute between the parties."

40. In the decision reported in Coastal Engineering Vs. Southern Railway, (2014) 4 ARBLR 207 : (2014) 3 ILR (Ker) 890 : (2014) 3 KLJ 358 : (2014) 3 KLT 447 , it was held as follows:

"28. In this context, we will also refer to another three Bench judgment of the Apex Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 which interpreted Section 11(6) of the Act itself as well as the words "necessary measures" and "due regard" contained in Section 11(6). Therein, the matter was referred to a Larger Bench in the light of the different views expressed in the two decisions in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, AIR 2007 SC 1764 : (2007) 2 ARBLR 49 : (2008) 4 CompLJ 20 : (2007) 5 JT 105 : (2007) 5 SCALE 341 : (2007) 5 SCC 304 : (2007) 4 SCR 777 : (2007) AIRSCW 2918 : (2007) 3 Supreme 502 and Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd., (2007) 3 ARBLR 282 : (2008) 4 CompLJ 32 : (2007) 10 JT 129 : (2007) 10 SCALE 9 : (2007) 7 SCC 684 : (2007) 9 SCR 993 . After exhaustively referring to the scheme under Section 11 of the Act, the Apex Court finally came to the following conclusions, in paragraphs 10, 11 and 12:

"10. The crucial sub-sections are sub-sections (2), (3), (4), (5) and (6). Sub-sections (3) to (5) refer to cases where there is no agreed procedure. Subsection (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (i) a party fails to act as required under agreed procedure or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators.

11. The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures" (underlined for emphasis). This expression has to read along with requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations."

Importantly, it was found in paragraph 11 that "the crucial expression in sub-section (6) that "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures", will have to read along with requirement in sub-section (8) and it was held that "the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator." In paragraph 13, the expressions "due regard" and "necessary" have been explained thus:

"13. The expression "due regard" means that proper attention to several circumstances have been focused. The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken."

Section 11(8) considered therein is in the following terms:

"11(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."

Finally, in paragraph 14 it has been further held as follows:

"..... It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the

appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable."

41. It is no doubt true that in the above decision it was held that normally the procedure and the method laid down in the contract between the parties will have to be followed.

42. The decisions relied on by the petitioner in this regard has already been referred to. In fact, learned Senior Counsel appearing for the petitioner did not contend for the position that Chief Justice of his designate is entitled to ignore the clause completely. His contention was that normally it should weigh with the Chief Justice or his designate. But the learned Senior Counsel went on to contend that under Section 11(6) of the Act, it could not be said that the Chief Justice of his designate has no power to appoint an arbitrator other than the one stated in the agreement. If, in suitable cases, the court is empowered to appoint an arbitrator of its choice to go into the dispute between the parties.

43. In the decision reported in *Reva Electric Car Company P. Ltd. Vs. Green Mobil*, AIR 2012 SC 739 : (2012) 106 CLA 1 : (2012) 4 RCR(Civil) 574 : (2011) 13 SCALE 169 : (2012) 2 SCC 93 : (2012) 1 UJ 224 : (2012) AIRSCW 472 after referring to various aspects, considered the factors which could be looked into by the Chief Justice or his designate, and went on to hold that there is valid arbitrable agreement. The question now mooted does not appear to have arisen in that case. In the decision reported in *Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence*, AIR 2012 SC 817 : (2012) 1 ARBLR 99 : (2012) 107 CLA 183 : (2012) 3 CTC 90 : (2012) 1 JT 53 : (2012) 3 RCR(Civil) 611 : (2012) 1 SCALE 73 : (2012) 2 SCC 759 : (2012) 1 UJ 519 : (2012) AIRSCW 685 , while considering the plea that when a procedure is laid down for the appointment of an arbitrator, while exercising power under Section 11 of the Act, that fact will have to be given due consideration and the decision went on to hold as follows:

"21. It is true that in normal circumstances while exercising jurisdiction under Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator.

22. A Three Judge Bench of this Court in the case of *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited*, considered the scope and ambit of Section 11(6) of the Act, as divergent views were taken in two decisions of this Court in *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* and *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.* (supra). Upon consideration of the relevant provisions it was inter alia observed as follows:

"12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as

possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations."

23. Keeping in view the observations made above, I have examined the facts pleaded in this case. I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to appoint an independent arbitrator. In this case, the contract is with Ministry of Defence. The arbitrator Mr. Satyanarayana has been nominated by DGOF, who is bound to accept the directions issued by the Union of India. Mr. Satyanarayana is an employee within the same organization. The attitude of the respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the Court, which indicated that the arbitrator was biased in favour of the Union of India. In the present case also, Mr. Naphade has made a reference to various notices issued by the arbitrator, none of which were received by the petitioner within time. Therefore, the petitioner was effectively denied the opportunity to present his case before the Sole Arbitrator. Therefore, the apprehensions of the petitioner cannot be said to be without any basis.

24. It must also be remembered that even while exercising the jurisdiction under Section 11(6), the Court is required to have due regard to the provisions contained in Section 11(8) of the Act. The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the Court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Keeping in view the aforesaid provision, this Court in the case of Indian Oil Corporation Limited (AIR 2009 SC (Supp) 2145.2 : 2009 AIR SCW 7354) (supra), whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In paragraph 45 of the aforesaid judgment, it is observed as follows:

"45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by Northern Railway Admn., where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the

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

(Emphasis supplied)

44. In the decision reported in *Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL)*, (2012) 3 ARBLR 1 : (2012) 110 CLA 388 : (2012) 5 SCALE 545 : (2012) 6 SCC 384 the Apex Court, after referring to the decisions in *Union of India v. M.P. Gupta* ((2004) 10 SCC 504), *You One Engineering and Construction Co. Ltd. and Another Vs. National Highways Authority of India (NHAI)*, AIR 2006 SC 3453 : (2006) 4 SCC 372 , *National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others*, (2006) 4 ARBLR 1 : (2006) 12 JT 334 : (2006) 9 SCALE 564 : (2006) 10 SCC 763 : (2006) 6 SCR 586 Supp , *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 and *Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.*, (2009) 11 JT 450 : (2009) 11 SCALE 672 : (2009) 8 SCC 520 : (2009) 13 SCR 510 : (2009) 9 UJ 4269 , it was held as follows:

"In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum-Managing Director or his designate. This Court would have the power to appoint a person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial."

45. In the decision reported in *Deep Trading Company Vs. Indian Oil Corporation and Others*, (2013) 4 AD 281 : AIR 2013 SC 1479 : (2013) 2 ARBLR 105 : (2013) 114 CLA 18 : (2013) 177 CompCas 475 : (2013) 2 CompLJ 271 : (2013) 2 CTC 888 : (2013) 8 JT 159 : (2013) 171 PLR 675 : (2013) 2 RCR(Civil) 953 : (2013) 5 SCALE 96 : (2013) 4 SCC 35 : (2013) AIRSCW 1891 : (2013) 3 Supreme 487 after referring to various decisions it was held as follows:

"18. Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects, (a) 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. In *Northern Railway Administration*, a three-Judge Bench of this Court considered the scheme of Section 11. Insofar as Section 11(8) is concerned, this Court stated that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements mentioned therein have to be kept in view.

46. In the decision reported in *Coastal Engineering Vs. Southern Railway*, (2014)

4 ARBLR 207 : (2014) 3 ILR (Ker) 890 : (2014) 3 KLJ 358 : (2014) 3 KLT 447 on which reliance is placed by both sides, after discussing various decision, the Division Bench summarised the law as follows:

"30. We will summarise the crucial points decided in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 :

"(a) The crucial expression in Section 11(6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures";

(b) This expression has to be read along with the requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(c) The scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the court may ask to do what has not been done;

(d) The court must first ensure that the remedies provided for are exhausted;

(e) It is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations;

(f) The expression "due regard" means that proper attention to several circumstances have been focused and the expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act;

(g) Necessary measures can be stated to be the reasonable steps required to be taken; and

(h) The appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment, the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable."

47. On a careful reading of the above decisions, they lead to the conclusion that Section 11(6) of the Act to a considerable extent is controlled by Section 11(8) of the Act. The law seems to be that normally the procedure and method prescribed by the contract cannot be ignored and it must receive due attention and care. However, to say that the Chief Justice or his designate has no authority to appoint an independent arbitrator cannot be simply accepted. The various

decisions clearly indicate that even though the procedure and the method prescribed in the arbitration agreement cannot altogether be ignored, that does not fetter the power of the court in suitable cases to appoint an arbitrator of its choice if it is felt that an independent arbitrator is necessarily to be appointed to resolve the dispute between the parties. It is true that compliance with the procedure and method prescribed in the agreement is the normal rule and departure is an exception.

48. In the cases on hand, there can be no doubt regarding the fact that disputes have arisen between the parties. They have their own version regarding the termination as well as the other factors governing the contract.

49. Shri. S. Krishnamoorthy, learned counsel appearing for the respondent, very vehemently contended that the issue involved is technical in nature and therefore, if this Court is inclined to appoint an arbitrator, a person with technical knowledge alone can be appointed. He alone will be able to resolve the dispute between the parties. There is no reason to believe, according to the learned counsel, that any technical person employed therein or any other Corporation or institution cannot function as arbitrator or he will not be able to resolve the dispute. According to the learned counsel, there is no reason to differ from the normal rule that the court will have to give due consideration to the procedure and method included in the contract between the parties regarding the appointment of an arbitrator.

50. Per contra, learned Senior Counsel for the petitioner contended that in the cases on hand, there is not much technical issues involved, it is essentially a pure question of law. The main question is whether the termination of the contract in two cases is legal and valid and that has nothing to do with the technical knowledge. As regards the inability to submit final bill is concerned, the allegation of the petitioner is that it was due to certain laches on the part of the department that final bill could not be submitted. The tribunal needs to go into the question only whether the said claim made by the petitioner is true or not. That does not require technical knowledge to come to a conclusion.

51. Going by Condition No. 70 of the General Conditions, an officer of the department is normally to be appointed as an arbitrator. In the nature of rival contentions raised by the parties, one gets the impression that appointment of an officer of the department may not be justifiable. He, at any rate, will be under the supervision and control of the superior officers and it is difficult for him to function impartially and independently. As noticed in the various decisions, even though the court is obliged to give due consideration to the procedure and method in the appointment of an arbitrator as contained in the agreement, there is no rule that the court cannot deviate from the above procedure and appoint any other person as arbitrator.

52. It is felt that in the cases on hand, it will be just and proper to appoint an impartial and independent person as arbitrator to go into the disputes between

the parties. It is not as if that the Act does not provide for a contingency when the arbitration tribunal is faced with a question regarding technical aspects of the matter. The Act enables the arbitration tribunal in such cases to take aid of a technical person to resolve the dispute between the parties. Therefore, in the cases on hand, merely because a non-technical person is appointed as arbitrator, that does not mean that if technical issues arise, the said arbitrator is helpless in the matter. The Tribunal can taken recourse to the provision under the Act and seek aid of a technical person.

For the above reasons, these Arbitration Requests are allowed as follows:

"(i) Justice K. Padmanabhan Nair is appointed as Arbitrator to resolve the disputes between the parties.

(ii) The Arbitrator is free to fix the remuneration in accordance with law.

(iii) The Arbitration Tribunal shall make every endeavour to dispose of the matter as expeditiously as possible."