

(2012) 09 RAJ CK 0150

In the Rajasthan High Court

Case No : Arbitration Application No. 26 of 2011

M/s. Simpark Infrastructure Pvt. Ltd.

APPELLANT

Vs

Jaipur Municipal Corporation

RESPONDENT

Date of Decision : 12-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(2), 11(4), 11(5), 11(6)

Citation : (2013) 2 CDR 1108 : (2013) 1 WLN 111

Hon'ble Judges : Prem Shanker Asopa, J

Bench : Single Bench

Advocate : Mahendra Singh, for the Appellant; Vinod Singhal, Advocate on behalf of Mrs. Naina Saraf, for the Respondent

Final Decision : Dismissed

Judgement

Prem Shanker Asopa, J.—This is an arbitration application under Sec. 11 of the Arbitration and Conciliation Act, 1996 (in short "the Act of 1996") for appointment of the Arbitral Tribunal consisting of three Arbitrators to resolve the dispute, arising out of the Agreement dt. 17.02.2010 (Anx. A). Briefly stated, the facts of the case, are that in order to regulate the traffic position in Jaipur, the Jaipur Municipal Corporation (in short "JMC") after following the procedure, entered into the development agreement dt. 17.02.2010 (Anx. A) with the Applicant—a Company incorporated under the Companies Act, 1956—for Design, Built, Finance, Operate and Transfer (i.e. DBFOT Basis) of multi-level parking spaces along with commercial development at Ramleela Maidan-Rangmanch, M.I. Road, Jaipur which contained Dispute Resolution Article 16 and further, Clause 16.3 provided for Arbitration. In the said Agreement, reference to the "Developer" is the Applicant and the "authority" means JMC. After fulfilling certain obligations, as referred to in Clause 4.1.1 and 4.1.2, the JMC shall have to procure for the Applicant, peaceful possession of the site, free from all encumbrances along with permission for commencement of the construction. It is further stated in the arbitration application that subsequent to the execution of

the Agreement, the Applicant deposited the following amount:

Performance Security-Rs. 10,00,00,000/- (Rupees Ten Crores Only)

Ist installment of premium paid as upfront: Rs. 12,75,00,000/- (Rupees Twelve Crores Seventy Five Lacs Only)

2. The Applicant requested for the project site, free from all encumbrances and a letter to this effect was sent on 14.04.2010 (Anx. B) which was replied to by the JMC alleging willful default on the part of the Applicant to comply with the provisions of the development agreement. The Applicant again requested the JMC to hand over the project site, free from all encumbrances, within the working area so that the Applicant may commence the work at the earliest. It was further stated that on 30.12.2010 (Anx. C) in case appropriate orders in this respect with requisite statutory compliances are not made within another 2 weeks, the Applicant shall be constrained to presume that the Government and its instrumentalities are disinclined to abide by and adhere to the assurances given to the Applicant.

3. The Applicant vide its letter dt. 01.02.2011 (Anx. D), brought to the notice of the JMC that the peaceful possession of the site for construction of the proposed multi-level parking and commercial complex project at Ramleela Maidan and Rangmanch has not been handed over to the Applicant, free from all encumbrances and specifically referred the encumbrances-(i) the temple and the houses; (ii) vocational training institute by the name of Shri Chand Shilp Shala on 99 years" lease from the State Government and (iii) Rangmanch project site covering almost 823 Sq. Meters of the proposed commercial area and the vacant area at the Rangmanch site is completely occupied by "Phoolwallas" and "Chudiwallas" who were earlier evicted by the JMC. The Applicant in the said letter dt. 01.02.2011 (Anx. D) requested the JMC to appoint the Arbitrator as per the Development Agreement on account of the disputes and differences arisen between the parties-the Applicant and the JMC-with regard to the fact of not handing over of project site, free from all encumbrances.

4. Subsequently, the Applicant filed an application under Sec. 9 of the Act of 1996 for seeking interim measure which was decided by the Court vide order dt. 02.02.2011 with the direction that the Applicant shall extend the bank guarantee for a period of six months unless the peaceful possession of the land in question was handed over to the Applicant free from all encumbrances and further, no coercive action shall be taken by the JMC. The Court also observed that the parties are free to resolve their dispute through arbitration/conciliation.

5. On 03.02.2011 (Anx. E), the Applicant requested to the JMC in unequivocal terms that the Non-applicant may fulfil the warranties, guarantees and assurances given by them within three days of the receipt of the said communication, failing which the Applicant would be constrained to presume that the said warranties given by the Non-applicant in respect of the agreement were false and misleading.

6. On 17.02.2011 (Anx. F), the Applicant sent a notice to the Non-applicant for appointment of the Arbitrator under the Act of 1996 as also the provisions of Clause 16.3 of the Agreement and requested the JMC to form a Panel of Arbitrators on receipt of the said notice. However, even after lapse of more than thirty days, the JMC has failed to act upon the request and has not formed the Panel of Arbitrators so far, therefore, knowingly and willingly forfeited its right to do so under the agreement. After expiry of the thirty days, when no Panel of Arbitrators was supplied, the present arbitration application has been filed for appointment of Arbitral Tribunal consisting of three Arbitrators.

7. The Non-applicant has filed reply to the arbitration application wherein the preliminary objection has been taken that the Applicant has not taken the recourse to the amicable settlement as per the procedure set forth for reconciliation in accordance with Clause 16.1 and 16.2 which is a condition precedent for appointment of Arbitral Tribunal under Clause 16.3 therefore, the application is not maintainable. The Non-applicant has also mentioned the fact that in the interim measure of the Court dt. 02.02.2011, there is reference of reconciliation proceedings and the Non-applicant has sent number of letters on 03.03.2011, 30.03.2011, 20.04.2011 and 13.06.2011 (Anx. R-1 to 5), to attend the conciliation meetings but despite receiving such letters sent by the JMC, none of the representative of the Applicant ever appeared before the conciliation meeting.

8. The Applicant has filed rejoinder stating therein that a conspectus of the uncontroverted averments made in the arbitration application as also un-rebutted documents annexed thereto, clearly demonstrate that the issues raised by the Applicant are so fundamental that they vitiate the contract itself and are plainly incapable of being resolved merely by conciliation or reconciliation and further annexed a copy of the letter dt. 09.03.2011 (Anx. G) in reply to the JMC letter dt. 03.03.2011.

9. On 02.05.2012, the Applicant has filed an additional affidavit stating therein that the representative of the Applicant on several occasions also met the concerned official of the Non-applicant in person to sort out the dispute and to try and explore the possibility of any amicable settlement. The efforts so made by the Applicant for resolution of the disputes, before referring the matter to the Arbitral Tribunal, could not succeed because of the gross inaction and failure on the part of the Non-applicant to do the needful.

10. The Non-applicant has filed counter affidavit to the said affidavit stating therein that the contents mentioned by the Applicant that representatives of the Applicant company, on several occasions also met the concerned officials to the respondent authority in person to sort out the dispute and to try and explore possibility for any amicable settlement are false and incorrect. It was further averred that the Applicant never took any interest for any amicable settlement. It was also stated therein that the without following the necessary provision of Articles 16.1 and 16.2 to amicably settle the dispute through conciliation of the

Agreement, the Applicant has filed the present arbitration and now has further filed the present additional affidavit narrating the false facts. It has been further repeated that the Applicant never participated in any of the conciliation meetings for amicable settlement despite receiving number of letters sent by the JMC.

11. The preliminary objection raised by the counsel for the JMC is that the Applicant never took any interest to participate in the conciliation meetings, therefore, the matter could not be referred for amicable settlement in accordance with the conciliation procedure set forth in Clause 16.2. Counsel for the JMC further submits that a bare reading of Clauses 16.1 and 16.2 of the Dispute Resolution would reveal that any dispute or difference or controversy of whatever nature, howsoever arising under or out of or in relation to this Agreement between the parties, and so notified in writing by either party to the other party shall in first instance attempted to resolved amicably in accordance with the Conciliation Procedure set forth in Clause 16.2. The said Clause 16.2 relates to reference to the Authority concerned and fixing of the time limit for resolution of the said dispute through conciliation and further, in case of not amicably settling the dispute within fifteen days of the meeting or thirty days of notice in writing referred to in Clause 16.1.1, either party may refer the dispute to arbitration in accordance with the provisions of Clause 16.3, therefore, the clause relating to amicable settlement in accordance with the conciliation procedure set forth in Clause 16.2 is a condition precedent which has not been followed in the present case and directly, the arbitration application has been filed on expiry of thirty days" notice for appointment of Arbitral Tribunal which is premature, therefore, the same is not maintainable.

12. Submission of counsel for the Applicant on the aforesaid preliminary objection is that availability of the provision for amicable settlement through conciliation prior to initiation of arbitral proceedings under the agreement cannot act as a restraint on the power of the Court in a proceeding under Sec. 11 of the Act of 1996 to appoint Arbitral Tribunal/Arbitrator directly when the nature of the dispute is such that it cannot be resolved amicably by conciliation or when either party rejected invitation for commencement of the conciliation proceedings within the meaning of Sec. 62(3) of the Act of 1996. In support of the aforesaid contention, counsel for the Applicant has placed reliance on Sunil Manchanda and Others Vs. Ansal Housing and Construction Ltd., : Sunil Manchanda and Others Vs. Ansal Housing and Construction Ltd., , paras 2, 4, 8, 9 and 10. On the issue of appointment of Arbitral Tribunal under Sec. 11(6) of the Act of 1996 when the JMC has failed to provide the panel of five Arbitrators for appointment of the Arbitral Tribunal of three Arbitrators and further has not nominated its Arbitrator, as per Clause 16.3, even after lapse of thirty days and thereafter, up to the date of filing of the present arbitration application i.e. 23.03.2011, submission of counsel for the Applicant is that the right of the JMC to make appointment of the Arbitral Tribunal ceases to exist or the same is forfeited for constitution of the Arbitral Tribunal, therefore, the Applicant is entitled to appointment of the Arbitral Tribunal consisting of three Arbitrators and on the said issue, he has

placed reliance on Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, (Paras 7, 9, 11, 18, 19), Punj Llyod Ltd. vs. Petronet MHB Ltd., (2006) 2 SCC 638 (Paras 3, 5 and 6), Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd., (Paras 9, 12 and 13) and Bharat Sanchar Nigam Ltd. and Another Vs. Dhanurdhar Champatiray, (Paras 7 and 10).

13. In this particular case, the following two Issues are involved:

(i) Whether the agreed arbitral procedure of dispute resolution which has been made condition precedent for invoking the arbitration clause is required to be followed or not by the Applicant ?

(ii) Whether sub-Section (6) of Sec. 11 of the Act of 1996 can be invoked on expiry of thirty days" notice, as required under sub-Section (4) of Sec. 11 of the Act of 1996 in a case where the agreed arbitral procedure for appointment of Arbitral Tribunal has not been followed by the Applicant?

14. The relevant sub-Section (1) to (6) of Sec. 11 of the Arbitration and Conciliation Act, 1996 as also Clause 16 consisting of Clauses 16.1 Dispute Resolution, Clause 16.2 Conciliation and Clause 16.3 with sub-clauses of arbitration contained in the Agreement 17.02.2010 (Anx. A) are as follows:

(i) Sub-sec. (1) to (6) of Sec. 11 of the Act of 1996

11. Appointment of arbitrators

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-Section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-Section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-Section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-Section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any

person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties-

(a) a party fails to act as required under that procedure;

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(Emphasis supplied)

(ii) Relevant Clause 16 of the Agreement

16.1 Dispute Resolution

16.1.1 Any Dispute or Difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties and so notified in writing by either party to the other party ("the Dispute") shall, in first instance attempted to resolved amicably in accordance with the Conciliation Procedure set forth in Clause 16.2.

16.1.2 The parties agree to see their best efforts for resolving all disputes arising under or in respect of this Agreement promptly, equitably and in good faith and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any dispute.

16.2 Conciliation

In the event of any Dispute between the parties, either party may require such Dispute to be referred to the Chief Executive Officer and/or Mayor of the Authority and the Director of the Developer for the time being (in case of consortium/JV the director of th Lead Member), for amicable settlement. Upon such reference, the two shall meet at earliest and not later than seven (7) days from the date of reference to discuss and attempt to amicably resolve the dispute. If such meeting does not take place within the period of seven (7) days or Dispute is not amicably settled within fifteen (15) days of the meeting or the Dispute is not resolved as evidenced by signing the written terms of settlement within thirty (30) days of notice in writing referred to in clause 16.1.1 above or such longer period as may be mutually agreed by the parties, either party may refer the Dispute to arbitration in accordance with the provisions of Clause 16.3.

16.3 Arbitration

16.3.1 Any Dispute which is not resolved amicably shall be referred to a panel of three (3) arbitrators in terms of the Arbitration and Conciliation Act, 1996. For this purpose Authority will make out a panel of five (5) possible arbitrators. Each party shall nominate an arbitrator out of this panel submitted by the Authority and these two (2) arbitrators will appoint the third arbitrator in writing and also inform the concerned parties about such appointment and call upon the other party to appoint its arbitrator. If within fifteen (15) days of receipt of such intimation the other party fails to appoint its arbitrator, the party seeking appointment of arbitrator may take further steps in accordance with Arbitration and Conciliation Act, 1996. The arbitrator shall give item-wise and reasoned award. Where three (3) arbitrators have been appointed, the award of the majority will prevail.

(Emphasis supplied)

16.3.2 Place of Arbitration:

The place of arbitration shall be at Jaipur.

16.3.3 English Language:

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and awards shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings. The award shall made in writing.

16.3.4 Enforcement of Award:

The parties agree that the decision or award, which shall be a speaking order, resulting from arbitration shall be final and binding upon the parties and shall be enforceable in accordance with the provision of the Arbitration and Conciliation Act, 1996 subject to the rights of the aggrieved parties to secure relief from any higher forum.

16.3.5 Performance during Arbitration:

Pending the submission of and/or decision on a Dispute and until the arbitral award is published, the Parties shall continue to a perform their respective obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

15. Sec. 11 of the Act of 1996 deals with the procedure for appointment of the Arbitrator; Sec. 11(2) says that subject to sub-Section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators and only if there is any failure, the aggrieved party can invoke sub-sections (4), (5) and (6) of Sec. 11 of the Act of 1996, as the case may be. In the instant case, the opening word of arbitration Clause 16.3 are that "any dispute which is not resolved amicably shall be referred to a panel of three Arbitrators in terms of Arbitration and Conciliation Act, 1996, out of the panel of 5 Arbitrators to be given by the Authority, which reveals the intention of the parties to first make

attempt to resolve the dispute amicably as referred in Clause 16.1 in accordance with the conciliation procedure set forth in Clause 16.2 of the dispute resolution. Considering the submission of Mr. Mahendra Singh, admittedly, the said procedure has not been followed by the Applicant and he has invoked the arbitration clause directly after expiry of the period of thirty days of the notice. When the JMC failed to appoint its Arbitrator for constitution of Arbitral Tribunal of three Arbitrators out of the panel of five Arbitrators, the present arbitration application has been filed.

(A) Consideration of Issue No. 1-

Whether the agreed arbitral procedure of dispute resolution which has been made condition precedent for invoking the arbitration clause is required to be followed or not by the Applicant?

16. Before proceeding further, it is necessary to reproduce relevant paras of the judgments cited by Mr. Mahendra Singh, counsel for the Applicant, on the issue that it is not necessary to follow the conciliation procedure and the Applicant has a right to reject the invitation of the conciliation proceedings of Clause 16.2 of the Agreement under Sec. 62(3) of the Act of 1996, in (i) Sunil Manchanda and Others Vs. Ansal Housing and Construction Ltd., , relevant paras 9 and 10 which is based on an earlier Constitution Bench judgment of five learned Judges of the Supreme Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., .

(i) Paras 9 and 10 of Sunil Manchanda and Others Vs. Ansal Housing and Construction Ltd., : Sunil Manchanda and Others Vs. Ansal Housing and Construction Ltd., .

9. I have heard Mr. Arvind Nigam, learned counsel representing the petitioners and Mr. A.S. Chandhioke, advocate appearing on behalf of the respondent and have given my thoughtful consideration to their respective submissions. In the instant case the existence of an arbitration clause, being clause no. 51 in the agreement as also that of disputes/differences, is accepted by the parties. Therefore, having regard to the settled legal position about the nature and scope of the present proceedings and the powers and functions of this Court/Judicial Authority, strictly speaking the petition deserves to be allowed and an arbitrator needs to be appointed in terms of the said arbitration agreement. In that view of the matter this Court is not obliged to examine the question as to whether the procedure prescribed in the arbitration agreement has, in fact, been followed before the invocation of the arbitration and seeking appointment of the arbitrator. In this view, I am fortified by the Constitution Bench decision of the Hon'ble Supreme Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., . In that case the Hon'ble Supreme Court had the occasion to more fully consider the ambit and scope of the power of the Chief Justice or his nominate while deciding an application under Sec. 11 of the Arbitration and Conciliation Act, 1996. In the said case the Apex Court clearly

laid down that there is nothing in Section 11 of the Arbitration and Conciliation Act, 1996 that requires a party other than the party making the request to be noticed and it does not contemplate a response from the other party. The Apex Court further held that appointment of arbitrator by the Chief Justice or his designate is not a judicial function resulting in an adjudicatory order. Further, that Section 11 does not contemplate a decision on any controversy between the parties. It further held that the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of 30 days is over does not lead to the conclusion that the decision to nominate is adjudicatory. While disposing of an application under Sec. 11 containing an averment that the said period has passed, the Chief Justice or his designate has to make the appointment of an arbitrator. This is additionally for the reasons that Section 16 of the Act empowers the Arbitral Tribunal to rule on its jurisdiction and the expression "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 under Sec. 16 is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction. It is, therefore, open for any party to challenge before the Arbitral Tribunal that it had been wrongly constituted.

(Emphasis supplied)

10. After going through the material available on record, more particularly, the letter dt. 7.10.2003 issued by the petitioner to the respondent there remains no doubt that the procedure of conciliation talked in clause 51 of the agreement was put in service but failed. During the course of argument, learned counsel for the petitioner submitted that even if the respondent still think that despite the letter dt. 07.10.2003 the conciliation has not come to an end, the petitioner even now rejects the invitation for commencement of the conciliation proceedings within the meaning of sub-Section (3) of Section 62 of the Act. Therefore, looking at the matter from any angle, this Court must hold that the application deserves to be allowed and an arbitrator needs to be appointed in terms of the arbitration agreement.

(Emphasis supplied)

17. Subsequently, the judgment of the Constitution Bench of five learned Judges of the Supreme Court in *Konkan Railway Corpn. Ltd. vs. Rani Construction (P) Ltd.* has been over-ruled in para 47 (xii) by the Constitution Bench of learned seven Judges of the Supreme Court in *SBP & Co. vs. Patel Engineering Co.*, therefore, the same is no more a good law. The aforesaid para 47 (xii) of the later 7 learned Judges Constitution Bench judgment is as follows:

(xii) The decision in *Konkan Rly. Corpn. Ltd. vs. Rani Construction (P) Ltd.* is overruled.

(Emphasis supplied)

18. I may also refer the other judgments of the Supreme Court on the issue that

the Applicant must satisfy the conditions for appointment of the Arbitrator under Sec. 11(6). Since in the present case, the procedure for appointment of the Arbitrator has been agreed upon by the parties under Clause 16.1, 16.2 and 16.3 of the Dispute Resolution as required under Sec. 11(2), it is necessary for the Applicant to follow the same before invoking Clause under Sec. 11. On the said issue, I may refer the judgments in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, paras 39 and 47 (iv) of the Constitution Bench of the seven learned Judges of the Supreme Court (6:1), You One Engineering and Construction Co. Ltd. and Another Vs. National Highways Authority of India (NHAI), (para 10); National Highways Authority of India and Another Vs. Bumihway DDB Ltd. (JV) and Others, ; India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., (para 24 and 25); You One Maharia - JV through You One Engineering and Construction Company Ltd. and Another Vs. National Highways Authority of India, paras 12 and 13 wherein You One Engineering & Construction Co. Ltd. and Another vs. National Highways Authority of India (supra) has also been considered; Para 22 of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., .

19. It is appropriate to quote relevant paras 39, 47 (iv) and 47 (xii) of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, , You One Engineering and Construction Co. Ltd. and Another Vs. National Highways Authority of India (NHAI), (para 10); National Highways Authority of India and Another Vs. Bumihway DDB Ltd. (JV) and Others, ; India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., (para 24 and 25); You One Maharia - JV through You One Engineering and Construction Company Ltd. and Another Vs. National Highways Authority of India, paras 12 and 13 wherein You One Engineering & Construction Co. Ltd. and Another vs. National Highways Authority of India (supra) has also been considered; Para 22 of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., .

(i) Paras 39 and 47 (iv) of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another,

39. It is necessary to define what exactly the Chief Justice, approached with an application under Sec. 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to

decide whether the applicant has satisfied the conditions for appointing an arbitrator under Sec. 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the Court at various stages of the proceedings before the Arbitral Tribunal.

(Emphasis supplied)

47. (iv) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(Emphasis supplied)

(xii) The decision in *Konkan Rly. Corpn. Ltd. vs. Rani Construction (p) Ltd.* is overruled.

(Emphasis supplied)

(ii) Para 10 of *You One Engineering and Construction Co. Ltd. and Another Vs. National Highways Authority of India (NHAI)*,

10. In my view, the contention has no merit. The arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).

(Emphasis supplied)

(iii) Para 36 of *National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others*,

36. It was argued by Mr. Altaf Ahmed, learned Senior Counsel for the respondent, that there has been a judicial determination by the High Court in the impugned order which is based on the reasoning that hierarchically a judicial arbitrator must sit with another Judge only. This reasoning, in our opinion, is de hors the sanction in the contract. The appointment made by the High Court as per the impugned order is against the express provisions of contract as held by

this Court in *You One Engg. & Construction Co. Ltd. vs. National Highways Authority of India*, reaffirming that once the arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC, there is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).

(Emphasis supplied)

(iv) *India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.*, (para 24 and 25);

24. The applicant has not appointed its arbitrator. The respondent has also not been called upon to appoint its arbitrator by the said notice or otherwise. An application for appointment of an arbitrator, therefore, is not maintainable unless the procedure and mechanism agreed to by and between the parties is complied with.

(Emphasis supplied)

25. In *National Highways Authority of India vs. Bumihiway DDB Ltd. (JV)*, it was opined: (SCC p. 781, para 44)

44...The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong.

(Emphasis supplied)

(v) *You one You One Maharia - JV through You One Engineering and Construction Company Ltd. and Another Vs. National Highways Authority of India*, paras 12 and 13

12. It may be stated at this stage that when the matter was placed before me on 24.4.2007, the parties invited my attention to the aforesaid clause and it was submitted that no consensus could be arrived at by the parties. Considering the fact situation and the agreement, I thought it proper that the parties should undertake fresh exercise in the direction. I accordingly passed an order to make one more attempt. Unfortunately, however, the effort could not succeed and both the counsel stated that the matter will have to be decided on merits. Accordingly, the matter was heard.

13. In my opinion, the learned counsel for the respondent is right that apart from clear language of arbitration clause, the point is also covered by *You One Engg.* Almost in identical circumstances, this Court was called upon to consider the provisions of the Act and the right of the respondent to appoint presiding arbitrator under the agreement. The Court held that it is the right of IRC to

appoint presiding arbitrator in case the parties are not ad idem in appointment of third/presiding arbitrator. This Court stated: (You One Engg. Case, SCC p. 378, para 10)

The arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).

(Emphasis in original)

(vi) Para 22 of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.,

22. Where the intervention of the Court is sought for appointment of an Arbitral Tribunal under Sec. 11, the duty of the Chief Justice or his designate is defined in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . This Court identified and segregated the preliminary issues that may arise for consideration in an application under Sec. 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

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

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

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

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

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

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

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

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

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

(Emphasis supplied)

(B) Consideration of Issue No. 2

Whether sub-Section (6) of Sec. 11 of the Act of 1996 can be invoked on expiry of thirty days' notice, as required under sub-Section (4) of Sec. 11 of the Act of 1996 in a case where the agreed arbitral procedure for appointment of Arbitral Tribunal has not been followed by the Applicant?

20. Further submission of the counsel for the Applicant is that the right to appoint Arbitral Tribunal consisting of three Arbitrators under Clause 16.3 by the JMC to appoint its one Arbitrator out of the panel of five Arbitrators, ceases or is forfeited after filing of the application under Sec. 11 of the Act of 1996 on expiry of notice period of thirty days. All the aforesaid three judgments have been referred and relied in paras 8, 9 and 11 of *Bharat Sanchar Nigam Ltd. and Another Vs. Dhanurdhar Champatiray*, and in para 10, *Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited*, has been referred and in para 11, it was mentioned that a somewhat different view was expressed in a later decision of the Supreme Court in *Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd.*, and therefore, the matter was referred to a three-Judge Bench in *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, (Paras 10, 11 and 12). The scope of Sec. 11 and 11(8) of the Act of 1996 has been referred in Paras 13 of *BSNL vs. Dhanurdhar Champatiray* (supra). Paras 8, 9, 10, 11 and 12 of *BSNL vs. Dhanurdhar Champatiray* (supra) wherein *Punj Lloyd Ltd. vs. Petronet MHB Ltd.* has been followed in para 8 and in para 9, there is reference of *Punj Lloyd* wherein reliance was placed on the judgment of *Datar Switchgear Ltd.* and para 19 of the same has been reproduced and further, in para 10 of *Ace Pipeline Contracts (P) Ltd.* has been quoted, reference of *Union of India V. Bharat Battery* has been made in para 11 and thereafter, difference of opinion between *Ace Pipeline* and *Bharat Battery* has been referred in para 12 and the judgment of the three Judges' Bench of *Northern Railway Administration* has been quoted, are quoted below:

(i) Paras 8, 9, 10, 11 and 12 of *Bharat Sanchar Nigam Ltd. and Another Vs. Dhanurdhar Champatiray*,

8. In this connection, a three-Judge Bench decision of this Court in *Punj Lloyd Ltd. vs. Petronet MHB Ltd.* may be referred to. In this case, this Court considered the applicability of Section 11(6) of the Act and after considering the scope and object of the Act held that once notice period of thirty days has expired and the party has moved the Hon'ble Chief Justice of the High Court under Sec. 11(6) of the Act, the other party loses his right to appoint an arbitrator on the basis of arbitral agreement.

9. While taking this view, this Court in *Punj Lloyd* case had relied on the judgment referred in *Datar Switchgears Ltd. vs. Tata Finance Ltd.* wherein this Court observed as follows: (SCC p. 158, para 19)

19. So far as cases falling under Sec. 11(6) are concerned--such as the one

before us--no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Sec. 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to 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 under Sec. 11, that would be sufficient. In other words, in cases arising under Sec. 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Sec. 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

(Emphasis supplied)

10. Similarly, in *Ace Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corpn. Ltd.* this Court went to observe that: (SCC p. 312, para 10)

10...But in sub-Section (6), where, the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may in that event, request the Chief Justice or a person or an institution designated by him to make necessary measures, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in Sub-Section (6). The period of limitation is only provided under sub-sections (4) & (5) of Section 11. As such, as per the statute, the period of limitation of thirty days cannot be invoked under sub-Section (6) of Section 11 of the Act.

On a perusal of the above quoted observations of this Court made in *Ace Pipeline Contracts Private Limited*, the reasons advanced in the orders passed by the High Court must be found to be a correct interpretation of the aforesaid provision and so far as the period of 30 days with regard to Section 11(6) is concerned, there is no doubt at all that thirty days" limitation cannot be invoked as mandatory period under Sec. 11(6) of the Act.

11. But a somewhat different view was expressed in a latter decision of this Court in *Union of India vs. Bharat Battery Mfg. Co. (P) Ltd.*

12. In view of the difference of opinion of the two coordinate Benches of this Court, the matter was referred to a three-Judge Bench in *Northern Railway Admn. Ministry of Railway vs. Patel Engg. Co. Ltd.* in which the decision in *Ace Pipeline Contracts (P) Ltd.* was also referred to.

21. In para 9 of Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., , Sec. 11 of the Act of 1996 has been reproduced which has already been reproduced hereinabove, therefore, the other relevant paras No. 2, 3, 10, 11, 12, 13 and 14 of this judgment are as under:

2. Noticing two different views in two decisions of this Court in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, and Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd., the matter has been referred to a larger Bench and that is how these cases are before us.

3. In both the decisions the question related to appointment of arbitrator under Sec. 11(6) of the Arbitration and Conciliation Act, 1996 (in short the "Act"). In Bharat Battery's case (supra) the earlier decision in Ace Pipeline's case (supra) was apparently not brought before the Bench as a result of which there appears to be some confusion. As noted above, the scope and ambit of Section 11(6) of the Act relating to appointment of arbitrator falls for consideration in these cases.

(Emphasis supplied)

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

(Emphasis supplied)

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

12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The

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

(Emphasis supplied)

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

14. In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-Section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.

22. Presently, I am considering the case whether an application under sub-Section (6) of Sec. 11 of the Act of 1996 is maintainable or not, for the reason that the agreed procedure has not been followed by the Applicant in respect of which the aforesaid two Issues have been framed.

23. In *Bharat Sanchar Nigam Ltd. and Another Vs. Dhanurdhar Champatiray*, , *Punj Llyod* has been followed wherein *Datar Switchgear* has been placed reliance and there is reference of *Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd.*, with reference to *Ace Pipelines* for invoking Sec. 11. In *Northern Railway Administration vs. Patel Engineering Company Ltd.* (supra) and *Bharat Sanchar Nigam Ltd. V. Dhanurdhar Champatiry* (supra), the arbitration clause has not been reproduced. However, the arbitration clause has been reproduced only in *Datar Switchgear*, *Punj Lloyd* and *Bharat Battery* (supra). The arbitration clauses of *Datar Switchgear*, *Punj Lloyd* and *Bharat Battery* (supra) are reproduced as follows to compare the same with the present arbitration Clause.

(i) Para 9 of *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*,

9. Clause 20.9 of the Agreement is the Arbitration clause, which is to the following effect:-

20.9 " It is agreed by and between the parties that in case of any dispute under this Lease the same shall be referred to an Arbitrator to be nominated by the Lessor and the award of the Arbitrator shall be final and binding on all the parties

concerned. The venue of such arbitration shall be in Bombay. Save as aforesaid, the Courts at Bombay alone and no other Courts whatsoever will have jurisdiction to try suit in respect of any claim or dispute arising out of or under this Lease or in any way relating to the same.

(Emphasis supplied)

(ii) Paras 2 and 3 of Punj Llyod 2006 (2) SCC 638

2. The agreement entered into between the parties contains an arbitration clause which reads as under:

14.1. Disputes or differences arising out of or in relation to agreement/contract shall be referred to the Functional Director of the owner who may either act himself as sole arbitrator or nominate some officer of the owner to act as an arbitrator to adjudicate the disputes and differences between the parties (except those in respect of which the decision of any person is by the contract expressed to be final and binding)

(Emphasis supplied)

14.2 The contractor shall not be entitled to raise any objection to the appointment of such officer of the owner as the sole arbitrator on the ground that the said officer is an officer of the owner or that he/she has to deal or dealt with the matter to which the contract relates or that in the course of duties a an officer of the owner he/she has/had expressed views on all or any of the matters in dispute or difference.

14.3 In the event of the arbitrator to whom the matter is originally referred to is transferred or vacates office, the Functional Director, aforesaid, shall nominate another officer of the owner to act as arbitrator.

14.4 Such officer nominated as sole arbitrator shall be entitled to proceed with the arbitration from the stage at which it was left by the predecessor. It is the term of this contract that no person other than the Functional Director or a person nominated by Functional Director of the owner shall act as arbitrator.

3. Disputes and differences arose between the parties. The appellant served a 30 days" notice on the respondent demanding appointment of an arbitrator and reference of disputes to him. The respondent failed to act. On expiry of 30 days, the appellant moved the Chief Justice of the High Court for appointment of an arbitrator under Sec. 11(6) of the Arbitration and Conciliation Act, 1996. Admittedly, even till the date of the moving of the application, the respondent had not made appointment consistently with the arbitration clause. The learned Judge designated by the Chief Justice of the High Court refused to appoint the arbitrator holding that the only remedy available to the appellant was to move in accordance with clause 14.1 above said, whereupon the Functional Director would adjudicate upon the disputes as sole arbitrator.

(iii) Para 6 of Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd.,

6. Clause 24 of the agreement deals with the arbitration between the parties. The relevant portion of Clause 24 reads as under:

24. (i) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of an officer in the Ministry of Law, appointed to be the arbitrator by the Director General of Supplies and Disposals. It will be no objection that the arbitrator is a government servant that he had to deal with the matters to which the contract relates or that in the course of his duties as a government servant he has expressed views on all or any of the matters in dispute or differences. The award of the arbitrator shall be final and binding on the parties to this contract.

(Emphasis supplied)

(ii) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the Court for any reason, shall be lawful for the Director General of Supplies and Disposals to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(iii) It is further a term of this contract that no person other than the person appointed by the Director General of Supplies and Disposals as aforesaid should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to arbitration at all.

24. In Bharat Sanchar Nigam Limited, the arbitration clause has not been reproduced whereas the arbitration clauses in other three judgments, reproduced hereinabove, will reveal that there is no clause to amicably settle the dispute through conciliation procedure set forth in the Clause of dispute resolution and further the same was not made condition precedent for invoking the arbitration clause.

25. I have gone through record of the arbitration application and further considered the rival submission of the counsel for the parties in the light of Sec. 11 of the Act of 1996 and the aforesaid judgments.

Finding on Issue No. 1

26. On consideration of the submissions of both the parties along with the aforesaid judgments, I am of the view that the judgment of Delhi High Court in Sunil Manchanda and Others vs. Ansal Housing and Construction Ltd., (supra) cited by the counsel for the Applicant is based on the Constitution Bench Judgment of five learned Judges of the Supreme Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., , which has been over-ruled by the later Constitution Bench judgment of 7 learned Judges (6:1) of the Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, in para 47 (xii), therefore, the mid decision of the Delhi High Court in Sunil

Manchanda is no longer good law.

27. In the Constitution Bench judgment by seven learned Judges of the Supreme Court in *SBP & Co. vs. Patel Engineering Co.* (supra) in paras (sic) and 47 (iv) it has been held that an Applicant has to satisfy the conditions for appointing an Arbitrator under Sec. 11(6) of the Act of 1996 and further, all the aforesaid judgments of the Supreme Court considered on Issue No. 1 have been delivered after the Constitution Bench judgment of seven learned Judges of the Supreme Court in *SBP & Co. vs. Patel Engineering Co.* (supra) that agreed arbitral procedure is required to be followed and further, a defaulting party cannot be allowed to take advantage of its own wrong. A perusal of Sec. 11(6) of the Act of 1996 would also reveal that a party is required to act upon the agreed arbitral procedure for dispute resolution by signing an agreement with open eyes then, it is not open to the party to ignore the same and invoke exercise of power under Sec. 11(6) of the Act. In the present case, the first attempt was to be made by the parties to resolve the dispute amicably in accordance with the conciliation procedure set forth in Clause 16.2, and the same is a condition precedent for invoking Clause 16.3 for appointment of three Arbitrators out of the panel of five possible Arbitrators made out by the Authority.

28. As regards the submission of Mr. Mahendra Singh that the dispute between the parties was incapable of being resolved by conciliation or reconciliation, or either of the parties may reject the invitation for commencement of the agreed conciliation proceedings within the meaning of Sec. 62(3) of the Act of 1996, I refrain myself from giving the finding on the said issue as the same would touch the merit of the claim which is not permissible for me in view of Para 22.3 of *National Insurance Co.* (supra), while limiting the scope of Sec. 11(6) which apply with equal force while considering the issue whether the agreed arbitral procedure has been followed or not and further, Sec. 62(3) of the Act of 1996 is not applicable in the present case as the amicable settlement by way of conciliation procedure set forth in Clause 16.1 and 16.2 has been made the condition precedent for invoking clause 16.3 Arbitration with the opening words "any dispute which is not resolved amicably shall be referred to a panel of three Arbitrators out of the panel of 5 Arbitrators made out by the Authority in terms of Arbitration and Conciliation Act, 1996". In a case where amicable settlement as per the conciliation procedure set forth has been made a condition precedent for invoking the arbitration clause, it is not open to an Applicant to reject the invitation for conciliation.

29. In view of the aforesaid discussion, I am of the view that where (sic) agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed. In the present case, Clause 16.1 for amicable settlement to resolve the dispute in accordance with the procedure set forth in Clause 16.2, is a condition precedent for invoking Clause 16.3 for appointment of Arbitral Tribunal consisting of three Arbitrators out of the panel of five possible Arbitrators made out by the Authority,

has not been followed, therefore, the present arbitration application is premature.

Finding on Issue No. 2

30. The other judgments cited by the learned counsel for the Applicant are on the issue that after the expiry of the notice period and filing of the claim, the right of the other party to appoint an Arbitrator is forfeited, therefore, this arbitration application is maintainable. In none of the aforesaid judgments, the arbitration Clause contained the provision for amicable settlement in accordance with the conciliation procedure set forth in Clause 16(2). The scheme of the Act of 1996 under Sec. 11, as referred to hereinabove, along with the judgments clearly reveals that the parties are free to agree on a procedure for appointing an Arbitrator or Arbitrators and the said procedure is required to be followed for invoking the arbitration clause. In *Northern Railway Admit*, (supra), while considering the crucial sub-sections (2), (3), (4), (5) and (6), the Supreme Court has held that sub-sections (3) to 5 refer to cases where there is no agreed procedure and sub-Section (2) provides that subject to sub-Section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. The contingencies contemplated in sub-Section (6) statutorily are (i) a party fails to act as required under agreed procedure; or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure; or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In para 12, it has been held that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted.

31. In the instant case, the opening words of arbitration clause 16.3 are that "any dispute which is not resolved amicably shall be referred to a panel of three Arbitrators in terms of Arbitration and Conciliation Act, 1996", which reveals the intention of the parties to first make attempt to resolve the dispute amicably as referred in Clause 16.1 in accordance with the conciliation procedure set forth in Clause 16.2 of the dispute resolution. Considering the submission of Mr. Mahendra Singh, admittedly, the said procedure has not been followed by the Applicant and the Applicant has invoked the arbitration clause directly after expiry of the period of thirty days of the notice when the JMC failed to supply to the Applicant the panel of five Arbitrators and appoint its Arbitrator for constitution of the Arbitral Tribunal of three Arbitrators out of which one was to be appointed by the Applicant and both the Arbitrators have to appoint the third Arbitrator, the present arbitration application has been filed which is not maintainable under Sec. 11(6) of the Act of 1996.

32. In the aforesaid Constitution Bench judgment, the Supreme Court has emphasized in paras 39 and 47 (iv) whether the applicant has satisfied the condition for appointing the Arbitrator under Sec. 11(6). The opening words of Sec. 11(6) are "where, under an appointment procedure agreed upon by the

parties, a party fails to act as required under that procedure". Here, the Applicant has failed to act as required under the appointment procedure.

33. An Applicant cannot file an arbitration application directly on expiry of the period of thirty days" notice under sub-Section (4) of Sec. 11 of the Act of 1996 when the JMC/Authority has failed to supply the panel of five Arbitrators and further appoint one of its Arbitrators for constitution of the Arbitral Tribunal of three Arbitrators as per the agreed arbitral procedure and for this reason also, the present arbitration application is not maintainable.

34. In view of the aforesaid consideration and findings on the above two issues in this particular case, my conclusions on the aforesaid two Issues are as under:

(i) Where the parties have agreed arbitral procedure of dispute resolution, which has been made a condition precedent for invoking the arbitration clause, then it is required to be followed before filing an application under Sec, 11 of the Act of 1996.

(ii) Sub-Section (6) of Sec. 11 of the Act of 1996 cannot be invoked directly on expiry of thirty days" notice under sub-sec. (4) of Sec. 11 of the Act of 1996, by the Applicant for appointment of the Arbitral Tribunal ignoring the agreed arbitral procedure.

In this particular case, the agreed arbitral procedure has not been followed by the Applicant, therefore, the arbitration application is premature and the same is dismissed as such with liberty to the Applicant to file fresh arbitration application for constitution of the Arbitral Tribunal after following the agreed arbitral procedure.