
(1997) 09 AP CK 0090

In the Andhra Pradesh High Court

Case No : Arbitration Application No's. 5 to 8 of 1996

Marshall Corporation Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 19-09-1997

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(5)

Citation : (1997) 5 ALT 421 : (1998) 2 ARBLR 175

Hon'ble Judges : R. Bayapu Reddy, J

Bench : Single Bench

Advocate : D. Ramalinga Swamy, for the Appellant; R.S. Murthy, for the Respondent

Judgement

R. Bayapu Reddy, J.—These four applications are filed by the same applicant under the provisions of Section 11(5) of the Arbitration and Conciliation Act, 1996 (for short, "the New Arbitration Act"), seeking appointment of an independent arbitrator by the Hon'ble Chief Justice of High Court of A.P. for deciding the disputes that have arisen between him and the respondents relating to the execution of different contracts entered into between them.

2. The petitioner in all the petitions is M/s. Marshal Corporation Ltd., Visakhapatnam, represented by its Director, while the respondents represent the Union of India the first respondent being the Engineer-in-Chief, Army Head Quarters, New Delhi and the second respondent being the Chief Engineer (Navy), Visakhapatnam. The petitioner is having its registered office at Calcutta and Branch Office at Visakhapatnam. It was awarded the contract work of providing accommodation for married sailors at Visakhapatnam by the respondents under Contract agreement No. CEDE/VIZ/57 of 85-86, which is the subject matter relating to Arbitration Application No. 5/96. The said work was commenced on 1-1-1986 and it had to be completed by 31-12-1988. On account of various lapses on the part of the second respondent, there was delay in completing, the work and it was finally completed on 23-12-1989 and a completion certificate

was also issued. Subsequent to 31-12-1988 by which date the work had to be completed as per the original agreement, the respondents were granting extension by addressing various letters and the work was finally completed by 23-12-1989. On account of various lapses on the part of the respondent-department and due to non-adherence to time schedule by the Department, various disputes arose between the parties and such disputes could not be settled amicably. The petitioner, therefore, requested the second respondent by addressing a letter dated 14-2-1992 for referring the disputes to arbitration by appointing an arbitrator in terms of Clause 70 of General Conditions of Contract which was part of the agreement entered into between the parties. As the matter were not referred to arbitrator by appointing an arbitrator, the petitioner was renewing his requests by addressing various letters and the respondents though promising to appoint an arbitrator, failed to do so in spite of sufficient time allowed in that regard. As such, the petitioner approached the Hon'ble Chief Justice of High Court of A.P. u/s 11(5) of the New Arbitration Act by filing Arbitration Application No. 5/96 seeking appointment of an independent arbitrator to decide the disputes relating to various claims of the value of Rs. 56,17,059-89 Ps. as enumerated in the petition schedule.

3. The respondents filed their counter in A.A. No. 5/96 contending that the application filed under the New Arbitration Act is not maintainable as the contract work was completed and the disputes arose between the parties only when the Old Arbitration Act of 1940 was in force and that, therefore, the petition filed under the New Arbitration Act seeking appointment of arbitrator by the Chief Justice of High Court of A.P. is not maintainable. It is also contended by the respondents in their counter that the claims enumerated in the petition schedule cannot be referred to arbitration as such claims are excluded by specific clauses in the contract entered into between the parties and that such claims made by the petitioner are also unreasonable, untenable and without any basis and they cannot, therefore, be referred to arbitration. It is also contended by the respondents in their counter that as per the arbitration clause in the agreement, the authority to appoint an arbitrator to decided the disputes between the parties rests with the Engineer-in-chief, Army Head Quarters, New Delhi, which is the first respondent, that the second respondent has already taken up the matter with the first respondent for appointment of an arbitrator as requested by the applicant and the matter is under active consideration of the first respondent, who has been willing to appoint such arbitrator to decide the disputes and that therefore, the petition filed by the petitioner is not maintainable and is liable to be dismissed.

4. The petitioner filed his reply for the counter of the respondents denying the allegations made in the counter and reiterating his earlier pleas raised in the petition and contending that the application filed under the New Arbitration Act is maintainable.

5. The contention of the petitioner in the other three arbitration applications is

the same as in A.A. No. 5/96, and each case differs only with regard to the nature of work and the nature of the disputed claims and such other material particulars. The contract entered into between the parties relating to A.A. No. 6/96 is bearing No. CEDD/VIZ/32 of 1987-88 and it relates to the work of providing two warehouses at N.S.D., Visakhapatnam. The said work which had commenced on 1-1-1989 had to be completed by 14-8-1989. On account of various lapses on the part of the second respondent, the work was completed only on 12-2-1993 and disputes arose between the parties relating to various claims which are enumerated in the petition schedule. The petitioner requested the second respondent to refer the dispute to an arbitrator by addressing a letter dated 14-7-1990 as per the same Clause No. 70 of General Conditions of Contract. But the respondents failed to appoint the arbitrator in spite of several reminders issued by the petitioner in that regard. The value of the different claims in this application is Rs. 88,74,099-33 Ps.

6. The contract of work entered into between the parties relating to A.A. No. 7/96 is bearing No. CEDD/VIAZ/80 of 1988-89 and it related to construction of married officers quarters for 18 Lt. Cdrs. and 54 Ltd. at Naval Park Extension, Visakhapatnam. The work commenced on 2-2-1989 and it had to be completed by 1-11-1990. On account of various lapses on the part of the respondents, the work could be finally completed only by 30-9-1992 and disputes arose between the parties relating to various claims which are enumerated in the petition schedule. The petitioner requested the second respondent to refer the disputes to the arbitrator by addressing a letter dated 21-10-1993 as per the same Clause No. 70 of General Conditions of Contract. But the respondents failed to appoint the arbitrator in spite of several reminders issued by the petitioner in that regard. The value of different claims in this application is Rs. 75,08,642.95 Ps.

7. The contract of work entered into between the parties relating to A.A. No. 8/96 is bearing No. CEDD/VIZ/56 of 1985-86 and it related to the construction of multi-storeyed accommodation for 36 Lt. Cadrs. at Naval Park Extension, Visakhapatnam. The work commenced by 7-7-1983 (sic). On account of various lapses on the part of the respondents, the work could be finally completed only by 15-2-1989 and disputes arose between the parties relating to various claims which are enumerated in the petition schedule. The petitioner requested the second respondent to refer the disputes to arbitrator by addressing a letter dated 14-2-1992 as per the same Clause No. 70 of General Conditions of Contract. But the respondents failed to appoint the arbitrator in spite of several reminders issued by the petitioner in that regard. The value of different claims in this application is Rs. 39,92,891.39 Ps.

8. The respondents, who are the same in the other applications also, filed separate counters in each application raising the same contentions as in A.A. No. 5/96, contending that the petitions are not maintainable under the New Arbitration Act and are liable to be dismissed.

9. As the points involved for consideration and the parties in all the four

applications are the same, they are heard together and are being disposed of by this common order.

10. The points that arise for consideration in these applications are :

(1) Whether the applications filed under the Arbitration and Conciliation Act, 1996 are not maintainable under the provisions of the said Act and whether they are governed only by the Old Arbitration Act, 1940 ?

(2) Whether the claims made by the petitioner in various applications are untenable and whether an arbitrator cannot be appointed for deciding such claims ?

(3) Whether independent arbitrator of the choice of the Court can be appointed by the Court as prayed for in the applications ?

(4) To what relief ?

Point No. 1 :

11. In all the four cases, the applicant had issued notices to the respondents on different dates during the years 1990, 1992 and 1993 when the Old Arbitration Act, of 1940 was in force, requesting them to appoint an arbitrator to decide the disputes that had arisen between the parties and the respondents, however, failed to concede such request in spite of several reminders, issued by the applicant. The applicant issued final notices during the year 1996 after the New Arbitration Act came into force on 25-1-1996 requesting, the respondents to appoint an arbitrator to decide the disputes. In spite of issuing such final notices after the New Act came into force, the respondents failed to appoint the arbitrator and as such all the four applications were filed into court on 4-12-1996 requesting the Hon'ble Chief Justice of the High Court of A.P. to appoint the arbitrator u/s 11(5) of the New Act. The contention of the learned Counsel for the respondents in this regard is that inasmuch as the applicant had served notices on the respondents requesting them to appoint an arbitrator when the Old Act was in force the arbitration proceedings shall be deemed to have been commenced at a time when the Old Act was in force and that, therefore, the present applications are not maintainable under the New Arbitration Act. But this contention of the learned Counsel for the respondents cannot, however, be accepted. It will be useful in this connection to refer to the relevant provisions of the New Arbitration Act as well as the Old Arbitration Act and also some of the decisions which were rendered in this regard in order to appreciate the respective contentions of the parties.

12. Section 85 of the New Arbitration Act deals with repeals and savings and the provisions of Section 85 are as follows :

"85. Repeal and saving :

(1) The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards, (Recognition and Enforcement) Act, 1961 are

hereby repealed.

(2) Notwithstanding such repeal :

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under such enactments shall, to the extent of which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

It is clear from the above said provisions of Section 85(2) that the provisions of the Old Arbitration Act shall continue to apply in relation to arbitral proceedings which commenced before the New Act came into force unless otherwise agreed upon between the parties, and the New Act will, however, apply in relation to arbitral proceedings which commenced on or after the New Act came into force. Section 21 of the New Arbitration Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute coimnnences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In view of such provisions of Section 21 r/w Section 85(2) of the New Arbitration Act, the learned Counsel for the respondents tries to contend that the arbitration proceedings in the present case shall be deemed to have commenced in the year 1992 and 1993, as the case may be, when a request made by the applicant was served on the respondents seeking appointment of an arbitrator and as such the Old Act alone applies to the present cases. "But this argument is quite untenable and cannot be accepted. The earlier notices issued by the petitioner to the respondents requesting them to appoint the arbitrator were not after the commencement of the New Arbitration Act but only when the Old Arbitration Act was in force. Section 21 of the New Act can be considered only with reference to the actions that may arise under the new Act. But regarding the question as to at what stage the arbitral proceedings under the Old Act had commenced, no reference can be made and no support can be derived from the provisions of Section 21 r/w. Section 85(2) of the New Arbitration Act. The same view was expressed by a single Judge of this Court in a recent decision reported in Y. Parthasarathy Vs. General Manager, Railway Electrification and Another, , after referring to the decision of the Supreme Court and Kerala High Court.

13. In the decision of the Supreme Court reported in Secretary to the Government of Orissa and Another Vs. Sarbeswar Rout, , while dealing with the question as to when it can be said that arbitral proceedings can be said to have commenced, it is observed by their Lordships :

"As soon as the arbitrator indicates his willingness to act as such, the proceeding must be held to have commenced."

In the decision of the Kerala High Court reported in Baby Paul Vs. Hindustan Paper Corporation Ltd. and Another, , dealing with a similar question, it was observed :

"..... for arbitration begins and arbitration proceedings commence only on the arbitrator getting an authority to act. The arbitrator's authority to act arises by actual submission of particular dispute or disputes to the authority of a particular arbitrator by the parties, or by one of the parties to an arbitration agreement requesting the arbitrator appointed by the arbitration agreement itself or subsequent thereto to enter upon the reference in respect of particular dispute or disputes or by the Court making an order of reference to the arbitrator as contemplated by Section 20 of the Act or where the Court by order refers the matter or matters in difference to the arbitrator as provided for the Chap. IV of the Act."

In the present case, in spite of the request made by the applicant when the Old Act was in force, the respondents failed to appoint the arbitrator and as such, the questions of the arbitrator indicating his willingness to function as such arbitrator did not arise when the Old Act was in force and the arbitral proceedings cannot, therefore, be said to have commenced when the Old Act was in force. Therefore, the New Arbitration Act alone is applicable to the present cases and the applications filed under the New Arbitration Act are maintainable.

Point No. 2 :

14. The contention of the learned Counsel for the respondents is that the various claims made by the applicant in all the present applications are false and untenable; that such claims cannot be referred to arbitration in view of various exclusive clauses contained in the agreement and that, therefore, an arbitrator cannot be appointed for deciding such claims. On the other hand, it is the contention of the learned Counsel for the applicant that in view of various lapses and delays on the part of the respondents, the work under the different agreements could not be completed within the specified time and extension was granted by the respondents from time to time for completing the works and on account of such delay and lapses on the part of the respondents, the applicant has suffered loss and such claims are enumerated in the schedule appended to the present applications and that it is only for the arbitrator after he is appointed to decide whether a particular claim is valid and tenable, and it is not for the Court at the stage of appointment of an arbitrator to consider and decide whether any particular claim is false or untenable. The learned counsel for the respondents is not able to specifically point out any particular alleged exclusion clause which prohibits any of the claims made by the applicant from being referred for arbitration. Clause 70 of General Conditions of Contract enclosed to all the four agreements refers to Arbitration. Clause 70 states that all disputes between the parties to the contract (other than those for which the decision of the C.W.E. (Commander Works Engineer) or any other person is by the Contract expressed to be final and binding shall be referred to the sole arbitration of an

Engineer Officer to be appointed by the authority mentioned in the tender documents. It is not the contention of the respondents that any of the claims which are enumerated in the petition schedules are to be subjected to the decision of the C.W.E. or any other persons as per the terms of the contract. Therefore, the disputes relating to the claims enumerated in the application are to be referred only to the arbitrator for decision as per Clause 70 of the General Conditions of the Contract, and it will be open to both parties to plead before the arbitrator that a particular claim is tenable or not and it is for the arbitrator to decide whether a particular claim can be allowed or not on any ground.

15. It will be useful in this regard to refer to some of the decision of the various Courts with regard to this aspect. In the above cited decision of our High Court in *Y. Parthasarathy Firm v. General Manager, Railway Electrification* (supra), it is observed in para 11 of the Judgment that what is the nature of the claims put forward and whether really such claims are covered by the excluded matters in the terms of the contract are matters for consideration and decision by the arbitrator and that the Court cannot embark upon an enquiry into such aspects at the stage of appointment of an arbitrator. In the Division Bench decision of the Delhi High Court reported in *Jaichand Bhavin v. Union of India* 1983 Arb. LR 191, it is observed at page 194 as follows :

"This part of Clause 25 really is only one of defences to any particular claim being raised by the applicant, and the Union may successfully resist it subject to its proving the conditions laid down in the sub-clause. But the said sub-clause does not make the existing arbitration agreement non-existent. This plea relates to the merit of the claim-whether it be on the ground of time or on the merits all of them necessarily must be decided by the arbitrator. This particular plea cannot be invoked at the threshold as a shield against the matter being referred to the arbitrator u/s 20 of the Act."

The same view was expressed in another Division Bench decision of the Delhi High Court reported in *Central Warehousing Corporation Vs. Batra Contractors and Another*, to the effect that the question whether a dispute is within the excepted matters under the contract or can be decided by the arbitrator, can be referred to the arbitrator unless his jurisdiction is barred by the agreement itself. In the decision of the Orissa High Court reported in *Union of India v. Prahallad Moharana* AIR 1996 Orissa 19 : 1996 (suppl.) Arb. 267, also it is observed that the dispute whether it is included in the agreement or excluded from the agreement is a matter to be decided by the arbitrator and not by the Court at the time of appointment of the arbitrator. Therefore, it is clear from such views expressed by the various High Courts that the contention of the learned Counsel for the respondents in this regard cannot be accepted. Inasmuch as the disputes have admittedly arisen between the parties, such disputes have to be referred to the arbitrator as per Clause 70 of the general conditions of contract and it is for the arbitrator to decide whether any particular claim is tenable or not.

16. Regarding the question whether an arbitrator can be appointed in the present

applications, the learned Counsel for the respondents have tried to contend that the various claims put forward by the applicant in all the applications are barred by limitation; that the applications filed for appointment of the arbitrator are also barred by limitation and that, therefore, no arbitrator can be appointed in the present applications. It is seen from a perusal of the counters filed by the respondents in all the applications that no such plea of limitation either with regard to any particular claim or with regard to the applications filed for appointment of arbitrator, is specifically claimed by the respondents in their counters. But such plea of limitation was sought to be raised during the course of hearing of the applications. The contention that the claims made by the petitioner are barred by limitation and that an arbitrator cannot, therefore, be appointed cannot be Countenanced at this stage. Whether a particular claim is barred by limitation or not is a matter which cannot be decided by this Court at the stage of appointment of an arbitrator and that such question can be decided only by the arbitrator before whom the respondents will be entitled to raise such plea. This view was clearly expressed by various High Courts including the High Court of Orissa in the above cited decision of *Union of India v. Prahallad Moharana*, wherein it is observed that the question of limitation is not one for decision by the Court, but is a matter for accession of the arbitrator. In the above cited decision of the Delhi High Court in *Jaichand Bhasin v. Union of India*, also it is observed that the question whether any particular claim has become time barred is for the arbitrator to decide in the decision of the Supreme Court reported in *Wazirchand Mahajan and Another Vs. Union of India (UOI)*, , also it is observed in para 7 that it is for the arbitrator to decide by applying the law of limitation contained in the Limitation Act whether a particular claim is barred by time. Therefore, the contention of the learned Counsel for the respondents that some of the claims put forward by the applicant and barred by limitation and as such the arbitrator cannot be appointed, cannot be accepted and it is for the arbitrator to decide whether any particular claim is barred by limitation.

17. The other contention of the learned Counsel for the respondents that the applications filed for appointment of the arbitrator are also barred by limitation, cannot also be accepted in view of the facts of the present cases. It is now not disputed that the provisions of Article 137 of the Limitation Act are applicable even to the proceedings under the Arbitration Act and that the applications filed for appointment of an arbitrator beyond three years from the date when the right to apply accrues can be said to be barred by limitation. This view was clearly expressed by the Supreme Court in the decision reported in *Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority*, . But in view of the facts and circumstances in the present cases, it cannot be said that the applications filed for appointment of an arbitrator can be said to be barred by limitation under Article 137 of the Limitation Act. In all the present cases, the works were completed as long back as in 1992 and in some cases even a little prior to that. The facts and circumstances in all the four cases are almost similar and by way of illustration and for the sake of convenience, the facts concerned in *Arb. Appln.*

No. 5/96 can be referred to in this connection. In this case, the applicant addressed the letter dated 14-2-1992 for the first time to the second respondents, who is the Chief Engineer (Navy), Visakhapatnam stating that certain disputes have arisen in respect of various aspects relating to the execution of the contract work; that the department did not respond to the claims put forward by the applicant on various occasions and that, therefore, as per Clause 70 of the general conditions of contract, an arbitrator may be appointed for deciding the disputes. As no reply was received for that letter, the applicant issued a reminder dated 12-9-1992 reiterating his request for appointment of the arbitrator. Thereupon, the second respondent issued the reply dated 1-12-1992 stating that some of the claims made by the applicant were not tenable. The applicant thereupon addressed the letter dated 22-12-1992 to the second respondent stating that as the genuineness of the claims made by him were being disputed by the respondents, the same may be referred to an arbitrator as already requested by him. As no reply was received, the applicant addressed another letter dated 15-7-1993 reiterating the request for appointment of the arbitrator. By way of reply to this letter, the second respondent addressed the letter dated 10-8-1993 to the applicant asking him to approach the first respondent, who is the Engineer-in-Chief, Army Head Quarters, New Delhi and who is said to be the appointing authority for appointment of the arbitrator as per the terms of the agreement. On receiving such reply from the second respondent, the applicant addressed the letter dated 21-8-1993 to the first respondent, who is the appointing authority, requesting him to appoint the arbitrator for deciding the disputes that arose between them. The second respondent once again addressed the letter dated 9-11-1993 to the applicant, stating that the request for appointment of the arbitrator is concurred and there was no objection for appointing such arbitrator. On 29-4-1994 the first respondent addressed a letter to the applicant requesting him to forward brief description of each disputed item together with its particulars in order to take necessary action for appointment of arbitrator. The applicant thereupon addressed the letter dated 9-5-1994 to the first respondent drawing his attention to the earlier letters and further stating that all claims in detail will be submitted before the arbitrator after he is appointed and while submitting the claim statement before him. The second respondent thereupon addressed the letter dated 7-7-1994 to the applicant informing him that no fresh claims can be put forward by him apart from the claims which were already submitted by him for being referred to the arbitrator. On 27-9-1994 the second respondent marking a copy to the applicant once again stating that reference to arbitration is concurred and that there is no objection for appointment of an arbitrator. But even then, neither the first respondent nor the second respondent took any steps for appointment of the arbitrator in spite of the fact that they had agreed for appointing the arbitrator to decide the disputes. On 28-9-1994 the applicant once again addressed the letter to the first respondent, who is the appointing authority, drawing his attention to the earlier correspondence and to the fact that no objection was already expressed by the respondents for appointment of the

arbitrator and also reiterating his request for appointment of such arbitrator as the request has been pending since a long time. On 11-7-1996 the second respondent addressed the letter to the applicant informing him that action was being taken for appointment of sole arbitrator as per the terms of the agreement. In spite of the same, the respondents did not take any steps to appoint the arbitrator. Under those circumstances, the applicant got issued the notice dated 22-8-1996 to both the respondents drawing their attention to the earlier correspondence and the request made for appointment of the arbitrator and also informing them that in case of the failure of the respondents to appoint the arbitrator within 30 days from the date of receipt of the said notice, application will be filed in the High Court u/s 11(5) of the New Arbitration Act seeking appointment of an arbitration. Even after receipt of the said notice in the month of August, 1996, the respondents failed to take any steps for appointment of the arbitrator in spite of the fact that they had already agreed for such all appointment of arbitrator and promised to appoint such arbitrator. The facts and the correspondence concerned in the other three applications are almost similar to the above said facts and circumstances concerned in Arb. Appln. No. 5/96. It is also to be seen in this connection that even in the counters filed by the respondents in all the applications, it is mentioned that the respondents are willing to appoint that arbitrator to adjudicate the disputes as requested by the applicant that the appointment of an arbitrator is, however, delayed due to certain administrative reasons in the office of the first respondent and that the High Court, may therefore grant some more time to the respondents to finalise the terms of reference and then appoint an arbitrator for deciding the claims. Therefore, even after filing of the present applications, the respondents failed to appoint the arbitrator till the date of filing of the counters. Inasmuch as the respondents failed to take any steps for appointment of the arbitrator in spite of the receipt of the notices issued in August, 1996, the applicant filed the present four applications u/s 11(5) of the Arbitration Act on 4-12-1996 seeking appointment of the arbitrator. In view of such facts and circumstances, it cannot be said that the present applications filed by the applicant requesting the Chief Justice of the High Court for appointment of an arbitrator are barred by limitation under Article 137 of the Limitation Act. Therefore, the present applications filed for appointment of arbitrator are maintainable and an arbitrator has to be appointed by deciding the disputes that have arisen between the parties.

Point No. 3 :

18. The contention of the learned Counsel for the respondents is that even if it is to be said that all arbitrator has to be appointed for deciding the disputes between the parties, the Court has to direct the first respondent to appoint the arbitrator as contemplated under Clause 70 of the general conditions of contract and that an independent arbitrator of the choice of the Court cannot be appointed. On the other hand, the learned Counsel for the applicant has tried to contend that inasmuch as the respondents failed to appoint the arbitrator in spite of the notice issued to them and in spite of sufficient time granted to them, they

shall be deemed to have forfeited their right to appoint the arbitrator as contemplated in the arbitration clause and the Court is entitled to appoint the arbitrator of its choice for deciding the disputes between the parties. It is to be seen from the facts of these cases as already narrated above, that the applicant issued notices to the respondents as long back as in 1992 and number of reminders subsequently also issued and also the final notice was issued in August, 1996 granting one month time for the respondents to appoint the arbitrator and that the respondents, though expressed willingness to appoint the arbitrator, did not choose to appoint any such arbitrator till December, 1996 when alone the present applications were filed seeking appointment of the arbitrator by the Court. In view of such conduct of the respondents and their failure to appoint the arbitrator in spite of several requests made by the petitioner, they shall be deemed to have forfeited their right to appoint the arbitrator as contemplated under Clause 70 of the General conditions of contract and the Court is entitled to appoint an independent arbitrator of its choice for deciding the disputes that have arisen between the parties. The contention of the learned Counsel for the applicant has any amount of force and has to be accepted in view of the view expressed by the Supreme Court as well as various other High Courts in this regard.

19. In the decision of the Supreme Court reported in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, , it was observed that inasmuch as the Administrative Head of the Department had failed to appoint an arbitrator within time, it can be said that he had abdicated himself of the power to appoint the arbitrator under the contract and that the Court gets jurisdiction to appoint an arbitrator in place of the contract and that rejecting such request of the applicant for appointment of an arbitrator by the Court under such circumstances amounts to putting premium on inaction depriving the applicant of the remedy of arbitration frustrating the contract itself. In another decision of the Supreme Court reported in *G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service*, , also a similar point arose for consideration and it was observed by their Lordships :

"Thus 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 when no agreement was reached, even in the Court between the parties the Court gets jurisdiction and power to appoint an arbitrator. 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-availing 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. The respondent averred in the written statement that it was under consideration. Even before the learned single Judge he did not even state that he was willing to appoint an arbitrator. The learned single Judge rightly exercised the power u/s 20(4) of the Act and

appointed the arbitrator."

In the said decision, their Lordships referred to an earlier decision of the Supreme Court reported in *Union of India (UOI) Vs. Prafulla Kumar Sanyal*, , and distinguished the said case on facts and observed that the observations made by the Supreme Court in the decision of *Union of India v. Prafulla Kumar Sanyal* (supra) were in view of the particular facts of that case and in view of the agreed course between the parties and such observations made by their Lordships in that decision cannot be made applicable to the case before them. The same view was expressed by various High Courts also in similar cases as seen from the decisions reported in *Union of India v. Prahallad Moharana* (supra) *Banarasi Dass Mittal v. Housing Board, Haryana* 1988(1) Arb.LR 170, and *Union of India v. Amar Nath Agarwal Construction Pvt. Ltd.* 1988(2) Arb. LR 337, which are the decisions of the High Court of Punjab & Haryana. It is clear from such circumstances and from the facts of these cases that the respondents did not respond to the notices and reminders issued by the applicant for taking any steps to refer the disputes to the arbitrator as contemplated under the arbitration clause and such conduct on the part of the respondents, therefore, amounts to forfeiture of their right to appoint an arbitrator as contemplated under the arbitration clause and that the Court is, therefore, competent to appoint all independent arbitrator of its own choice in view of the fact and circumstances of the present cases.

20. It is further to be seen in this case that subsequent to the filing of the present applications seeking appointment of arbitrator and also subsequent to the filing of the counters of the respondents the respondents are said to have appointed an arbitrator on their own accord they decide the disputes between the parties and on account of such circumstances, the learned Counsel for the respondents has tried to contend that inasmuch as the arbitrator is since appointed by the respondents as per the terms of the arbitration clause, the present applications have become infructuous and are liable to be dismissed. But this contention also cannot be accepted in view of the facts of this case. As already stated above, in spite of the notices issued as long back as in 1992 and in spite of the fact that respondents agreed to appoint the arbitrator, no steps were, however, taken by them to appoint the arbitrator till August, 1996 and as such, the applicant issued final notices on 22-8-1996 calling upon the respondents to appoint the arbitrator within 30th days after receipt of the notice and also informing them that necessary steps will be taken according to law in case of failure to appoint the arbitrator within that time. But the respondents do not take any steps to appoint an arbitrator till December, 1996 and as such the present applications were filed u/s 11(5) of the New Arbitration Act seeking appointment of an arbitrator by the Hon"ble Chief Justice of the High Court. It is already stated above that in view of such conduct of the respondents in not appointing the arbitrator as per the request made by the applicant, they have forfeited their right to appoint an arbitrator and as such, the alleged appointment of in arbitrator during the pendency of the present applications cannot be said to

be valid and the present applications cannot be said to be infructuous and not maintainable on such ground. In the decision of the High Court of Punjab & Haryana in *Banarsi Dava Mittal v. Housing Board, Haryana* (supra) also an arbitrator was appointed by the Department subsequent to the filing of the application in the Court and it was contended on behalf of the Department that in view of such appointment of the arbitrator by the Department, even though subsequent to the filing of the petition in Court, the petition filed in the Court seeking appointment of arbitrator had become infructuous. But the High Court rejected such contention of the Department and observed that as the Department did not exercise its option to appoint the arbitrator within the specified period after the receipt of notice, they have forfeited their right to appoint the arbitrator and it is for the Court to exercise its jurisdiction to appoint the arbitrator u/s 8(2) of the Arbitration Act, (Old). Therefore, the said contention of the learned Counsel for the respondents is untenable and cannot be accepted. In view of all such facts and circumstances, the present applications filed for appointment of an arbitrator by the Hon'ble Chief Justice of the High Court are maintainable and an independent arbitrator of the choice of the Court can be appointed for deciding the disputes that have arisen between the parties.

The Hon'ble the Chief Justice who has to appoint the arbitrator u/s 11(5) of the New Arbitration Act has designated me to hear these applications. There is no consensus between the parties regarding identity of the person to be appointed as an arbitrator. I have, therefore, come to the conclusion that an independent arbitrator of my choice shall be appointed in all the four applications.

Point No. 4 :

21. In the result, all the four applications are allowed but without costs. Sri Justice T. Lakshinarayana Reddy, Retired Judge of the High Court of A.P. is appointed as arbitrator in each of these four cases to decide the disputes that have arisen between the parties. His remuneration is tentatively fixed at Rs. 40,000/- in each case making a total of Rs. 1,60,000/- to be initially paid by the applicant.