
(2002) 04 AP CK 0026
In the Andhra Pradesh High Court
Case No : AA No. 41 of 2001

Madhava Hytech Engineers Private Limited	APPELLANT
Vs	
Union of India (UOI), South Central Railways and Another	RESPONDENT

Date of Decision : 09-04-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6)
Limitation Act, 1963 — Article 137

Citation : (2003) 3 ALD 185 : (2003) 1 ALT 321 : (2003) 1 ARBLR 611

Hon'ble Judges : S. Ananda Reddy, J

Bench : Single Bench

Advocate : B. Nalin Kumar, for the Appellant; C.V. Vinitha Reddy, for the Respondent

Judgement

S. Ananda Reddy, J.—In this application filed u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "the Act"), the applicant is seeking the appointment of an arbitrator for adjudication of the dispute between the parties.

2. According to the applicant, it was the lowest tender for the Gauge Conversion of UBL-LD Section from Meter Gauge to Broad Gauge in respect of Bridge Nos.87 and 91, which was accepted by the Respondents. Accordingly, an agreement dated 27-01-1995 was entered into between the parties. The said agreement includes the General Conditions of Contract (for short "the General Conditions"), which provides for reference of dispute to arbitration under Clause 64 of the said conditions. As per the original agreement, the contracted work was for an amount of Rs.71.27 lakhs and the same has to be completed within a period of three months. While the applicant was executing the said work, certain additional works were entrusted to the applicant and the same were also stipulated to be completed within the period of three months. The revised cost of the entire work, including the original work as well as additional works, went up to Rs.2,16,22,601/-. It is stated by the applicant that the then Chief Engineer Sri T.

Seshachalapathi and the Deputy Chief Engineer Sri B. Ashok agreed to pay for the additional quantities as per the original agreement rates. The applicant also accepted the said rates and agreed to execute the additional works. Accordingly, he had executed the work by working round the clock, paying extra amounts to labour and purchasing material like cement, metal etc,, at exorbitant rates, in order to carry out the instructions of the department with the amounts borrowed at high rates of interest. It is also stated that the work was completed by April 1995 and by that time the Respondent paid only part of the bills including the part of the additional quantities of work. But, however, for further quantities, the amounts were withheld and not paid. Therefore, the applicant addressed a letter dated 19-2-1996 requesting the Respondents for payment of the amounts. As there was no response, the applicant addressed several letters to the Respondent-authorities for settlement of the bills, but of no avail.

While things thus stood, the Respondents were invited the applicant for negotiations to formalize the rates already agreed to. In the negotiations held on 20-3-1997, the Respondents confirmed the acceptance of the rates for the additional quantities as per the original agreement rates as already accepted by the then Chief Engineer and the then Deputy Chief Engineer. But, however, the amounts outstanding were not paid though the work executed by the applicant. Thereafter the 2nd Respondent addressed a letter dated 22-7-1997 purporting to reduce the rates in respect of certain items involving variation beyond 25% of the original agreement rates, with reference to the additional works executed by the applicant. Thereupon, the applicant addressed a letter dated 12/19-8-1997 explaining that the rates for the additional quantities were already accepted as per the original agreement and there was no justification for unilaterally reducing the rates for such additional quantities. In the said letter the applicant also pointed out that with reference to the amounts withheld for various bills, the applicant is entitled for compensation apart from the amounts withheld. Again a letter was issued by the 2nd respondent dated 2-9-1997 communicating to the applicant that no interference is needed for the rates already accepted and communicated by letter dated 22-7-1997. But according to the applicant, some of the claims raised by the applicant have not been dealt with in the said letter. Therefore, the Respondent again addressed a letter dated 6-12-1997 through their lawyer seeking for settlement of the claim. The applicant states that the disputes raised by the applicant do not fall within the category of accepted matters under Clauses 34 and 63 of the Conditions, since the rates were already accepted at the time of execution. It is also stated that in the present facts and circumstances, the question of invoking Clause 6 of the Special Conditions of the Contract or Clause 39 of the General Conditions of Contract does not arise. The applicant further addressed a letter dated 6-2-1998 disputing the measurements and also pointing out various discrepancies in the measurement book. In response to the same, the Divisional Engineer addressed a letter dated 15-4-1998 purporting to state that the measurements now recorded were accurate and quantity billed are correct and at the same time the applicant was

also advised to attend the office by 27-4-1998. The applicant further stated that a sum of Rs.9,88,205/- was deducted towards alleged over payment in respect of this contract from the final bill in respect of the another contract bearing No.63/CAD/C/SC/1995, dated 20-3-1995 without any notice to the applicant and the same is illegal, arbitrary and contrary to the settled law.

According to the applicant, a lawyer's notice was issued on 22-03-2001 by registered post acknowledgement due, calling upon the Respondents to refer the disputes enumerated in the annexure thereof to an Arbitral Tribunal. The said notice was served on the Respondents, but in vain. The applicant, further, issued another notice dated 21-4-2001 seeking certain amendments to the earlier registered notice. In spite of the demand seeking to refer the disputes enumerated in the annexure thereof to an Arbitral Tribunal, the 1st respondent did not act upon and therefore, the applicant was constrained to approach this Court u/s 11(6) of the Act.

3. A counter has been filed on behalf of the Respondents disputing and denying the claims of the applicant. In the counter, it is admitted that an agreement was entered into between the applicant and the Respondents for carrying out the work of "Guage Conversion Hubli-Londa section from MG to BG." It is stated that an agreement dated 27-1-1995 was executed for execution of the work for a total value of Rs.71,07,532/-. It is also admitted that the work was to be completed within three months from the date of the Award dated 16-1-1995 as per the conditions of the contract. It is also admitted regarding the entrustment of the additional works and the cost of the additional works including the original work was Rs.2,11,24,871/-. According to the Respondents, the applicant had willingly accepted the proposal for execution of additional scope and signed the Variation Statement, as a token of his acceptance. In the counter, the allegations of the claimant that the then Chief Engineer as well as the Deputy Chief Engineer agreed to pay for the additional quantities as per the original agreement rates is denied. According to the Respondents, Clause 6.5 of the Special Conditions of Contract stipulates that the rates for the items in excess of 25% of agreement shall be decided in a mutual discussion between the Railways and the contractor. It is also stated that the additional work executed by the applicant exceed 25% of the original agreement work and claimant should not have carried out the extra work before the settlement of the rates and execution of a subsidiary agreement, as stipulated under Clause 39 of the General Conditions. It was further stated that if the contractor commences the work or incurs any expenditure in regard to the additional work before the rates are fixed, the rates determined by the Engineer are binding. But, however, that the person may appeal to the Chief Engineer within 30 days of getting the decision of the Engineer. The Respondents also disputed the claim that the work was completed by the claimant by April 1995 but was completed by 15-7-1995. It is also stated that the applicant was benefited by getting the huge additional work over and above 25% of the original agreement. The applicant did not even wait for finalisation of the variation and settlement of the rates, but started and

completed the work. It is also stated that the claimant is entitled to the payment as per the rates negotiated and settled between the parties and not as per the original agreement rates. Accordingly, the rates are fixed through negotiations on 20-03-1997, which have become final, the claimant/applicant is entitled for a sum of Rs. 1,87,73,875-76 paise but the applicant was paid by that time a sum of Rs. 1,97,62,018/-. Therefore, the excess amount was deducted from the other bills. In the counter it was also stated that fixation of the rates is an "excepted matter" in terms of Clause 63 of the General Conditions and therefore, it is not a matter for reference to the arbitration under Clause 64 of the General Conditions.

Subsequently, an additional counter is filed taking the ground that the present application of the applicant is barred by limitation in terms of Section 137 of the Limitation Act. According to the Respondents the claim of the applicant was rejected and communicated, as early as on 2-9-1997; whereas the present application u/s 11(6) of the Act was filed on 26-04-2001 i.e., beyond the period of three years and therefore, the application is liable to be dismissed.

4. The learned Counsel for the applicant, reiterating the averments that are made in the petition, contended that while considering the claim of the applicant for appointing an arbitrator for adjudication of the dispute, this Court is not empowered to go into contentious issues. In support of the same, the learned Counsel relied upon a larger Bench decision of the Supreme Court in the case of *Konkan Railway Corporation Ltd v. Rani Construction (P) Ltd* 2002 (2) ALD 14 (SC), contending that the scope and jurisdiction of this Court while dealing with the application filed u/s 11 of the Act is very limited. In fact, as per the said decision the function that is being discharged by the Court is only an administrative function and even not a general function. Therefore, this Court cannot go into the merits of the matter including the right of the applicant to claim for appointment of an arbitrator, as long as there is a clause in the contract for such appointment. The learned Counsel contended that there is no dispute as to the existence of arbitration clause in the General Conditions, which is treated as part of the agreement between the parties.

Admittedly, there is a contract between the parties for execution of the work, and admittedly, the Respondents have not settled the claim of the applicant in full and final. The learned Counsel also relied upon various decisions, which are to be considered later.

5. The learned Standing Counsel for the Railways, on the other hand, opposed the claim of the applicant. First of all the learned Counsel contended that on merits there is no case for the applicant. Secondly, it was contended that the present application for appointment of an arbitrator is barred by limitation, as the provisions of the Limitation Act are applicable in terms of Section 43 of the Act. According to the learned Counsel, the rejection was communicated as early as on 2-9-1997. If the applicant is aggrieved by the said communication, he ought to have approach the Court within a period of three years. As the present application is filed beyond the period of three years, it is a clear case, which is

barred by limitation. Alternatively, the learned Counsel also contended that ultimately if the Court comes to the conclusion that it is proper to refer the matter for arbitration then this Court may direct the Respondents to implement the procedure contemplated under the terms of the General Conditions. In support of the said contention, the learned Counsel relied upon a decision of the Kerala High Court in the case of Bel House Associates (P) Ltd. Vs. General Manager, Southern Railway, and also the decision of Madhya Pradesh High Court in the case of Subhash Projects and Marketing Ltd. Vs. South Eastern Coalfields Limited, , where such claim was accepted by the Kerala High Court holding that the Court cannot appoint an independent arbitrator at first instance but has to implement the procedure agreed upon between the parties regarding arbitration.

6. From the above rival contentions, the issue to be considered is whether a dispute exists between the parties and the same is required to be referred to an arbitrator for adjudication.

7. It is not in dispute that there was an agreement between the parties for execution of certain work. Apart from the originally agreed works, additional works were also entrusted to the applicant for execution and those additional works were also executed by the applicant. According to the applicant, the then Chief Engineer and the then Deputy Chief Engineer have agreed to pay the additional works as per the originally agreed rates. But this claim of the applicant is disputed by the Respondents. According to them when the additional entrusted work exceeds 25% of the original work, the rates have to be fixed by mutual negotiations and according to the Respondents there were no such mutual negotiations for fixation of the rates earlier. Therefore, the Respondents issued a letter" and called for the settlement for negotiations and after negotiations, the rates were fixed in March 1997. When those rates fixed by the Respondents-authorities are disputed by the applicant, the objections raised by the applicant were also rejected and communicated by letter dated 2-9-1997. Therefore, it is contended by the Respondents that as there were subsequent negotiations between the parties, and further the objections raised as to such fixation was already rejected as early as on 2-9-1997, the present application filed by the applicant for appointment of an arbitrator is without any merit.

8. Before considering the merits of the rival contentions, it would be proper to refer to the various decisions relied upon by both the parties.

The scope of appointment of an Arbitrator was considered by the Apex Court in the case of Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, under the provisions of the Arbitration Act, 1940. It was held that where if no arbitrator had been appointed in terms of the contract within 15 days from the date of the receipt of the notice, the Administrative Head of the appointment had abdicated himself of the power to appoint arbitrator under the contract and the Court gets the jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a) of the Act and such appointment of arbitrator by the Court is legal and valid and binding on the parties.

Similarly, in the case of G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, , the Apex Court considered the jurisdiction of the Court as to the appointment of an arbitrator. It was held as under:

"The Court should endeavour that the contract should always be given effect to, though the contracting party had failed to act according to contract. It is to be seen, whether the contract provided for the appointment of a named arbitrator, and if so, the parties normally would be bound by the terms of contract and the Court would not be justified to appoint any arbitrator unless the arbitrator refused or neglected to enter upon the reference, etc. In the absence of any named arbitrator it would be open to the contracting parties to agree for an appointment of an arbitrator by agreement even after the proceedings were laid in the Court u/s 20 of the Act. In the absence of any such agreement, the Court gets jurisdiction and power to appoint an arbitrator. When the notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. Even if Section 8(a) per se does not apply, notice was an intimation to the opposite contracting party to act upon the terms of the contract and his/its non-availment entails the forfeiture of the power to appoint an arbitrator in terms of the contract and gives right to the other party to invoke the Court's jurisdiction u/s 20. In the instant case the Respondent did not appoint an arbitrator, after the notice was received. Even before the Single Judge he did not even state that he was willing to appoint an arbitrator. The Single Judge rightly exercised the power u/s 20(4) of the Act and appointed the Arbitrator. The Division Bench, therefore, erred in interfering with the order of the Single Judge. The appointment of an arbitrator made by the Single Judge must be deemed to have been approved by the Supreme Court".

The issue as to the appointment of arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996, was considered by the Apex Court in Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., . The Apex Court considered the issue as to what should be the correct approach of the Chief Justice or his nominee in relation to the matter of appointment of an arbitrator u/s 11(6) of the Act and formulated the following two questions and answered:

"Two basic questions which really arise for consideration are, (1) what is the nature of the order that is passed by the Chief Justice or his nominee in exercise of power under Sub-section (6) of Section 11 of the Act? And, (2) even if said order is held to be administrative in nature what is the remedy open to the person concerned if his request for appointment of an Arbitrator is turned down by the learned Chief Justice or his nominee, for some reason or other ?"

After tracing to the history and the background under which the 1996 Act was enacted, at the stage of appointment of an arbitrator it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. Further, after referring to the provisions of

Sections 13, 15 and 16, where it empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement, it was observed that conferment of such power on the arbitrator under 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. That being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. It was also held that the power under provision 11(6) provides to cure the problem of hurdles for appointment of an arbitrator permitting the aggrieved party to request the Chief Justice or his designate to take the necessary measure i.e., to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Sub-section (6), therefore, aims at removing any dead-lock or undue delay in the appointment process. That being the position, it is reasonable to hold while discharging the functions under Subsection (6), the Chief Justice or his nominee will be acting in his administrative capacity and such a construction would sub serve the very object of the new Arbitration Law. Paragraph 6 of the said judgment reads as under:

"The nature of the function performed by the Chief Justice being essentially to aid the Constitution of the Arbitration Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in Ador Samia Private Limited Vs. Peekay Holdings Limited and Others, and the observations of this Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., also is quite appropriate and neither of those decisions require any reconsideration. This being the position even an order refusing to appoint an arbitrator will not be amenable to the jurisdiction of this Court under Article 136 of the Constitution. Needless to mention such an order refusing to appoint an arbitrator after deciding the contentious issues would be an act of non-performance of duty and in view of what has been stated earlier the concerned authority could be directed by Mandamus to perform its duty."

The Apex Court in the case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , considered the scope of Section 11(6) with reference to the appointment of an arbitrator by the party having responsibility to appoint such arbitrator. It was held as far as Section 11(6) of the Arbitration and Conciliation Act, 1996 is concerned, if one party demands opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to make appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court u/s 11 that would be sufficient. Only then, the right of the opposite party ceases.

In that 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. The appointment of the arbitrator by the Respondent was held valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

When the 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 endeavour 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, it cannot be said 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.

Subsequent to the above decisions, the issue as to the scope and ambit of the provisions of the 1996 Act was considered by a Constitution Bench of the Apex Court in a reference made to it in the case of Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd. (supra). The Apex Court noted the emphasis of the Act in the learned Attorney General's submission was to accept the domestic proceedings to which the parties had agreed to submit their views. It was in this light that the Act had to be read.

Thereafter, it was held in paragraphs 24, 25, 26, 27, 28 and 29 as under;

"Para-24. There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed, and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word "decision" is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

Para-25. As we see it, the only function of the Chief Justice or his designate u/s 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.

Para-26. It might be that though the Chief Justice or his designate might have taken all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrator's independence or impartiality. In that event it would be open to that party to challenge the arbitrator u/s 12, adopting the procedure u/s 13. There is no reason whatever to conclude that the grounds for challenge u/s 13 are not available only because the arbitrator has been nominated by the Chief Justice or his designate u/s 11.

Para-27. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal's authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by learned Counsel for the Appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction.

Para-28. The schemes made by the Chief Justices u/s 11 cannot govern the interpretation of Section 11. If the schemes, as drawn, go beyond the terms of Section 11 they are bad and have to be amended. To the extent that the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, goes beyond Section 11(6) by requiring, in Clause 7, the service of a notice upon the other party to the arbitration agreement to show-cause why the nomination of an arbitrator, as requested, should not be made, it is bad and must be amended. The other party needs to be given notice of the request only so that it may know of it and it may, if it so chooses, assist the Chief Justice or his designate in the nomination of an arbitrator.

Para-29. In conclusion, we hold that the order of the Chief Justice or his designate u/s 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a Tribunal. Such an order cannot properly be

made the subject of a petition for special leave to appeal under Article 136. The decision of the three Judge Bench in *Konkan Railway Corporation Limited and others v. Mehul Construction Company* is affirmed".

9. During the course of arguments, however, the Counsel for the respective parties have even advanced arguments as to the issue of limitation. According to the Counsel for the Respondent, the present application was presented beyond the period of three years from the date of the cause of action, and therefore, in terms of Article 137 of the Limitation Act, the present application is beyond the period of limitation, and therefore, the applicant is not entitled to seek any relief. On the other hand, the contention of the applicant is that even with reference to the issue of limitation, the Chief Justice or his nominee is not obligated to decide as it is also a contentious issue and it is only for the arbitrator to decide such issue. No doubt, in the case of *M.V.V. Satyanarayana Vs. Union of India and Others*, , it was decided by a learned Single Judge of this Court as to the bar of limitation and held that the application is barred by limitation under Article 137 of the Limitation Act. In that view of the matter, the Counsel for the Respondent sought for the rejection of the present application.

10. On the other hand, similar issue was considered by this Court in the case of *Meda Narsimhulu Vs. Council of Scientific and Industrial Research, New Delhi* and another, , by another learned single Judge of this Court and took a different view and held that the said question has to be decided only by the arbitrator to be appointed and not by the Court while considering the application for the appointment of an arbitrator. In the case of *Asia Resorts Ltd. Vs. Usha Breco Ltd.*, , the Apex Court considered the application under the provisions of the Limitation Act, of course, with reference to the provisions of Arbitration Act, 1940 and held that the provisions of the said Act are applicable and even if an application is filed beyond the period of limitation, Court can condone the delay by extending the benefit of Section 5 of the Limitation Act.

11. The issue as to the bar of limitation was also considered by the learned single Judge of the Orissa High Court in the case of *Union of India v. Prahallad Moharana*, AIR 1996 Ori 19, wherein it was held under the provisions of the Arbitration Act, 1940, that the question of limitation is a matter to be decided by an arbitrator and not by the Court.

12. Another contention was advanced by the learned Standing Counsel for the Railways stating that even in case of an application u/s 11(6), the Chief Justice or his designate has to see that the procedure formulated between the parties under the terms of the agreement has to be given effect to, and accordingly, the General Manager has to be directed to appoint an arbitrator in terms of the agreement between the parties and it is not open to this Court to appoint an independent arbitrator. Strong reliance is placed on the decision of the Kerala High Court in the case of *M/s. Bel House Associates Pvt. Ltd. v. G.M., Southern Railway, Madras* (supra) as well as in the case of *M/s. Subhash Projects & Marketing Ltd. v. South Eastern Coalfields Ltd.* (supra) and also the decision of

the Madras High Court in the case of Kamala Solvent v. Manipal Finance Corporation Ltd., Manipal 2002 (1) RAJ 40 (Mad.).

13. A perusal of the decision of the Kerala High Court in the case of M/s. Bel House Associates Pvt. Ltd., (supra) shows that the Court directed the Respondent-authorities to give effect to the terms of the agreement. But, a close examination of the terms of the agreement shows that there is a restriction as to the appointment of an arbitrator in the terms of the agreement between the parties. The specific portion of the agreement under Clause (3Xb) reads as under:

"It is a term of this contract that no person other than a gazetted Railway Officer should act as an Arbitrator/ Umpire and if for any reason, that is not possible the matter is not to be referred to Arbitration at all."

In the light of the said specific provision, it was held that in an application filed u/s 11(6), the Chief Justice or his nominee has to give effect to the procedure formulated under the terms of the agreement between the parties. Similar view was expressed by the Madhya Pradesh High Court in the case of M/s. Subhash Projects and Marketing Ltd. (supra). Even in this case also under the terms of the agreement the Chief Managing Director of the Respondent is concerned, has to appoint a sole arbitrator and the award of the said arbitrator shall be final and binding on the parties. Therefore, it was held that such a clause has to be given effect to by the Chief Justice or his nominee. But, the said view expressed is not in accordance with the law laid down by the Apex Court where it was held that failure to act upon in terms of the contract, the authority empowered to refer for arbitration would forfeit his right and when once the party approaches the Court, the authority empowered to nominate or appoint an arbitrator, would loose his right and it is only the Chief Justice or his nominee who is empowered to appoint an arbitrator for resolving the disputes between the parties. Apart from the above, specific clauses contained in the above case are totally different from the agreement clauses existing between the parties, in the present case. Even on that ground also, the above decisions have no relevancy for the present case.

14. In the case of Kamala Solvent (supra), it was an application filed u/s 9(11) (e) of the Act, praying for an order of injunction restraining the Respondents 1 and 2 from proceeding with the proposed arbitration proceedings. In this case, though the 1st Respondent did not appoint the arbitrator within the stipulated time of 30 days, but appointed the 3rd Respondent as arbitrator, who was also the specified arbitrator under the terms of the contract as he was appointed before the applicant filed an application u/s 11. The Court refused to grant any injunction as sought for. The facts of the present case are totally different and the same is not of any assistance to the Respondent.

15. Apart from the above, a Single Judge of this Court in the case of Ashok Engineering Company Engineers and Contractors Vs. General Manager, South Central Railway, Secunderabad and another, , has specifically rejected such a plea advanced by the Respondent that the Chief Justice or his nominee is not

empowered to appoint an independent outside arbitrator in terms of Clauses 63 and 64 of the General Conditions of Contract.

16. If we examine the facts of the present case in the light of the above decisions, especially, the decision of the Constitution Bench of the Apex Court in the case of Konkan Railway Corporation Ltd (supra), the Chief Justice or his designate is not obligated to go into the contentious issues, and the very object and purpose of the Act is to expedite and move the arbitral proceedings without causing any loss of time. In that view of the matter, there is absolutely no justification for the Respondent to raise any objection. In fact, as observed by the Apex Court, the Respondent has no role to play except to assist the Chief Justice or his nominee to complete the proceeding expeditiously.

17. In that view of the matter, the application for appointment of an arbitrator to go into the disputes between the parties is allowed. However, it is open to the Respondent-Railway administration, to take all the pleas/objections that are available under law before the arbitrator.

18. Accordingly, Sri Justice A.Seetaram Reddy, is appointed as arbitrator for adjudication of the disputes between the parties. He is at liberty to fix up his fees.