
(2007) 08 GAU CK 0055
In the Gauhati High Court

Union of India (UOI)

APPELLANT

Vs

Major V.P. Najhawan

RESPONDENT

Date of Decision : 07-08-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : (2007) 4 GLT 156

Hon'ble Judges : T. Nanda Kumar Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T. Nandkumar Singh, J.—This appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (hereinafter called the Act 1996) is directed against the Judgment dated 27.2.2006 passed by the District Judge, Kamrup, Guwahati rejecting Misc. (Arb) Case No. 576 of 2003 filed by the present appellant u/s 34 of the Act 1996 against the arbitral award dated 15.9.2003 in Contract Agreement No. S&T/CON/91/4 dated 4.3.1992.

2. Heard Mr. J. Singh, learned Senior Counsel assisted by Miss B. Das, learned Standing Counsel appearing for the appellant and also Mr. S. Bhattacharyya, learned Counsel appearing for the respondent.

3. A short fact in a nutshell which would be sufficient for deciding the present appeal is that the respondent Major V.P. Najhawan (Retd.) had entered into a contract agreement being No. S&T/CON/91/4 dated 4.3.1992 with the present appellant for executing a contract work for the present appellant by the respondent. The relevant portion of the said contract agreement dated 4.3.1992, which would be relevant for deciding the present appeal is quoted here under.

Whereas the "Contractor" have agreed with the Railway for performance of the work "Supply of materials (party) and construct of overhead alignment comprising of 2 pairs of copper coated steel wires (68 Kg/Km) for MG & BG Control, 3 pairs of G.I. Wire (98 Kg/Km) for MG & BG Dy. Control & Maintenance

Control 7 G.I. Wires (77.3 Kg/R) for MG & BG Block and gate phones in Aluabari Road-Kishanganj Section of Northeast Frontier Railway" as set forth in the schedule of works of tender documents No. S&T/CON/91/4, general conditions of contract and standard specifications of the Northeast Frontier Railway Engineering Department 1979 edition with upto date corrections, special conditions and special specifications if any of the contract and in conformity with the Indian Railway Signal Engineering Manual and drawing hereto annexed and whereas the performance of the said work is an act in which the public is interested.

From the terms of the contract agreement dated 4.3.1992 quoted above, it is clear that the terms of the contract agreement for the said contract work are the terms set for in the general conditions of contract and the standard specification of the Northeast Frontier Railway Engineering 1979 with edition upto date correction, special condition and the special specification if any of the contract and in conformity with the Indian Railway Signal Engineering Manual and drawing thereto annexed and also the performance of the said work is an act in which the public is interested.

4. As per the general conditions of contract N.F. Rly., 1979 which are the conditions agreed to be followed by both the appellant and respondent under the said contract agreement dated 4.3.1992 there is an Arbitration Clause being Clause 64, relevant portion of which quoted hereunder.

64(3)(a) Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:

(i) A sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs. 5,00,000./-(Rupees Five lakhs) and in cases where the issues involved are not of a complicated nature. The General Manager shall be the Sole Judge to decide whether or not the issues involved are of a complicated nature.

(ii) Two arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs. 5,00,000/- and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of complicated nature. The General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not in the event of the two Arbitrators being divided in their opinions, the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

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

(iv) In cases where the claim is upto Rs.5,00,000/-, the Arbitrator(s)/Umpire so appointed, as the case may be, shall give the award on all matters referred to

arbitration indicating therein break up of the sums awarded separately on each individual item of disputes. In cases where the claim is more than Rs.5,00,000/-, the Arbitrator(s)/Umpire so appointed, as the case may be, shall give intelligible award (i.e. reasoning leading to the award should be stated) with the same awarded separately on each individual item of dispute referred to arbitration.

64.(3)(b) For the purpose of appointing to two arbitrators referred to in Sub-clause 64(3)(a)(i) above, the Railway will send a panel of more than three names of Gazetted Railway Officer of one or more departments of the railway to the contractor, who will be asked to suggest to the General Manager one name out of the list for appointment as the contractor's nominee will also appoint a second arbitrator as the railway nominee either from the panel or from outside the panel ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer to whom the case will be referred to in the event of any difference between the two arbitrators. Officers of the Junior Administrative Grade of the Accounts Department of the Railways shall be considered as of equal status to the officers in the intermediate administrative grade of other department of the railway for the purpose of appointment as Arbitrators.

5. Because of the dispute between the present appellant and respondent, the respondent filed an application being Arbitration Petition No. 26 of 2007 u/s 11 of the Act 1976 before the Hon'ble Chief Justice of the Gauhati High Court for appointment of an arbitrator for the said contract work. Hon'ble Chief Justice passed an order dated 14.5.2002 in the said Arbitration Petition No. 26 of 2001 for appointing one Shri K. Dutta Lahkar, retired Commissioner and Secretary, Public Works Department, Government of Assam, Rupali Path, R.G. Baruah Road, Guwahati whose name appeared in the list of members of the Indian Council of Arbitration as sole arbitrator to decide the claim and counter claim between the parties in accordance with the law. It would be apt and appropriate to quote the said order of the Hon'ble Chief Justice dated 14.5.2002 which reads as follows.

By order dated 20.3.2002 the Counsel for the Railways was given opportunity to furnish the list of more than 3 names of the Railway Gazetted Officers to the learned Counsel for the petitioner within three weeks. This was as per Clause 64 of the General Conditions of Contract out of the names suggested by the Railways the petitioner was to nominate one of those person as Arbitrator and thereafter the Railways was required to appoint the Second Arbitrator. Learned Counsel for the petitioner states that till date no list of Gazetted Officers was supplied. However, learned Counsel for the respondents who is appearing today states that a letter was addressed by the Railways to Shri J. Singh, Advocate on 10.4.2002 mentioning 4 names. But as per the statement of the learned Counsel for the petitioner, no list has been supplied. In this view of the matter I am of the opinion that Railways have lost their right to get arbitrator appointed as per Clause 64. In these circumstances, I, myself appoint Shri K. Dutta Lahkar, retired

Commissioner & Secretary, Public Works Department, Govt. of Assam, Rupali Path, R.G. Baruah Road, Guwahati, whose name appears in the list of members to the Indian Council of Arbitration, as sole arbitrator to decide the claims and counter claims between the parties in accordance with law.

Copy of this order be sent to the Arbitrator at the aforesaid address, who proceed in the matter in accordance with law.

This application stands disposed of.

Sd/- R.S. Mongia Chief Justice

6. The present appellant filed the writ petition being W.P.(C) No. 3956 of 2002 assailing the said order of the Hon"ble Chief Justice dated 14.5.2002 for appointing the said sole arbitrator. The learned Single Judge of this Court disposed of the W.P.(C) No. 3956 of 2002 by passing the final Judgment and order dated 6.8.2002 with the observations and direction that-

The next objection is with regard to the qualification embodied in Clause 64(3)(i) of the General Conditions of Contract. It appears that the qualification is prescribed in respect of one of the two Arbitrators to be nominated by the Railways. As per agreement one of such Arbitrators should invariably be from Accounts Department. The Second Arbitrator on behalf of the Railways is yet to be appointed and the option is still open for the Railways to apprise the learned Chief Justice as and when the matter is taken up for appointment of other Arbitrators.

The petition accordingly stands disposed of.

Sd/-D. Biswas Judge

7. It appears from the perusal of the order of this Court dated 6.8.2002 passed in W.P. (C) No. 3956 of 2002, the learned Single Judge was of the view that the prescribed qualification for the Arbitrator embodied in Clause 64 of the General Conditions of Contract should be taken into consideration while appointing the Arbitrator of the contract agreement dated 4.3.1992.

8. Against the Judgment and order of the learned Single Judge dated 6.8.2002 passed in W.P.(C) No. 3956 of 2002, a writ appeal being W.A. No. 569 of 2002 was filed by the present respondent before the Division Bench of this Court. The Division Bench of this Court had allowed the said W.A. No. 569 of 2002 by passing the Judgment and order dated 17.7.2003 wherein the Division Bench had made an observation that once the sole Arbitrator has been appointed by the Hon"ble Chief Justice there is no scope for appointment of an Arbitrator for and on behalf of the Railways, therefore, the observations made by the learned Single Judge in the Judgment and order dated 6.8.2002 passed in W.P.(C) No. 3956 of 2002 is contrary to the fact and are hereby set aside. The learned Division Bench further observed that if the Railways want to challenge the jurisdiction of the sole Arbitrator appointed by the Hon"ble Chief Justice, it is

open for it to challenge it before the Arbitrator himself. No writ petition can be entertained challenging the jurisdiction of the Arbitrator if the Arbitrator appointed by the Court adjudicates upon the question.

9. The appellant filed a written statements of reasons dated 24.5.2002 challenging the appointment of the sole Arbitrator u/s 12(3)(b) of the Act 1996 on the ground that the sole Arbitrator does not possess the qualification agreed to by the parties under the said contract agreement dated 4.3.1992 i.e. Clause 64 of the General Condition of Contract and also the appointment of the sole Arbitrator by the Hon'ble Chief Justice under the said order dated 14.5.2002 passed in Arbitration Petition No. 26 of 2001 was in direct conflict with the agreement of the parties. The learned sole Arbitrator passed the orders dated 31.1.2003 and 13.4.2003 rejecting the objection raised by the present appellant regarding the appointment of the sole Arbitrator. Thereafter, the sole arbitrator proceeded the Arbitration Proceeding and passed the award dated 15.9.2003.

10. Against the said arbitral award dated 15.9.2003 made by the learned sole Arbitrator, the present appellant filed an application being No. Misc. (Arb) No. 576/03 u/s 34 of the said Act 1996 in the Court of District Judge, Kamrup for setting aside the arbitral award on different inter-alia grounds, one of which was that arbitral award is required to be set aside by the Court u/s 34(2)(a)(v) inasmuch as the appointment of the sole arbitrator was not in accordance with the said contract agreement of the parties dated 4.3.1992. The learned District Judge, Kamrup, Guwahati passed the judgment and order dated 27.2.2006 for rejecting the said application u/s 34 of the Act 1996 wherein the learned District Judge held that there is nothing to interfere with the said arbitral award dated 15.9.2003 and also that when the N.F. Railway (the present appellant) participated for the entire proceeding before the sole arbitrator at this stage it has no authority to question the validity of the award. Being aggrieved by the said Judgment and order of the learned District Judge, Kamrup, Guwahati dated 27.2.2006 passed in Misc. (Arb) Case No. 57/03 the present appellant filed the present appeal u/s 37 of the said Act 1996. There are three main grounds in the present appeal for assailing the Judgment and order of the learned District Judge dated 27.2.2006 and also the arbitral award. One of the said main grounds is that the appointment of the sole arbitrator by Hon'ble Chief Justice was in direct conflict with the said contract agreement with the party dated 4.3.1992 or in violation of the General Conditions of the contract in Clause 64 and also that the requirement of the said Clause is that there are two arbitrators to be appointed, one each on behalf of the parties and both shall be Railway Gazetted Officers and they shall appoint an umpire and further that out of the two Arbitrators one has to be a man from the Accounts Department. For deciding the present appeal the certain provision of the Act 1996 are required to be looked into and interpreted. As such it is necessary to take note of the said provisions of the Act 1996. The intent of legislature regarding the extent of judicial intervention in matters governed by Part-I of the said Act 1996 comprising of Sections 2 to 43 is clear from Section 5 of the Act which reads as follows:

Section 5: Extent of Judicial intervention-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part.

11. u/s 10 of the said Act 1996 the parties are free to determine the number of arbitrators, provided that such number shall not be an even number and failing the determination the number of arbitrator, arbitral Tribunal shall consist of a sole arbitrator. In the case in hand the parties had already agreed the number of arbitrators to be appointed under the said contract agreement dated 4.3.1992, the relevant portion of which has already been quoted above. u/s 11 of the said Act 1996, the Hon'ble Chief Justice or his nominee has to appoint the arbitrator in the cases coming under Sub-section (4), (5) and (6) of Section 11. Sub-section (8) of Section 11 of the said Act 1996 mandates that the Hon'ble Chief Justice or the person or the institution designated by him, in appointing an arbitrator, shall have due regard to-(a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. The relevant portion of the Section 11 of the said Act 1996 are quoted hereunder.

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

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

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

(4) If the appointment procedure in Sub-section (3) applies and-

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

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

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

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

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

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

(c) A person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by Sub-section (4) or Sub-section (5) of Sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) Any qualifications required of the arbitrator by the agreement of the parties; and

(b) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

12. The arbitrators appointed by the Hon"ble Chief Justice or his designate u/s 11 of the said Act 1996 could be challenged for the ground mentioned in Clause (b) of Sub-section (3) of Section 12 of the said Act if the Arbitrator does not possess qualification agreed to by the parties. Section 13 of the said Act prescribed the procedures for challenging the appointment of the arbitrator. If the challenge to the appointment of the arbitrator is not successful, the arbitral Tribunal shall continue the arbitral proceeding and make an arbitral award under Sub-section (4) of Section 13 of the Act 1996. As such an award made under Sub-section (4) can be challenged by making an application for setting aside in accordance with Section 34 of the said Act. Section 12 and the relevant portion of the Section 13 are quoted hereunder.

12). Grounds for challenge-(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in Sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) He does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13). Challenge procedure-(1) Subject to Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in Sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Under the arbitrator challenged under Sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under Sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

13. u/s 16 of the said Act 1996 the arbitral tribunal may rule on his own jurisdiction including ruling on any objections with regard to the existence or validity of the arbitration agreement. Party aggrieved by any order passed by the arbitral tribunal, by exercising his power u/s 16 of the said Act 1996 may make an application for setting aside such an arbitral award in-accordance with Section 34. Section 16 is quoted hereunder.

16). Competence of arbitral tribunal to Rule on its jurisdiction-(1) The arbitral tribunal may Rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose-

(a) An arbitration Clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration Clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is

raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

14. The grounds for setting aside the arbitral award on an application filed u/s 34 of the said Act 1996 are mentioned in Sub-section (2) of the Section 54 which reads as follows.

34 (2) An arbitral award may be set aside by the Court only if-(a) The party making the application furnishes proof that-

(i) A party was under some incapacity, or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) The Court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

Explanation-Without prejudice to the generality of Sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud

or corruption or was in violation of Section 75 or Section 81.

15. Order passed on the application filed u/s 34 of the Act 1996 is an appealable order u/s 37 of the said Act which reads as follows.

37. Appealable orders-(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

(a) Granting or refusing to grant any measure u/s 9;

(b) Setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal-

(a) Accepting the plea referred in Sub-section (2) or Sub-section (3) of Section 16; or

(b) Granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

16. From the above discussion of the relevant provisions of the Act 1996 it transpires that the Hon'ble Chief Justice or his designate while appointing the arbitrator shall consider any qualification required of the arbitrator by the agreement of the parties. An appointment of arbitrator, who does not have qualification required of the arbitrator by the agreement of the parties, by the Hon'ble Chief Justice or his designate is not an arbitrator or arbitral tribunal duly appointed u/s 11 of the said Act and also that an order of the Hon'ble Chief Justice or his designate appointing the un-qualified arbitrator could be challenged under clause (b) of Sub-section (3) of Section 12 of the said Act. Under Sub-section (5) of Section 13 of the said Act 1996-a party aggrieved by an arbitral award made by an unqualified arbitrator may make an application u/s 34(2)(a) (v) of the said Act 1996 for setting aside such an arbitral award.

17. The Apex Court (Constitution Bench) in *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, I held that Hon'ble the Chief Justice or his designate has to take into account the qualification required of the arbitrator by the agreement between the parties and other consideration likely to secure the nomination of an independent and impartial arbitrator while appointing the arbitrator u/s 11 of the said Act 1996. The Apex Court in *Union of India and Anr. v. M.P. Gupta* reported in (2004) 10 SCC 504 held that where the agreement specifically provided for appointment of two gazetted Railway Officers of equal status as arbitrators, the order of the High Court appointing one Justice P.K. Bahri as sole arbitrator is liable to be set aside. Para No. 2, 3 and 4 of SCC in *M.P. Gupta* (supra) which reads as follows:

(2) Shri N.N. Goswami, learned Senior Counsel appearing for the appellants urged that in view of Clause 64 of the agreement which provides that only two Gazetted Railway Officers of equal status are to be appointed as arbitrators, no person other than the two specified persons could be appointed as arbitrator. We find merit in this submission.

(3) The relevant part of Clause 64 runs as under:

64. Demand for arbitration-

(3)(a)(ii) Two arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs. 5,00,000/-(Rupees five lakhs) and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being undecided in their opinions, the matter under dispute will be referred to an umpire to be appointed in the manner laid down in Sub-clause (3)(b) for his decision.

(3)(a)(iii) It is a term of this contract that no person other than a Gazetted Railway Officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

4. In view of the express provision contained there in that two Gazetted Railway Officers shall be appointed as arbitrator. Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the Judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two Gazetted Railway Officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months.

18. The Apex Court (Seven Judges) in *SBP & Co. v. Patel Engineering Ltd.* And Anr. reported in (2005) 8 SCC 618 held that the Hon'ble Chief Justice or the designated Judge would be entitled to seek the opinion of any institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if need arises but the order appointing the arbitrator would only be that of the Chief Justice or the designated Judge. The relevant portion of Para No. 17 and 40 of SCC in *SBP & Co.* (supra) are quoted hereunder.

17. Section 11(6) does enable the Chief Justice to designate any person or institution to take the necessary measures on an application made u/s 11(6) of the Act. This power to designate recognized in the Chief Justice, has led to an argument that a judicial decision-making is negated, in taking the necessary measures on an application, u/s 11(6) of the Act. It is pointed out that Chief Justice may designate even an institution like the Chamber of Commerce or the

Institute of Engineers and they are not judicial authorities. Here, we find substance in the argument of Mr. F.S. Nariman, learned Senior Counsel that in the context of Section 5 of the Act excluding judicial intervention except as provided in the Act, the designation contemplated is not for the purpose of deciding the preliminary facts justifying the exercise of power to appoint an arbitrator, but only for the purpose of nominating to the Chief Justice a suitable person to be appointed as arbitrator, especially in the context of Section 11(8) of the Act. One of the objects of conferring power on the highest judicial authority in the State or in the country for constituting the Arbitral Tribunal, is to ensure credibility in the entire arbitration process and looked at from the point of view, it is difficult to accept the contention that the Chief Justice could designate a non-judicial body like the Chamber of commerce to decide on the existence of an arbitration agreement and so on, which are decisions, normally, judicial or quasi-judicial in nature. Where a Chief Justice designates not a Judge, but another person or an institution to nominate an Arbitral Tribunal, than can be done only after questions as to jurisdiction, existence of the agreement and the like, are decided first but him or his nominee Judge and what is left to be done is only to nominate the members for constituting the Arbitral Tribunal. Looking at the scheme of the Act as a whole and the object with which it was enacted, replacing the Arbitration Act of 1940, it seems to be proper to view the conferment of power on the Chief Justice as the conferment of a judicial power to decide on the existence of the conditions justifying the constitution of an Arbitral Tribunal. The departure from the UNCITRAL Model regarding the conferment of the power cannot be said to be conclusive or significant in the circumstances. Observations of this Court in paras 389 and 391 in *Supreme Court Advocates on Record Assn. v. Union of India* (SCC at p. 668) support the argument that the expression "Chief Justice" is used in the sense of collectivity of Judges of the Supreme Court and the High Courts respectively.

40. An aspect that requires to be considered at this stage is the question whether the Chief Justice of the High Court or the Chief Justice of India can designate a non-judicial body or authority to exercise the power u/s 11(6) of the Act. We have already held that, obviously, the legislature did not want to confer the power on the Court as defined in the Act, namely, the District Court, and wanted to confer the power on the Chief Justices of the High Courts and on the Chief Justice of India. Taking note of Section 5 of the Act and the finality attached by Section 11(7) of the Act to his order and the conclusion we have arrived at that the adjudication is judicial in nature, it is obvious that no person other than a Judge and no non-judicial body can be designated for entertaining an application for appointing an arbitrator u/s 11(6) of the Act or for appointing an arbitrator. In our dispensation, judicial powers are to be exercised by the judicial authorities and not by non-judicial authorities. This scheme cannot be taken to have been given the go-by by the provisions in the Act in the light of what we have discussed earlier. Therefore, what the Chief Justice can do u/s 11(6) of the Act is to seek the help of a non-judicial body to point out a suitable

person as an arbitrator in the context of Section 11(8) of the Act and on getting the necessary information, if it is acceptable, to name that person as the arbitrator or the set of persons as the Arbitral Tribunal.

19. For the reasons discussed above, arbitral award dated 15.9.2003 made by the arbitral tribunal who does not possess the qualification agreed to by the parties under the said contract agreement dated 4.3.1992 is liable to be set aside and in consequence thereof the impugned judgment and order dated 27.2.2006 passed by the learned District Judge, Kamrup, Guwahati in Misc. (Arb) Case No. 576/03 is liable to be interfered with.

20. Since the present appeal is to be allowed only on this score, other points agitated by the parties are left open. The appeal is allowed. The arbitral award dated 15.9.2003 and the impugned judgment and order dated 27.2.2006 passed in Misc. (Arb) case No. 576/03 are hereby set aside. The parties are to bear their own costs.