
(2016) 05 DEL CK 0154
In the Delhi High Court
Case No : Arb.P. 455 of 2015

M/s K.P. Buildcon Pvt Ltd.

APPELLANT

Vs

Indus Towers Ltd.

RESPONDENT

Date of Decision : 09-05-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2016) 3 ArbILR 483 : (2016) 6 RAJ 443

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Mr. S.S. Ray, Mr. Rohit Modi & Mr. Vaibhav Golia, Advocates, for the Appellant; Mr. Gopal Jain, Senior Advocate with Mr. Aditya Vashisth & Mr. Abhishek Birthray, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The petitioner has filed the above mentioned petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of an Arbitrator for adjudication of the disputes having arisen between the parties.

2. The petitioner is a company incorporated under the Companies Act, 1956 and is engaged in the business of providing services for Building, Upgrading, Consolidation and support of the telecommunication infrastructure. As per the petitioner, the value of the claim(s) is to the tune of Rs. 91 crores.

3. The respondent is a registered infrastructure provider, Category-1 (IP-1) by virtue of registration granted by the Department of Telecommunications, Ministry of Communication & IT, Government of India and is engaged in the business of the establishment, maintenance and provision of passive telecommunication infrastructure doing the business in the name and style of 'Indus Towers Limited'.

4. The petitioner and the respondent entered into an agreement dated 6th

October 2008 (hereinafter referred to as the said agreement) whereby subject to the terms and conditions of the said agreement, the respondent engaged the petitioner for providing the service as per Annexure-II of that agreement.

The case of the petitioner as per the petition

5. As per the said agreement, the petitioner had to provide the services in 5 Telecom circles i.e. Maharashtra, U.P.(E), U.P.(W), Rajasthan and Gujarat as per the terms and conditions mentioned in the said agreement. The respondent had to give to the petitioner the work for each circle as detailed in Annexure-I of the said agreement which is detailed below:

Annexure-I

Service Area

Service area within which the service provider shall render its service, pursuant to this Agreement, comprises of the following:

Sr. No.

Circles

Starting October

Starting November

Starting December

New Build

Upgrade

New Build

Upgrade

New Build

Upgrade

1

Maharashtra

25

100

25

100

25

100

2

UP (E)

25

100

25

100

25

100

3

UP (W)

25

100

25

100

25

100

4

Rajasthan

25

100

25

100

25

100

5

Gujrat

25

100

25

100

25

100

5.1. As per the Annexure-I of the said agreement, the respondent had to give the petitioner 25 New Build Work and 100 upgrade work in each circle every month as per Annexure-I of the said agreement.

For that purpose the respondent had also instructed the petitioner to recruit the employees/manpower as per the standards mentioned by the respondent in Annexure-V which is attached with the agreement. Clause 6(i) of the agreement deals with Manpower Recruitment Details and standards:

"In order to fulfil its obligations under this agreement, my client shall deploy manpower in the manner and of the standard as agreed and set out in Annexure-V titled "manpower Recruitment Details and Standard" to this agreement."

5.2 As mentioned above and as per the respondent's instructions and standard mentioned in Annexure-V in which the respondent had given the list for recruitment of manpower for 25 new Build sites and 100 Upgrade sites, the petitioner had recruited the required number of employees as detailed below:

Manpower requirement for new build sites

Manpower requirement for upgrade/consolidation/loading support

No. of Sites

25 (GBT/RTT)

No. of Sites

100 Sites

Cost Elements

Nos.

Assumption

Cost Elements

Nos.

Assumption

Project Manager

1

1 per circle

Project Manager

0

1 per circle

Survey Engineer

1.7

1 per 15 sites

Civil Engineer

4

1 per 25 sites

Conveyance & Communication

0

Conveyance & Communication

0

Civil Engineer

1.7

1 per 15 sites

Electrical Engineer

6.7

1 per 15 sites

Conveyance & Communication

0

Conveyance & Communication

0

Electrical Engineer

1.7

1 per 15 sites

Co-ordinators

2

1 per 50 sites

Conveyance & Communication

0

Mis person

0

1 per circle

Co-ordinators

0.5

1 per 50 sites

Warehouse Officer

1

1 per circle

Mis person

0.5

1 per circle

Office & stationery

0

Warehouse Officer

1

1 per circle

Miscellaneous

0

Office & stationery

0

Total requirement

13.7

Miscellaneous

0

Manpower required

14

Total requirement

8.1

Manpower required

9

and it is alleged that as per the instruction and assurance of the respondent to give average monthly 25 New Sites and 100 upgrade sites, the petitioner had recruited the employees as per the respondent's requirement as detailed, standards and qualification mentioned in Annexure-V.

5.3 The said agreement dated 6th October, 2008 was for the period of 3 years (36 months) i.e. from 6th October, 2008 to 5th October, 2011. It is alleged by the petitioner that during the aforesaid period the respondent had to give the petitioner the work for each circle as detailed in Annexure-I of the said agreement. The respondent had assured the petitioner to give in each circle (Maharashtra, U.P.(E), U.P(W), Rajasthan and Gujarat) average monthly 25 New Build Work and 100 upgraded Work. As per the said agreement, the respondent had to give the petitioner in 36 months in all 5 circles 4500 New Build Works [25 (work) X 36 (Months) X 5 (circles)]. In the same way and as per the said agreement in 36 months the respondent had to give the petitioner in all 5 circles 18000 Upgraded Works [100 (work) X 36 (Months) X 5 (Circles)].

5.4 The respondent had to give the petitioner the work as stated aforesaid in terms of the Annexure-I of the said agreement. However, the respondent failed to allot the contracted work to the petitioner, rather in terms of the said agreement, the respondent had to give the said work in 36 months and the petitioner had to fulfil all the requirements as per the said agreement, although the petitioner had fulfilled all its contractual requirements/ obligations as per the terms and condition of the said agreement.

5.5 It is submitted that the petitioner also had to recruit all the manpower/ employees mentioned in Annexure-V to the said agreement as the respondent had assured the petitioner to give average monthly 25 New Site and 100 upgrade sites. There has never been even an iota of objection or complaint on behalf of the respondent in respect of the performance of the obligations on the part of the petitioner under the said agreement.

6. The petitioner submits that as per the Annexure-I to said agreement, the respondent had to allot the work to the petitioner which was agreed that the respondent can change/modify/reduce the work but by providing a written notice to the service provider/ petitioner and the service provider would be bound by the same. However, the respondent never gave any such notice to the petitioner who had performed all its obligations as per the terms and condition of the said agreement and the respondent was completely satisfied with their work which was also mentioned in their emails.

7. The petitioner alleges that in spite of this, the petitioner understands that the respondent had given its work to some other companies in the same circle allotted to the petitioner in the breach of the said agreement causing huge losses in turn to the petitioner. But, the respondent has failed to fulfil its obligations and to comply with the terms and conditions of the said agreement.

8. The petitioner submits that in terms of the said agreement the respondent had

to allot/give the petitioner below mentioned work in 36 months :-

Circle : Gujarat

New Building Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

25

25

25

May

NA

25

25

25

June

NA

25

25

25

July

NA

25

25

25

August

NA

25

25

25

September

NA

25

25

25

October

NA

25

25

25

November

25

25

25

NA

December

25

25

25

NA

January

25

25

25

NA

February

25

25

25

NA

March

25

25

25

NA

Total

125

300

300

175

Circle : Gujarat

Up gradation Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100

November

100

100

100

NA

December

100

100

100

NA

January

100

100

100

NA

February

100

100

100

NA

March

100

100

100

NA

Total

500

1200

1200

700

Circle : U.P. (E)

New Building Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

25

25

25

May

NA

25

25

25

June

NA

25

25

25

July

NA

25

25

25

August

NA

25

25

25

September

NA

25

25

25

October

NA

25

25

25

November

25

25

25

NA

December

25

25

25

NA

January

25

25

25

NA

February

25

25

25

NA

March

25

25

25

NA

Total

125

300

300

175

Circle : U.P.(E)

Up gradation Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100

November

100

100

100

NA

December

100

100

100

NA

January

100

100

100

NA

February

100

100

100

NA

March

100

100

100

NA

Total

500

1200

1200

700

Circle : U.P. (W)

New Building Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

25

25

25

May

NA

25

25

25

June

NA

25

25

25

July

NA

25

25

25

August

NA

25

25

25

September

NA

25

25

25

October

NA

25

25

25
November
25
25
25
NA
December
25
25
25
NA
January
25
25
25
NA
February
25
25
25
NA
March
25
25
25
NA
Total
125
300
300

175

Circle : U.P.(W)

Up gradation Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100

November

100

100

100

NA

December

100

100

100

NA

January

100

100

100

NA

February

100

100

100

NA

March

100

100

100

NA

Total

500

1200

1200

700

Circle : M & G

New Building Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

25

25

25

May

NA

25

25

25

June

NA

25

25

25

July

NA

25

25

25

August

NA

25

25

25

September

NA

25

25

25

October

NA

25

25

25

November

25

25

25

NA

December

25

25

25

NA

January

25

25

25

NA

February

25

25

25

NA

March

25

25

25

NA

Total

125

300

300

175

Circle : M & G

Up gradation Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100

November

100

100

100

NA

December

100

100

100

NA

January

100

100

100

NA

February

100

100

100

NA

March

100

100

100

NA

Total

500

1200

1200

700

Circle :Rajasthan

New Building Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

25

25

25

May

NA

25

25

25

June

NA

25

25

25

July

NA

25

25

25

August

NA

25

25

25

September

NA

25

25

25

October

NA

25

25

25

November

25

25

25

NA

December

25

25

25

NA

January

25

25

25

NA

February

25

25

25

NA

March

25

25

25

NA

Total

125

300

300

175

Circle : Rajasthan

Up gradation Allocation Commitment

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100
November
100
100
100
NA
December
100
100
100
NA
January
100
100
100
NA
February
100
100
100
NA
March
100
100
100
NA
Total
500
1200
1200

700

9. The petitioner also submits that there is a difference between the actual works which the respondent had to allot/give to the petitioner. The difference of work which the respondent had not given to the petitioner in each circle are as under:

Circle : Gujarat

New Building Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

18

24

25

May

NA

23

25

25

June

NA

21

19

25

July

NA

19

19

25

August

NA

16

22

25

September

NA

18

18

25

October

NA

23

19

25

November

17

24

24

NA

December

3

20

25

NA

January

-20

20

25

NA

February

-15

17

25

NA

March

-2

20

25

NA

Total

-17

239

270

175

Circle : Gujarat

Up gradation Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

90

-53

100

May

NA

70

54

100

June

NA

47

24

100

July

NA

12

23

100

August

NA

52

7

100

September

NA

63

41

100

October

NA

63

24

100

November

78

35

97

NA

December

67

48

100

NA

January

34

-6

100

NA

February

50

36

100

NA

March

48

-18

100

NA

Total

227

492

617

700

Circle : U.P. (E)

New Building Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

18

25

25

May

NA

10

25

25

June

NA

17

25

25

July

NA

14

25

25

August

NA

19

25

25

September

NA

12

25

25

October

NA

20

25

25

November

25

23

25

NA

December

25

23

25

NA

January

19

22

25

NA

February

21

25

25

NA

March

12

24

25

NA

Total

102

227

300

175

Circle : U.P. (E)

Up gradation Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

95

100

100

July

NA

92

100

100

August

NA

97

100

100

September

NA

96

100

100

October

NA

99

100

100

November

100

99

100

NA

December

100

100

100

NA

January

100

99

100

NA

February

100

100

100

NA

March

100

100

100

NA

Total

500

1177

1200

700

Circle : U.P. (W)

New Building Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

24

25

25

May

NA

22

25

25

June

NA

13

25

25

July

NA

24

25

25

August

NA

25

25

25

September

NA

22

25

25

October

NA

25

25

25

November

25

25

25

NA

December

25

24

25

NA

January

22

24

25

NA

February

19

24

25

NA

March

20

25

25

NA

Total

111

277

300

175

Circle : U.P. (W)

Up gradation Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100

November

100

100

100

NA

December

93

100

100

NA

January

65

100

100

NA

February

72

100

100

NA

March

86

100

100

NA

Total

416

1200

1200

700

Circle : M & G

New Building Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

17

24

25

May

NA

12

25

25

June

NA

9

22

25

July

NA

14

23

25

August

NA

24

20

25

September

NA

23

24

25

October

NA

25

23

25

November

25

25

23

NA

December

25

22

24

NA

January

24

20

25

NA

February

16

23

25

NA

March

11

22

25

NA

Total

101

236

283

175

Circle : M & G

Up gradation Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

69

100

100

May

NA

47

100

100

June

NA

65

100

100

July

NA

94

100

100

August

NA

85

100

100

September

NA

98

100

100

October

NA

94

100

100

November

100

99

100

NA

December

100

98

100

NA

January

78

99

100

NA

February

78

100

100

NA

March

75

100

100

NA

Total

431

1048

1200

700

Circle : Rajasthan

New Building Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

20

25

25

May

NA

24

23

25

June

NA

21

25

25

July

NA

24

25

25

August

NA

9

25

25

September

NA

21

25

25

October

NA

25

25

25

November

25

24

25

NA

December

25

25

25

NA

January

16

25

25

NA

February

13

24

25

NA

March

18

25

25

NA

Total

97

267

298

175

Circle : Rajasthan

Up gradation Short Allocate

Month

2008-09

2009-10

2010-11

2011-12

April

NA

100

100

100

May

NA

100

100

100

June

NA

100

100

100

July

NA

100

100

100

August

NA

100

100

100

September

NA

100

100

100

October

NA

100

100

100

November

100

100

100

NA

December

100

100

100

NA

January

100

100

100

NA

February

100

100

100

NA

March

100

100

100

NA

Total

500

1200

1200

700

10. In view of the above, it is submitted by the petitioner that from the respondent's side there is a breach of obligations and nonfulfillment of the terms and condition of the said agreement. The respondent had failed to allot/give the work as per the said agreement. In fact the respondent had given 534 New Build Work and 1842 Upgraded work. The respondent had not given 3966 New Build Work and 16158 Upgraded Work as specified in the said agreement and which the respondent was liable to give to the petitioner despite of sending many emails to the respondent for giving/allotting further work to them as per the terms and condition of the said agreement but the respondent failed to allot the work as per its commitment in the agreement. The respondent failed to abide by the terms and conditions of the said agreement and had failed to fulfil its commitments as per the said agreement.

The case set up by the respondent

11. The prayer of the petitioner is opposed by the respondent who stated that it has not received the purported notice of invocation dated 20th September, 2012 or purported letters dated 15th February, 2014 and 20th March, 2014 filed by the petitioner before this Court along with petition. The respondent submits that the petitioner has with malafide intention addressed all the three purported notices and letters mentioned in the preceding paragraph on respondent's old address to ensure that the respondent is not in receipt of the same and hence, not in a position to respond to them.

12. It is also alleged by the respondent that the petitioner has in fact as far back as on 30th December, 2008 wrote a letter to the respondent on the correct/new address. Such an act on petitioner's behalf can only be attributed to its ill-conceived agenda to harass the respondent and extract monetary gains.

13. It is argued on behalf of the respondent that the invocation is bad and contrary to the arbitration clause as per the averments made by the petitioner itself in para 26 and 29 of the petition.

14. It is submitted that the legal notice dated 20th September, 2012 and letters dated 15th February, 2014 and 20th March, 2014 would establish that the contentions of the petitioner are misleading, false and are untenable legally and contractually.

15. In nutshell, it is submitted that even the notice (which was not received by the respondent) did not meet the mandatory requirements stipulated under Section 21, Section 11(3) and Section 11(5) of the Act. In order to invoke any reference to arbitration, the petitioner ought to have invoked arbitration in terms

of Section 21 of the Act, requesting the respondent for the purported dispute to be referred to arbitration, but it can even be remotely inferred from the purported legal notice dated 20th September, 2012 that it contained any request for reference of purported disputes to arbitration much less as alleged by the petitioner in paragraph Nos. 26 and 29 of the petition.

In support of the above, it is submitted that the Arbitration Agreement provides procedure for appointment of Arbitrator which is not complied by the petitioner on the face of record.

16. It is argued by Mr. Gopal Jain learned Senior counsel appearing on behalf of the respondent that the petitioner failed to follow the procedure prescribed under Section 11(3) or Section 11(5) of the Act. The petitioner in contrary to the statutory provisions, unilaterally appointed Ms. Praveena Gautam, Advocate as a sole Arbitrator. As the petitioner has not invoked arbitration as per the statutory requirements of the Act, thus, this Court should not grant the prayer as sought in the absence of compliance of procedure agreed by both the parties in written agreement. It is submitted that assuming the purported appointment of Ms. Praveena Gautam as a sole Arbitrator was valid, the petition seeking appointment of an independent Arbitrator lacks cause of action since it is not the case of the petitioner that Ms. Praveena Gautam has declined to act or expressed her inability to proceed with the arbitration.

17. Mr. Gopal Jain, learned Senior counsel, has also argued that the petitioner has not served the notice at the correct address despite of having the full knowledge about the change of address as the petitioner itself has earlier corresponded with the respondent at new address. He says that in the present case, the petitioner has acted malafidely; all the acts and conducts of the petitioner are contrary to the arbitration clause, therefore unless the proper procedure is followed, his client is not ready to give its consent to the prayer made in the present petition.

18. Counsel for the petitioner on the other hand argued that the respondent did receive the notice. It was sent by registered post. There is a presumption under Sections 3 and 4 of the Act, therefore, the said objection is wholly misconceived. As far as compliance of arbitration clause is concerned, he says that after filing the present petition, the matter was referred to the mediation centre, thus, the first condition is also satisfied. With regard to other objection about the appointment of Advocate as Arbitrator without the consent of respondent, he says that his client is now agreeable if retired Judge of this Court is appointed as sole Arbitrator who would adjudicate the disputes between the parties in view of existing arbitration clause.

19. Mr. Gopal Jain, learned Senior counsel, has refuted his arguments and submits that no doubt the matter was referred for mediation but the same was referred by the Court without prejudice. He says that all the claims of the petitioner are bogus and time barred. The same are raised in order to blackmail

his client, therefore, in the nature of the present matter, the Court should strictly examine the provisions of the Act and law applicable.

20. Let me now deal with rival submissions of the parties.

21. As per the petitioner the following disputes have arisen between the parties out of the said agreement which are required to be adjudicated by the Arbitrator in terms of the agreement:-

(i) Damages/losses caused to the petitioner by not giving/allotting the work as per the terms and condition of the said agreement to the tune of Rs. 77,00,00,000/-,

(ii) Man power expenses which the petitioner had incurred to the tune of Rs. 8,00,00,000/-,

(iii) Office expenses which the petitioner had incurred to the tune of Rs. 1,00,00,000/- approx.,

(iv) impairment cause to the petitioner's goodwill to the tune of Rs. 5,00,00,000/- and

(v) with interest @ 24% per annum from expiry of the agreement till the date of actual payment and costs.

22. The arbitration clause has been reproduced herein below:

"Clause 7(xix). Arbitration - In the event of any dispute, differences or claims arising between the parties in connection with this Agreement, during the subsistence or land after its termination in any manner whatsoever including the validity or the construction or interpolation of any of the clauses hereof or anything done or omitted to be done pursuant hereto, the parties shall first endeavour to amicably settle such disputes, differences or claims, failing with the same shall be referred and resolved through Arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any reenactment or modification thereof"

23. The relevant excerpts from the purported legal notice dated 20th September, 2012 have been reproduced herein below:

"30. Take notice that on any failure on your part to comply with this demand notice within the stipulate time, my client would be constrained, without any further reference/notice to your client to refer the matter to Arbitration by the Sole Arbitrator appointed by my client, as per the relevant arbitral Clause as contained in the said Agreement enter between your client and my client under the Arbitration and Conciliation Act, 1996."

(Emphasis Supplied)

The case of the respondent is that the petitioner in the purported letter dated 20th September, 2012, has neither mentioned about appointment of Ms.

Praveena Gautam as the Sole Arbitrator nor has the petitioner called upon the respondent to either agree or to appoint their Arbitrator, as alleged or otherwise.

24. The relevant excerpts of paragraph Nos. 26 and 29 of the petition are reproduced herein below:

"26. ...It was requisitioned in the said notice that on any failure of the Respondent to comply with this demand notice within the stipulated time, the Petitioner would be constrained, without any further reference/notice to the Respondent, to refer the matter for adjudication of the disputes to Arbitration by the Sole Arbitrator (Ms. Praveena Gautam, Advocate on record, Supreme Court of India) appointed by the Petitioner. The Petitioner also called upon the Respondent to either to agree on appointment of the Arbitrator named by the petitioner or to appoint their Arbitrator as per the relevant arbitral clause as contained in the said Agreement entered between the Respondent and the Petitioner and under the Arbitration and Conciliation Act, 1996 ..."

29. The Petitioner submits that it has served 30 days notice on 20.09.2012 to both the Respondent and proposed the name of the Arbitrator namely, Ms. Praveena Gautam, Advocate on Record, Supreme Court of India. The Respondent has not come forward for any claim for appointment of Arbitrator and the Petitioner invoked the Section 11 with sub-section 4 & 5 of the Arbitration & Conciliation Act, 1996."

(Emphasis supplied)

25. In the present case, the respondent has challenged the maintainability of the present petition firstly, on the ground of nonreceipt of notice which is required under Section 11 of the Act. It is argued that it was not delivered or served at the correct address. As per the provisions of the Act, if the notice is sent at the correct address, no doubt inference can be drawn that it is a deemed service, but the position in the present case is different as the notice was sent at the old address where the respondent did not exist. Counsel for the respondent has pointed out that the petitioner was aware about the new address but it has chosen to send the notice at old address. He says that it is intentionally done in order to appoint its own Arbitrator to adjudicate the disputes. The said act is contrary to the scheme of the Act as well as it offends the arbitration clause. Counsel has also pointed out the clause of the agreement wherein it was agreed by the parties that in case of change of address, the correspondence is to take place at the new address. No Regd. AD card has been placed on record by the petitioner. Only photocopy of postal receipt is filed. From the record, it appears that the notice was not sent at the new address. Thus, the Court is not inclined to give the benefit of service by concluding that the proper notice has been served and delivered at the correct address of the respondent.

26. Even otherwise, before coming to any conclusion, let me take up the next objection of the respondent that the procedure has not been followed by the petitioner at the time of invoking the arbitration, the answer of the petitioner is

that since after filing the petition the matter was referred to mediation, it indicated that the parties were ready to settle their disputes. As the disputes were not settled, now the matter is to be referred to the Arbitral Tribunal. The said compliance under these circumstances is made out.

27. I do not agree with the arguments of the petitioner's counsel because of the reason as the reference date is the date of invocation. In case all the requirements on the date of invocation are not satisfied, the court may not allow the prayer unless with the consent of both the parties. In the present case as per the arbitration clause, it was required by the parties that they shall first endeavour to amicably settle such dispute, differences or claims, failing which the disputes would be referred for thorough arbitration. Nothing is available on record to show that prior to invocation, the plaintiff has at any time communicated or had a meeting with the respondent for amicable settlement. No notice of such nature was sent, rather the notice was allegedly sent on 20th September, 2012 wherein it was also mentioned that in case the amount is not paid, the petitioner would take criminal and civil action against the respondent. After filing the petition, if the matter was referred to the mediation centre ? without prejudice, it is not a compliance of the procedure.

28. The petitioner in the present case, without following the procedure (laid down in the arbitration clause) has appointed the sole Arbitrator without the consent of the respondent. The said act of the petitioner is one sided which is against the scheme of the Act and agreed procedure mentioned in the agreement.

29. In *Datar Switchgears Ltd. v. Tata Finance Ltd.*, (2000) 8 SCC 151, the question which arose for consideration was whether there was a failure of the mechanism provided in the arbitration clause of the agreement where under disputes were to be referred to an arbitrator to be nominated by the lessor. The lessor gave notice to the lessee and later appointed an arbitrator. It is in this context that the Supreme Court held as under:

"...When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigour 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...."

(emphasis supplied)

30. In the present case, the procedure prescribed, and mutually agreed to by the parties, under the arbitration agreement, the said procedure must be strictly adhered to and non-compliance thereof must, as of course, result in dismissal of the application. Section 11(5) are judicial in nature. If the parties fail to agree on an Arbitrator within thirty days from receipt of a request by one party from the other to so agree, would the Chief Justice's designate have jurisdiction, under

Section 11(5) of the Act, to appoint an Arbitrator. Failure to agree on an Arbitrator would only arise if the party after the receipt of notice did not take any step before filing of the petition under Section 11 before the Court.

31. In *SBP & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618, the Supreme Court observed:

...It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an order appointing an arbitrator or an Arbitral Tribunal. It is really the giving of an opportunity of being heard.

32. In the present case, the requirement of making a request in writing to the respondent seeking his consent for the appointment of an Arbitrator, and waiting for a period of thirty days, before filing the application under Section 11(5) of the Act, has not been complied with. Further, the petitioner has also failed to follow the procedure laid down in the arbitration clause of amicable settlement. This Court is clear in its mind that if injustice is being done to the petitioner on the face of the record, then the procedure to some extent cannot be relaxed in order to avoid delay. However, if *prima facie* Court finds in second category of cases that the claims raised by a party in the petition under Section 11 of the Act are apparently fanciful or self created, then under these circumstances, the Court has to follow the procedure stringently and due process of procedure is to be adhered to. The present case does not come within the category of first exception. Therefore, the petition is dismissed for want of full compliance as per arbitration clause.

33. It is open to the petitioner to comply with the aforesaid requirements and proceed thereafter in accordance with law and file the fresh petition after following the procedure, if so advised. If any petition is filed, the same would be decided as per its own merit.