

* **HIGH COURT OF DELHI : NEW DELHI**

Arb. P. No. 144/2010

Judgment decided on : 31.10.2011

M/s Metro Builders (Orissa) Pvt. Ltd. Petitioner
Through: Mr. R.K. Mehta, Adv. with Mr. Antaryami
Upadhyay, Adv.
Versus

Indian Oil Corporation Ltd. & Ors. Respondents
Through: Mr. Anish Dayal, Adv. with Mr. Siddharth
Vaid & Mr. Ranbir Datta, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. This petition has been preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for appointment of an independent arbitrator to adjudicate the disputes between the parties and to quash the order dated 16.10.2009 passed by General Manager of the respondent No.1

appointing respondent No. 5, Shri Dinkar Pandit as an Arbitrator.

2. It is urged by the petitioner that this court should appoint some independent and impartial arbitrator in terms of Clause 9 of the General Conditions of the Contract dated 29.3.2007 executed between the parties in respect of the work “construction of Residential quarters at Paradip”. The said clause 9.0.1.1 reads as under:

“The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of the panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel”

3. It is stated in the petition, that a Tender Call Notice was issued by the respondent No.1 for construction of residential quarters at Paradip, petitioner being a private limited company incorporated under the Companies Act, 1956 engaged in the business of civil construction works as a contractor, builder and developer submitted its offer vide tender quotation dated 14.10.2006. The bid submitted by the petitioner was the lowest. Before the process of finalization, the petitioner noticed that there had been a typographical error in the tender document and the rate of steel had been mentioned @ Rs. 48/- “per M.T.” instead of Rs. 48,000 per M.T. (which was the market price of steel at the relevant

time) or Rs. 48/- “per kg”. The petitioner immediately sent the letter dated 22.01.2007 to the respondent No.1 informing the respondents about the said inadvertent typographical error in the tender document. The respondent No.1 in its reply to the letter dated 22.01.2007 of the petitioner did not dispute the submission of the petitioner regarding the mistake in the rate of steel.

4. On 28/29.03.2007 the respondent No.1 issued the work order to the petitioner and on 18.04.2007 the petitioner entered into a contract with the respondent No.1. The value of contract was Rs. 12,02,86,880/-. The stipulated date for completion of work was 28.03.2008.

5. It is averred in the petition, that while the work was in progress, the petitioner realized that their clarification regarding the steel rate had not been accepted by the respondent No.1. The petitioner tried to resolve the issue but it could not be resolved. Therefore, the petitioner sent a letter dated 28.04.2008 to respondent No.1 asking either to close the contract by mutual consent or grant 30% escalation of the contract value for work and extend the time period for completion of work till 31.03.2009 as the contract between the parties had come to an end on 28.03.2008 due to efflux of time. The respondent No.1 sent its reply dated 14.10.2008, rejecting the proposal of the petitioner and

stating therein, that the remaining work would be withdrawn from the petitioner and would be given to other agencies at the risk and cost of the petitioner.

6. The petitioner sent a letter dated 07.03.2009 requesting the respondent No.1 to settle all pending bills and refund the security deposit including the bank guarantee and settle the claims enumerated in the claim statement dated 07.03.2009. But, in its reply dated 17.04.2009, respondent No.1 stated that the claims in question have not been made within 10 days, therefore, the same are barred by limitation and with regard to claim for escalation, extension of contract period, amendment of rate is impermissible and beyond the scope of the contract.

Being aggrieved by this act of the respondent No.1, the petitioner sent a notice dated 17.04.2009 requesting the respondent No.1 to appoint an arbitrator/ arbitral tribunal within 30 days from the date of receipt of the notice.

7. On 15.5.2009, the respondents sent the reply to the notice whereby the respondents denied the allegations made in the notice and also nominated the names of 3 persons as a panel of nominees for the purposes of selection as per the arbitration clause. However, it is stated

by the petitioner that without considering the said reply it approached the High Court of Orissa on 18.5.2009 praying for appointment of an arbitrator before Orissa High Court as the petitioner did not receive the response. On 18.6.2009, the petitioner responded to the respondents' notice stating that it had already approached the court on 18.5.2010. It is noteworthy that although the initial stand before the Orissa High Court was that the respondents had not timely appointed the arbitrator and therefore, the arbitrator may be appointed. But, during the pendency of the petition, the petitioner also developed the ground of biasness after considering the reply of the respondents dated 15.5.2009 and in the letter dated 18.6.2009, it was first time conveyed to the respondents that the panel names do not contain any independent name and also informed the respondents that it is seeking an appointment of the independent arbitrator.

8. It is stated in the petition, that by its letter dated 22.06.2009 the respondent No.1 informed the petitioner that it has terminated the contract dated 18.04.2007 executed between the parties and vide letter dated 09.07.2009 informed the petitioner that the unfinished work has been awarded to another contractor namely M/s Bhagaban Mohapatra Construction and Engineers for contract value of Rs. 15,96,29,094.30/-

and the petitioner was asked to pay a sum of Rs. 8,54,46,750/- towards the additional cost incurred by the respondent No.1 without showing any basis for arriving at such a figure.

9. As per the petitioner, vide letter dated 28.07.2009 the petitioner informed the respondent No.1 that it had no liability to pay the amount claimed by the respondents.

10. On 16.10.2009, the respondents appointed Mr. Dinkar Pandit as the arbitrator as the respondents had not heard from the petitioner within 30 days of the receipt of the names in the panel.

On 31.3.2010, the Orissa High Court has dismissed the petition filed by the petitioner on the ground that the court lacked territorial jurisdiction and also held that the Delhi Courts shall have the jurisdiction to entertain and try the proceedings.

11. Accordingly, the petitioner approached this court seeking appointment of the arbitrator under section 11(6) and also setting aside of the existing arbitrator Mr. Dinkar Pandit in view of the grounds stated in the petition. The notice was issued in the application and thereafter respondents filed the reply. The matter was taken up for hearing.

12. It is submitted that the said clause 9.0.11 provides that the sole arbitrator shall be selected by the contractor/ petitioner out of the

panel of three persons nominated by the respondents. It is the contention of the petitioner that the said clause does not expressly empower the respondents to nominate their own employees as Arbitrator and therefore this court should intervene and appoint only such an arbitrator who is independent, impartial and unbiased.

13. It is also submitted that the petitioner has expressed its apprehension of bias and has already asked the respondents to nominate three names out of which, sole arbitrator shall be selected. It is stated that the decisions of the respondents to appoint the serving officer of the company may leave a room for partiality and therefore the independent and impartial appointment of an arbitrator is warranted.

14. In the reply filed on behalf of the respondents, it is submitted that the agreement under which the petitioner is seeking the remedy of arbitration contains a mutually agreed arbitration clause and also a detailed procedure for appointment of an arbitrator. Therefore, the petitioner, by not complying with the agreed procedure for appointment of the arbitrator, is trying to overreach the specific provision of the said agreement. In terms of the said agreement, it was specifically mentioned that the respondents would propose a panel of three persons out of which the petitioner will have the right to choose one person. But, the

petitioner, instead of choosing one person from the suggested panel nominated by the respondents in accordance with the terms of the agreement approached the High Court of Orissa vide petition No.28 of 2009. However, the said petition was dismissed by the High Court of Orissa on the ground of lack of jurisdiction.

15. Further, it is submitted by the respondents, that though the three arbitrators nominated by the respondents were employees of the respondent No. 1, but, were in no way directly or indirectly connected with the present contract in dispute. And the respondent No.5 has now even been superannuated, hence, he is in no way connected with the contract in dispute.

16. Therefore, the respondents have objected to the maintainability of this petition on the basis, that the process for appointment of an Arbitrator as prescribed under the agreement has been duly followed and no deviation can be resorted to by the petitioner merely on the basis that a Retired Senior Executive of the respondents' Corporation would not be impartial or neutral.

17. It is submitted by the respondents that the nomination process as contemplated under the arbitration agreement was fully complied with and it is the respondents who have followed the agreed

procedure.

18. Learned counsel Mr. Mehta, appearing on behalf of the petitioner has made his submissions which can be outlined in the following manner:

- a) Learned counsel submitted that on the mere reading of the arbitration clause, it becomes clear that the said clause nowhere states that the panel of the 3 persons shall include the serving officers of the respondents company or its employees. It is argued that the purpose of nominating 3 persons and selecting one of them was to promote impartiality but, the same is not achieved as the respondent proceeded to nominate its own employees which may lead to partiality and element of bias shall remain. Therefore, this court should remove any such possibility of biasness by appointing some neutral, independent and impartial arbitrator.

19. Learned counsel has placed reliance upon the judgment passed by the apex court in **Union of India versus Singh Builders Syndicate**, (2009) 4 SCC 523. wherein the court has held:

“25. We find that a provision for serving officers of one party being appointed as arbitrator/s brings out considerable resistance from the other party, when disputes

arise. Having regard to the emphasis on independence and impartiality in the new Act, government, statutory authorities and government companies should think of phasing out arbitration clauses providing for serving officers and encourage professionalism in arbitration.”

20. Likewise, the judgment passed in **Indian Oil Corp. Ltd. vs Raja Transport (P) Ltd.** (2009) 8 SCC 520 is relied upon wherein the Supreme Court observed as under:

“ 39. It will be appropriate if Government/ Statutory authorities/ public sector undertaking reconsider their policy providing for arbitration by employee arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in arbitrators. A general shift may in future be necessary for understanding the word “independent” as referring to someone not connected with either party. That may improve the credibility of arbitration as an alternative dispute resolution process”

21. The case of **Northern Railways Admn. vs. Patel Engineering Co. Ltd.**, (2008) 10 SCC 240 has also been relied upon by the petitioner counsel wherein the supreme court held as under :

“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 measure"(underlined for emphasis). This expression has to be read along with 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”

“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”

22. Learned counsel also relied on the case of **Denel (Proprietary) Ltd. vs. Bharat Electronics Ltd.** (2010) 6 SCC 394 the Supreme Court has held as under:

“17.....The wordings of Clause 10 are as follows :
“Arbitration.-All disputes regarding this order shall be referred to our Managing Director or his nominee for arbitration who shall have all powers conferred by the Indian Arbitration and Conciliation Bill, 1996 for the time in force.”

“21. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the Company against whom the dispute is raised (the respondent). In addition to that, the said managing Director of Bharat Electronics Ltd. which is a “government company”, is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the purchase orders, it is not in a position to settle the dues only because of the directions issued by the Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties.”

23. **Bharat Sanchar Nigam Ltd. & Anr. vs. Motorola India**

Private Limited, (2009) 2 SCC 337 in which it was held as under:

“37. Further, the CGM, Kerala Circle has already taken a decision as is evident from his letter dated 25-4-2006, that the appellants were right in imposing the liquidated damages and therefore, the question of such a person becoming an arbitrator does not arise as it would not satisfy the test of impartiality and independence as required under Section 12 of the Arbitration and Conciliation Act, 1996. Moreover, it would also defeat the notions laid down under the principles of natural justice wherein it has been recognized that a party cannot be a judge in his own cause. The judgment of this Court in **State of Karnataka v. Shree Rameshwara Rice Mills** is significant in this matter. The Court had stated: (SCC P.161)

“.....Even assuming that the [terms of Clause 12 afford] scope for being construed as empowering the officer of the State to decide upon the question of branch as well as assess the quantum of damages, adjudication by the officer regarding the breach of the contract cannot be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract.”

By putting reliance upon the aforementioned decisions, it is the contended by the learned counsel for the petitioner that the apex court from time to time has observed that the government undertakings should refrain from appointing or nominating their own officials as arbitrators and in the given cases also replaced the same with the neutral ones. Accordingly this court should follow the same approach in the

present case as well by appointing an arbitrator other than it's the employees of the company.

24. Learned counsel also submitted that the appointment of the respondents' own employee as the arbitrator shall amount to judging its own cause which shall be violative of principles of natural justice. It is argued that there is no presumption that the higher official of the respondents shall be fair, impartial and free from any bias. Learned counsel for the petitioner also submitted that in another contract between the same parties, by letter dated 06.03.2010, the respondents have agreed to refer the dispute under the rules of Delhi High Court Arbitration Center which should also persuade this court in appointing a fresh arbitrator as the respondents are resorting to pick and choose policy when it comes to arbitration and the appointment of the arbitrator.

25. Learned counsel submitted that the parties have failed to reach an agreement in relation to appointment of the arbitrator, therefore, this court has the jurisdiction to appoint the arbitrator in the matter. It is submitted that the petitioner case falls within sub clause (ii) of the section 11 (6) which provides for the contingencies that if the parties or the two arbitrators fail to reach an agreement expected of them

under that procedure. Therefore, as per the petitioner's counsel this court should interfere upon due satisfaction of the provisions of section 11 (6).

26. Learned counsel also submitted that the appointment of the arbitrator Mr. Dinkar Pandit is void as the same has been done after the petitioner approached the court by filing an application under section 11(6) of the Act.

27. Learned counsel has placed reliance upon the judgment passed by the apex court in **Ace Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corp. Ltd., (2007) 5 SCC 304** wherein the court observed as follows:

“Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. (SCC p.158, para 19) wherein this Court has held as under :

"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 Section 11, that would be sufficient. In other words, in cases arising under Section 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 Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

28. By placing reliance upon the above quoted judgment passed by the Apex court, it is argued by the petitioner that the respondents' appointment of the current arbitrator is violative of the provisions of Section 11 of the Act as by the time the respondents appointed the arbitrator, the petitioner had already approached this court.

29. Learned counsel for the petitioner also argued the appointment of the high officials as arbitrators may be a matter of practice in the respondents organization but the same does not mean it is not subject to challenge and the same shall remain in force for all the time considering the guidelines and observations made by the apex court. Therefore, to do complete justice, this court can appoint an independent and neutral arbitrator.

30. On the otherhand, the respondents resisted the present application for appointment of the arbitrator by urging that the appointment of the arbitrator has been made by following the procedure as agreed between the parties and no departure has been made by the parties. This has been explained by the respondents by pinpointing the process of the appointment date wise which is reproduced hereinafter:

- On 17.4.2009, the petitioner gave a notice for invoking the arbitration process and the same was duly received by the respondents.
- On 15.5.2009, the respondents were to nominate and suggest a panel of 3 names of possible arbitrators which were duly communicated by the respondents to the petitioner on the said date.
- The petitioner had to select one name out of 3 suggested names within 30 days as per the agreed procedure. Since no selection was made by the petitioner, the respondents have appointed the sole arbitrator following the agreed procedure and Mr. Dinkar Pandit was appointed as sole arbitrator.

31. Therefore, the due procedure has been followed which had been agreed and therefore, the question of appointment by this court does not arise and more so when no ground for seeking appointment from the court is made out.

It is stated that the conduct of the petitioner is bad as it is indulging in delaying the proceedings. It is submitted by the respondents that the petitioner first filed the petition before the Orissa High Court

on 18.5.2009 which was rejected by the Orissa High Court on the ground of lack of territorial jurisdiction on 31.3.2010. Similarly, an application for the interim measures under section 9 was filed before the District judge, Cuttack which was also rejected on the ground of lack of jurisdiction.

32. Learned counsel Mr. Anish Dayal appearing on behalf of the respondents have made his submissions which can be crystallized in the following terms:

- a) Learned counsel for the respondents have submitted that the mere ground of challenge by the petitioner is that the sole arbitrator is the ex-employee or an employee of the company does not on its own mean that the said arbitrator will not be impartial or neutral etc. It is stated that the apex court has also made the observations in relation to the appointment of the employees as arbitrators wherein it has stated that the said apprehension has to be reasonable and the same can be tested. The said apprehension cannot be only on the basis of whimsical grounds and more so when the arbitrator is not even dealing with the same department which the contract is concerned with.

33. Learned counsel for the respondents argued that the issue

about employee/officer of large corporations being nominated as Arbitrators has been dealt with and discussed by the Supreme Court in the various matters which are referred as under:-

(a) **Indian Oil Corporation v. Raja Transport (P) Ltd.** (Supra) :

“The process of arbitration is a binding and voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the Arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause.

“It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts

providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable.”

“There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named arbitrator body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

(b) Department of Telecommunications v. Gujarat Co-operative Milk Marketing Federation Limited, 2010 (10) SCC 86 –

The Apex Court has held that the fact that the named Arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality of lack of independence on his part. The Hon’ble Supreme Court has observed that although there can be a justifiable apprehension about the independence or impartiality of an employee Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named Arbitrator though a senior officer of the government/statutory body/government company, had

nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

(c) **Secretary To Government, Telecom Department, Madras v. Munuswamy Mudaliar and Anr. – AIR 1988 SC 2232 –**

The Apex Court has held that although reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator however, there must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct.

(d) **Union of India v. Singh Builders Syndicate (2009)**
(Supra)

The Apex Court while dealing with a situation of an arbitration clause mandating the nomination of employee arbitrators, held that the process as contemplated under the Arbitration clause has to be adhered to (para 13, 14) as closely as possible and it was only in an exceptional circumstance (see paras 4 to 9, 18 and 19) that the Court would intervene.

34. By putting reliance upon the aforesaid judgments, it has been argued that the petitioner's claim is based on mere apprehensions which are whimsical as the respondents have appointed the senior official of

the company who has retired from the company and also is not connected with the department concerned with the contract. The said apprehension cannot be said to be one which should persuade this court to appoint a fresh arbitrator.

35. Learned counsel also submitted that the governing principle in case of the nominated arbitrator is that the mere fact that the nominated arbitrator is an official or an ex employee of the one of the parties cannot be considered to be partial. However there are exceptions to the same which are:

36. Learned counsel has argued that the policy of nominating very senior officers, mostly retired of the respondents' Corporation who are unconnected with the department executing the contract has been successfully and consistently followed by the respondents Corporation in several contracts. The said process of nomination of 3 names and giving an option to the contractor like petitioner to select one name itself denotes fairness cannot be faulted with.

37. Learned counsel submitted that the Apex Court in *Singh Builders (Supra)* justified the intervention of the same by appointing an arbitrator by providing the exceptional circumstances wherein the court

justified the appointment of the arbitrator. In the present case, no such circumstances exist and therefore, the present case is distinguishable.

38. I have gone through the petition, reply thereof filed by the parties along with the documents and also have given careful consideration to the submissions advanced by them. Let me now proceed to discuss the same point wise upon application of the law on the subject.

39. For the purposes of convenience, Section 11 of the Act is reproduced hereinafter:

“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 of 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 him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him 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) or 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 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.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub- section (4) or sub- section (5) or sub- section (6) to him.

(11) Where more than one request has been made under sub- section (4) or subsection (5) or sub- section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub- section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub- sections (4), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to " Chief Justice" in those subsections shall be construed as a reference to the " Chief Justice of India."

(b) Where the matters referred to in sub- sections (4), (5), (7), (8), and (10) arise in any other arbitration, the reference to " Chief Justice" in those sub- sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub- section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief justice of that High Court."

40. A conjoint reading of Section 11 (2) read with Section 11(6) and Section 11(8) reveals that Section 11(2) is subject to Section 11(6) which means that the parties to an agreement are free to agree for the procedure for appointment of the arbitrator subject to contingencies prescribed under Section 11(6) which are that in the agreed procedure:

- a) A party fails to act as required under the procedure or
- b) The parties or two appointed arbitrators fail reach an agreement expected out of them under that procedure.
- c) A person, including institution fails to perform its function.....

41. Only under these eventualities, the Hon'ble Chief justice or his designate or for that matter the designated court can step in and take the necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment.

42. Few things become immediately clear upon reading the aforementioned provisions:

- a) That the satisfaction of the eventualities prescribed under Section 11 (6) of the Act gives jurisdiction to this court as the same are jurisdictional facts enabling this court to exercise jurisdiction for appointment of arbitrator.

b) That the court has to first respect the agreed procedure and if the measures in the agreed procedure are already provided for securing the appointment, the court should not intervene unless the contingencies prescribed under sub section 11 (6) are satisfied.

43. This has also been emphasized by the Supreme Court from time to time that the court must respect to the agreed procedure of appointment of the arbitrator prior to stepping into the process of the appointment of the arbitrator under section 11(6). (Kindly see **Indian Iron & Steel Co Ltd vs Tiwari Roadlines**, (2007) 5 SCC 703, **India Household and Healthcare Ltd vs LG Household and Healthcare Ltd**, (2007) 5 SCC 510.

44. From the above, it is clear that the court may intervene to take measures for appointment of the arbitrator only when the party fails to act as required under the procedure, or fail to reach an agreement expected out of them under that procedure or a person fails to perform the function.

45. A reading of Section 11(8) further reveals that while exercising jurisdiction invested under Section 11(6), the court can take due regard. The consideration under Section 11(8) shall become

relevant only upon satisfaction of the provisions under Section 11(6). This is relevant due to the reason that if the eventualities existing under Section 11(6) are not satisfied, the court shall not even proceed further as the said Section 11(8) shall not come into play. It is only when the court's jurisdiction is exercised, (by way of presence of the eventualities under section 11(6)) the court can have due regard for the purposes of the sub section(8)

46. Let me now deal with the present case in hand and test whether the petitioner has made out the case for an appointment of the arbitrator by the court. For the purposes of the discussions, the following dates are relevant along with the arbitration clause which are reproduced hereinafter:

“17.4.2009 – Notice calling upon the respondents to nominate the arbitrator was issued.

15.5.2009 – The respondents responded to the notice by nominating the panel of three names as per the arbitration clause.

18.5.2009 - The petitioner without waiting the reply and considering the same, rushed to the court by filing the petition before High Court of Orissa under section 11 of the Act without completion of the agreed procedure.

18.6.2009 – The petitioner informed the respondents that it has already approached the court for appointment of the arbitrator.

16.10.2009 the respondents after completion of the procedure

exercised their right to appoint the arbitrator as per the arbitration clause.

31.3.2010 – The Hon'ble High Court of Orissa dismissed the application under section 11 on the ground that it lacked territorial jurisdiction to entertain and try the present proceedings.

47. In the 1st week of May, 2010 the petitioner approached this court seeking appointment of the arbitrator on the ground that the employee of the respondents is appointed as the arbitrator which is likely to be biased and therefore this court should appoint an independent arbitrator.

48. Firstly, it has been the contention of the petitioner that it had already approached the court on 18.5.2009 and therefore, the appointment of the arbitrator by the respondents is bad as the right to appoint the arbitrator is lost in view of Ace Pipeline (Supra). The contention of the petitioner is unmeritorious even if the petitioner's case is tested on the date of 18.5.2009. This is due to the following reasons:

- a) Firstly, on 18.5.2009 when the petitioner approached the Orissa High Court, the petitioner and respondents were yet to complete the agreed procedure of the appointment of the arbitrator. It can be seen by merely issuing notice of appointment of arbitrator on 17.4.2009, the petitioner without awaiting the completion of the

agreed procedure or awaiting the reply which was issued by the respondents on 15.5.2009 (which is within one month as stated in the notice for appointment issued by the petitioner) nominating three names for the purposes of the panel rushed to the court for the purposes of appointment of the arbitrator. The rest of the procedure which includes selection of the name out of the panel within 30 days of the receipt of the names in the panel and the process, thereafter, in the event of failure to select the name was yet to be completed on 18.5.2009. There is no stipulation of 30 days in agreement to nominate the arbitrator by the respondents on receipt of the demand, however the petitioner was to select the names for which 30 more days have been mentioned under the agreed procedure. Thus, there was no occasion to approach the court on 18.5.2009 without completing the agreed procedure by the petitioner. Therefore, approaching the court of the petitioner even assuming that it was a competent court was in contravention to the agreed procedure as on that date as the parties were in the process of conducting what had been agreed between them.

49. In this respect, the Supreme Court has time and again reiterated and given emphasis that the court should respect firstly the

agreed procedure under Section 11 (2) and the jurisdiction to interfere or take the measures under Section 11 (6) is attracted only once the agreed procedure is exhausted.

50. However, on 18.5.2009, the agreed procedure was yet to be completed or exhausted and therefore on that date, the petition filed by the petitioner is premature before court and no benefit can be given to the petitioner on the basis of the approaching the court on 18.5.2009.

51. The reasoning stated above gains strength from the fact that the petitioner has neither awaited for 30 days to complete and nor considered the reply given by the respondents on 15.5.2009 by nominating the names which the petitioner states that it has received the same on 20.5.2009. Further, the petitioner has not even intimated to the respondents that it is going to approach the court in the event of failure of the respondents to nominate the names and rather approached the court without participating or ending or completing the agreed procedure. Therefore, on 18.5.2009, it cannot be said that the petitioner was aggrieved by the non appointment of the arbitrator as per the eventualities prescribed under section 11(6) as on that date it cannot be said that the parties had failed to follow the procedure as they were under the process of following the same or the parties had failed to

arrive at the agreement on appointment as there is no communication from the respondents upto 18.5.2009 or even thereafter wherein it has denied for arbitration or the appointment of arbitrator nor any person or institution has failed to perform its function. Therefore, on 18.5.2009, the court could not have assumed jurisdiction in view of non satisfaction of ingredients of section 11(6). The court on 18.5.2009 could not have assumed jurisdiction as the mechanism prescribed under the agreed procedure was not exhausted by that time.

The petitioner is rather a party who has defaulted in the completion of the agreed procedure by approaching the court on 18.5.2009. In this respect, the observations of Supreme Court in the case of **National Highways Authority of India v. Bumihway DDB Ltd. (JV) & Ors., (2006) 10 SCC 763** are instructive. The Supreme Court observed thus:

“ 23. In the present case, for the purpose of appointment of Presiding Arbitrator, the respondent unilaterally approached the High Court of Orissa at Cuttack under Section 11(6) of the Arbitration and Conciliation Act, 1996, in express violation of the contract agreement without first requesting the Indian Road Congress being the designated authority for appointment of the Presiding Arbitrator.

34. In our view, the invocation of Section 11(6) of the Arbitration & Conciliation Act, 1966 is squarely based on a

default of a party. The ratio laid down in the case of Datar Switchgear Ltd. vs. Tata Finance Ltd. & Anr. (2000) 8 SCC 151 is the correct proposition and the case of Punj Lloyds Ltd. vs. Petronet MHB Ltd. (supra) followed Datar Switchgear. **The question arises for consideration here is who had defaulted and on what basis of default has the Court entered jurisdiction under Section 11(6). This question though raised by the appellant in the counter affidavit before the High Court has not been answered at all. Hence, the assumption of jurisdiction and adjudication by the High Court, in our opinion, is vitiated.** (Emphasis Supplied)

44. As rightly pointed out by the appellants, the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the Presiding Arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only respondent No.2 was authorized to make the appointment. Unless respondent No.2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent No.1 has wrongly invoked the jurisdiction of this Court without first following the procedure agreed to between the parties. Thus no cause of action had arisen in the facts of the case to seek the appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature. The High Court also is not correct in relying on the contention of the respondent No.1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. It was submitted by learned Solicitor General appearing for the appellants that the said finding of the High Court is self contradictory inasmuch as if the Presiding Arbitrator is a retired Judge of the High Court and one of the arbitrators is a retired Chief Justice of the High Court, the member of hierarchy is upset. Even otherwise, there does not exist any such provision in law which requires that if one of the

arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. 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)

The aforementioned observations of Supreme Court in National Highways (supra) have been affirmed by the Supreme Court in the case of India Household And Healthcare ... vs LG Household And Healthcare Ltd in the Arbitration Petition 18 of 2005 decided on 8th March 2007 wherein Hon'ble Justice SB Sinha J approves the same while dismissing the appeal by observing:

“Applicant has not appointed its arbitrator. 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.

In National Highways Authority of India & Anr. v. Bumihway DDB Ltd. (JV) & Ors. (Supra) it was opined:-

"44The 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."

For the views, I have taken, it is not necessary to consider the other submissions made at the bar. For the reasons aforementioned, this application is dismissed being not maintainable at this stage.”

52. The present case also covers within the observations of the Supreme Court in the case of National Highways (supra). This is due to the reason that the petitioner on 18th May, 2009 approached the Orissa High Court without following or completing, ending the agreed procedure. The petitioner has not accorded the ample opportunity to the respondents to nominate the panel and procedure thereafter has not been followed. The question then comes who has defaulted and on what basis, the court could have entertained the jurisdiction to appoint the arbitrator. In National Highways(Supra), the respondent is at the default and therefore, at the behest of the respondent, the court’s jurisdiction to appoint the arbitrator is vitiated. In the present case too, the petitioner is in default by being instrumental to non compliance of agreed procedure, thus, the court on 18.5.2009 could not have entertained the petition at the behest of the petitioner giving the petitioner benefits of his own wrongs and its jurisdiction could have been vitiated by non satisfaction of provisions of section 11(6) of the Act.

53. Thus, if the court on 18.5.2009 could not have entertained the application under section 11(6) of the Act, then no benefit can enure

to the petitioner by approaching the court and the completion of the agreed procedure and appointment of the arbitrator thereof subsequently cannot be faulted with.

54. The petitioner has approached the Orissa High Court which besides the fact that it could not have entertained the premature application of the petitioner in view of non compliance of agreed procedure, lacked territorial jurisdiction to entertain such petition which is clear from orders passed by the Orissa High Court. The court which does not have jurisdiction to entertain the application under Section 11 (6) of the Act also does not possess jurisdiction to appoint any such arbitrator. Therefore, it could not be said that the High Court of Orissa was *in seisin* of the application which took away the right of the respondents to appoint the arbitrator in compliance of the agreed procedure.

55. The observations of the Court in Ace Pipeline (supra) are not applicable in the present case as the court on 18.5.2009 lacked territorial jurisdiction to entertain such dispute and therefore, cannot be said to be *in seisin* of the application or dispute qua appointment. Further, the court in addition could not have assumed jurisdiction on the 18.5.2009 for the application filed by the petitioner in view of non

completion of the procedure. Therefore, seeing from any standpoint, the right to appoint the arbitrator of the respondents is not taken away. The cases of Ace Pipe and Datar(Supra) do not come to aid the petitioner being distinguishable on facts as in those cases there was departmental lethargy by governmental undertakings upto the time of approaching the court. The arbitrator was appointed only after the court was *in seisin* of the dispute that too competent court in all respects. In the present case, there is no departmental lethargy and rather the petitioner is wrongful on his part having approached the court prematurely and not following the complete agreed procedure.

56. In view of the same, the petitioner's submission on the right of the appointment of the arbitrator having been lost on the basis of applicability of dictum of Ace Pipeline (supra) is rejected as the said case is distinguishable on facts and the related arguments on approaching the court are rejected in view of my findings in the preceding paragraphs.

57. Before proceeding further, it is pertinent to point out that the petitioner's case before the High Court of Orissa was materially different from the case of the petitioner before this court. In Orissa High Court, the petitioner approached the court without following the agreed

procedure complaining that the respondents have not appointed the arbitrator timely and therefore, the court should appoint the arbitrator. It is only during the course of the arguments before Orissa High Court, the plea of partiality or biasness was developed. However, before this court, it is the case of the petitioner that the employee of the respondents could not act as an arbitrator as he would be partial and bias and such an appointment be set aside in view of the judgments of the Apex Court in Singh Builders's case (supra).

58. This is more so due to the reason as the respondents have never been informed or asked to point out the names of independent persons prior to approaching the Orissa High Court and it is the case of the petitioner before Orissa High Court that it has not even considered the reply dated 15.5.2010. Therefore, the case before the Orissa High Court was solely premised on the basis of non appointment of the arbitrator timely, however, before this court, the petitioner is challenging the appointment of an employee as an arbitrator.

59. Therefore, now the only question left to be examined is the challenge which the petitioner has laid on the basis of the apprehension of the biasness. Let me now deal with the same.

60. The Arbitration Clause 9.0.1.1 for the purposes of the

convenience is reproduced hereinafter:

“The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of the panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel”

61. From the bare reading of the clause, admittedly, it can be seen that the clause nowhere mentions that whether the persons to be nominated by the respondents shall be its employees, but it also nowhere provides that they shall be complete outsiders or third parties. However, one thing which becomes certain is that it is the respondents who shall have the say in nominating the names and also in case of the inaction of the petitioner in selecting the names, the respondents can on their own choose the name of sole arbitrator from the panel of names nominated by the respondents. The respondents are thus given enough discretion in the two processes, both nomination as well as final say in the selection in the event of failure to select the name by the petitioner. All this reveals the intention of the parties at the time of entering into the contract, which is, that the petitioner with the open eyes has proceeded to enter into such a contract which leaves enough leverage in the hands of the respondents in choosing the names of the persons in the

panel which the respondents deems fit. This is more so due to the reason that the arbitration clause does not provides names of the independent persons but only reads that the respondents shall nominate the names. Therefore, if the respondents as a matter of the policy of the governmental undertaking nominates the names of its employees in the panel unconnected with the subject work or the contract, the same cannot be faulted with solely on the general presumption that the employee of the governmental organization shall be biased and would not be able to effectively adjudicate the controversy in question.

62. No doubt, the apex court has from time to time asked the Governmental Undertakings to consider changing the policy of nominating their own employees as the arbitrators like in the case of Singh Builders (Supra), Raja Transport (Supra) wherein the appointment of the employees by the Governmental Undertakings have proven to be adversely affecting the arbitration proceedings either in the form of delay or otherwise. The courts have however in those cases also first attempted to effectuate the policy decisions of those undertakings by appointing the names of their employees only. It is only after the passage of the time, when the said policy has proven to be ineffective, such observations by the Supreme Court have been made wherein the

courts have asked to consider phasing out such named arbitrators who are the employees of the company.

63. It also needs special mention that the apex court when poised with the question of examining the biasness in the cases of arbitrators who are former employees or employees of the Governmental Undertakings has also observed that the biasness cannot be ascribed to the arbitrator on the sole presumption that the employee of the undertaking cannot effectively adjudicate the dispute when the arbitration clause provides so and the party with an open eyes signed such kind of agreement. The policy decision in those cases also find approval of the apex court.

64. In the present case too, firstly it is not the case of named sole arbitrator, it is rather the case wherein the respondents shall nominate 3 names in the panel and it is upon the petitioner to select the names and if the petitioner does not do so within 30 days, then the respondents on its own can appoint the arbitrator. The process of appointment is, therefore, varied to the extent that the respondents shall nominate 3 names and it is for the petitioner to choose any one of them. But, the policy matter remains the same which is that in order to avoid loss to the exchequer, the names of the persons who are senior former employees or employees

are given as nominees. The said process is in consonance with the arbitration clause and practice as adopted by the Governmental Undertakings like the respondents and the same cannot be faulted with solely on the ground that the nominated names are those of the employees who are in fact unconnected with the subject contract will likely to be biased when no material to the contrary is shown to substantiate such alleged biasness.

65. It has been pointed out that the arbitrator who has been appointed is the former employee of the company and has superannuated from the job. Further, it is also informed that the said arbitrator belongs a different branch of the corporation which is totally unconnected with the subject work and the contract. Accordingly, the said policy decision and appointment cannot be faulted with as the wordings of the arbitration clause are wide enough to give the discretion to the respondents to nominate the persons as per their policy decision in the organization.

66. This court cannot compel under the process of appointment of arbitrator under Section 11(6) of the Act to change its policy decisions. This is also more so due to the reason that Apex court can make such observations under its plenary powers under Article 142 of

the constitution but it is doubtful whether the High Court can make such observations by stating in generality without arriving at the finding of actual biasness in the given facts of the case. Further, even the Supreme Court also asked the respondents to consider changing the policy but has not scrapped the policy being ultra vires in violation of principles of natural justice. This shows that the apex court has not completely scrapped such policy of governmental undertaking appointing employee arbitrator as the apex court was conscious about the purpose behind the same which is that the expense involved in the private arbitration and loss to the exchequer thereto is considerably higher than in the cases involving the arbitrators who are the ex employees.

67. It is also well settled that the judicial review in cases involving policy decision is very limited unless the same is found to be arbitrary, unreasonable or actuated by malice.

68. In the present case, it is the respondents policy to nominate such names of the employees cannot be said to be arbitrary or actuated by malice or unreasonable. The mere fact that in one of the cases, the respondent consented to the court by getting the arbitrator appointed from the Delhi High Court mediation cell also does not lead any inference of arbitrariness or malice as no motives can be ascribed unless

it is shown that there is a malice in fact or in law directed against the petitioner.

69. The judgment passed by the Supreme Court in *Singh Builders (Supra)* is not applicable to the present case. It is well settled principle that the judgment passed by the court and observations made therein are to be read in the context and not like Euclid theorems.

70. The Supreme Court in ***Singh Builders(supra)*** has firstly narrated the facts of the case which revealed that the policy of nominated persons as arbitrators by the in that case governmental undertaking had proven to be totally unworkable and three times the arbitrators were replaced and the matter was pending for last 10 years. The governmental body in that case kept on nominating persons who were either transferred or otherwise. Taking note of all these facts and circumstances, The Supreme Court stated that when such situation arises, the court is not powerless to appoint the independent arbitrator and the court can interfere in those circumstances. The Apex court in *Singh Builders* took note this extraordinary circumstances in the following quoted paragraphs of the judgments reproduced below :

“3. It is true that the Arbitral Tribunal should be constituted in the manner laid down in the Arbitration agreement. Provisions for arbitration in contracts entered by

governments, statutory authorities, and government companies, invariably require that the Arbitrators should be their own serving officers. Such a provision has to be given effect, subject to requirements of independence and impartiality. But there can be exceptions and this case which has a chequered history, falls under such exceptions.

4. Let us refer to the facts briefly. The respondent made a request for arbitration in the year 1999. As the appellant failed to take necessary steps as mandated by clause 64, the respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act' for short) in AA No. 202/2000. In pursuance of the directions issued on 11.11.2002 by the designate of the Chief Justice of the Delhi High Court, an Arbitral Tribunal was constituted in terms of clause 64, consisting of Shri A.K. Mishra, (Chief Engineer/TPS) nominated by the contractor, Shri S.P. Viridi (Dy.F.A. & CEO) nominated by the appellant, and Shri H.K. Jaggi (Chief Bridge Engineer) as the Umpire.

But even before the proceedings could commence before the Arbitral Tribunal, Shri A.K. Mishra, one of the Arbitrators, was transferred and consequently he tendered resignation in May, 2004. As the appellant failed to provide a fresh panel to enable the respondent to make a fresh nomination, the respondent again approached the High Court by filing AA No.240/2004.

A fresh panel was made available thereafter from which the respondent nominated Shri Ashok Gupta as its Arbitrator. Hardly after one sitting of the Arbitral Tribunal, Shri Ashok Gupta was also transferred and he tendered his resignation on 21.7.2005.

As appellant again failed to take steps for filling the vacancy, the respondent approached the Court again by

filing IA No. 6511/2005 in AA 240/2004. In pursuance of an order dated 24.8.2005 passed by the High Court, again a panel was made available and the respondent made its choice on 9.9.2005. As no steps were taken in pursuance of it by the appellant, the respondent sent a reminder on 14.10.2005. There was no response.

In this background, the respondent again approached the High Court on 10.11.2005 in Arb. Petn. No. 256/2005 for appointment of an independent sole arbitrator. During the pendency of the said petition, the General Manager of Northern Railways appointed Sri Ved Pal as the contractor's nominee arbitrator on 22.11.2005.

5. The High Court was of the view that no useful purpose will be served by again reconstituting a Three Member Arbitral Tribunal in accordance with clause 64. The High Court found that the matter has been pending from 1999 when the respondent first made the request for reference to Arbitration and that the cumbersome process of constituting an Arbitral Tribunal in terms of the Arbitration agreement and the delays on the part of Railways in complying with the provisions of the arbitration agreement, led to the arbitration becoming virtually a non-starter. Therefore, the High Court allowed the petition on 27.3.2006 and appointed Justice Jaspal Singh, a retired Judge of the Delhi High Court as the arbitrator. Justice Jaspal Singh recused himself and the High Court on 19.7.2006, appointed Justice R.C. Chopra, another retired Judge of the Delhi High Court as the arbitrator.

The said order is challenged in this appeal by special leave. On 6.11.2006, this Court stayed the arbitration proceedings before the sole Arbitrator. The question that arises for consideration in this appeal by special leave is whether the

appointment of a the retired Judge of the High Court as sole Arbitrator should be set aside and an Arbitral Tribunal should again be constituted in the manner provided in terms of clause 64.

71. Taking note of aforementioned replacement of the arbitrators time and again and the fact that the agreed procedure under clause 64 in the agreement which had proven to be not fruitful, the Supreme Court was hearing the SLP against the order passed by the Delhi High Court appointing the arbitrator. The Supreme Court while dismissing the SLP justified the appointment by holding that the case of Single Builders is an exception to the ordinary rule that the court must respect the agreed procedure and reasonable intendment must be made to implement the agreed procedure and in the given case it is futile to go back on the appointment as per the clause 64 as several efforts had already been done to implement the clause which has not reaped the fruits in that case.

72. In the present case, no such circumstance has arisen of the like nature which warrants any such exception to be carved out by replacing the existing arbitrator who has been appointed as per the agreed procedure in the agreement. It is rather the petitioner who has

defaulted in following the agreed procedure. Therefore, the case of Singh Builders (supra) does not aid the case of the petitioner.

73. Likewise, the decision rendered in the case of Raja Transport (P) Ltd (Supra) does not aid the case of the petitioner. This is due to the reason that the Supreme Court in Raja Transport has rather approved the proposition that the mere fact the parties have agreed to nominate the employee or higher official as an arbitrator will not render the agreement void and nor the same raises any presumption against the impartiality on the ipse dixit of the adversary unless it is shown that there shall be serious prejudice to the case by virtue of position of the appointed person or dealings of the same. The Supreme Court observed thus:

“15. It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable. (Emphasis Supplied)

74. In Secretary To Government, Transport Department, Madras v. Munuswamy Mudaliar (Supra) the contract between the respondent and State Government contained an arbitration clause providing that the Superintending Engineer will be the arbitrator.

Disputes arising in respect of cancellation of the contract by the department were referred to the said Arbitrator. An application under section 5 of Arbitration Act, 1940 was filed by the contractor for removal of the arbitrator on the ground of apprehended bias on the part of the arbitrator as he was an employee of the State Government and was subordinate of the chief Engineer who took the decision to cancel the contract.

75. This Court negatived the said contention and held in **Munuswamy case** (Supra) that :

“When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration. **Unless there is allegation against the named arbitrator either against his honesty or mala fide or interest in the subject matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act.**”
(Emphasis Supplied)

This Court in **International Authority of India v. K.D.Bali and Anr.** [1988 (2) SCC 360] held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. **In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some**

official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. (Emphasis Supplied)

29. While the provisions relating to independence and impartiality are more explicit in the new Act, it does not mean that the old Act (Arbitration Act, 1940) enabled persons with bias to act as Arbitrators.

What was implicit under the old Act is made explicit in the new Act in regard to impartiality, independence and freedom from bias. The decisions under the old Act on this issue are therefore not irrelevant when considering the provisions of the new Act. At all events, *M. P. Gupta* and *Ace Pipeline* are cases under the new Act. **All the decisions proceed on the basis that when senior officers of government/statutory corporations/public sector undertakings are appointed as Arbitrators, they will function independently and impartially, even though they are employees of such Institutions/organisations.** (Emphasis Supplied)

30. We find no bar under the new Act, for an arbitration agreement providing for an employee of a government/statutory corporation/public sector undertaking (which is a party to the contract), acting as Arbitrator. Section 11(8) of the Act requires the Chief Justice or his designate, in appointing an arbitrator, to have due regard to

“Section 11(8)(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 or impartial arbitrator”.

31. Section 12(1) requires an Arbitrator, when approached in connection with his possible appointment, to disclose in

writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Sub-section 12(3) enables the Arbitrator being challenged if

(i) the circumstances give rise to justifiable doubts as to his independence or impartiality, or

(ii) he does not possess the qualifications agreed to by the parties.

32. Section 18 requires the Arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case. Nothing in sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement, naming the Arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement.

33. Sub-section (2) of section 11 provides that parties are free to agree upon a procedure for appointment of arbitrator/s. Sub-section (6) provides that where a party fails to act, as required under the procedure prescribed, the Chief Justice or his designate can take necessary measures. Sub-section (8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator. The power under sub-section (8) is intended to be used keeping in view the terms of the arbitration agreement.

34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some

other department) to the officer whose decision is the subject matter of the dispute. (Emphasis Supplied)

35. Where however the named arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/ public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract. (Emphasis Supplied)

36. The position may be different where the person named as the Arbitrator is an employee of a company or body or individual other than the state and its instrumentalities. For example, if the Director of a private company (which is a party to the Arbitration agreement), is named as the Arbitrator, there may be valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an Arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named Arbitrator, then the court has the discretion not to appoint such a person.

37. Subject to the said clarifications, we hold that a person being an employee of one of the parties (which is the state or its instrumentality) cannot per se be a bar to his acting as an Arbitrator. Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias.”

38. Before parting from this issue, we may however refer to a ground reality. Contractors in their anxiety to secure contracts from government/ statutory bodies/public sector undertakings, agree to arbitration clauses providing for

employee-arbitrators. But when subsequently disputes arise, they balk at the idea of arbitration by such employee-arbitrators and tend to litigate to secure an “independent” arbitrator. The number of litigations seeking appointment of independent Arbitrator bears testimony to this vexed problem.

39. It will be appropriate if governments/statutory authorities/public sector undertaking reconsider their policy providing for arbitration by employee-arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in Arbitrators. A general shift may in future be necessary for understanding the word & quot;independent" as referring to someone not connected with either party. That may improve the credibility of Arbitration as an alternative dispute resolution process. Be that as it may.”

76. From the reading of the above quoted observations of the court, the following propositions can immediately be discerned:

- a) That the observations in the case of Raja Transport(Supra) have been expressed in the context of named arbitrator wherein the ex employee or employee is named in the agreement in the arbitrator.
- b) The Apex court has stated the mere fact of appointment of ex employee in the case of named arbitrator when there is a senior officer of the corporation unconnected with the contractual subject, there is no presumption against the Impartiality. The reasonable apprehension has to be shown by supporting cogent evidence.

- c) The Apex court has also drawn a distinction between the governmental corporations or instrumentalities providing their employees as named arbitrators and those of private organizations or companies where the situation may differ. The Supreme Court in a way has kept governmental corporations/ instrumentalities on the separate footing as an exceptional case and rightly so as their dispute arises from time to time and they should be unnecessary loss to the exchequer.
- d) The Supreme Court has also at the same time asked the Corporations/Governments bodies to consider changing their policies of appointing their employees as arbitrators in future to avoid unnecessary litigation.

77. In a way, the Supreme Court also asked the bodies for reconsideration of their policies but has not held the said policies as void or unconstitutional being violative of principles of natural justice as there is no general presumption against the impartiality. Therefore, till the time the bodies themselves change their policies of not naming or nominating their own employees, they cannot be compelled to do so.

78. Thus, the dictum of Raja Transport(Supra) although relied upon by the petitioner to support its case actually does not come to the

aid of the petitioner as the said judgment is passed in the case of named arbitrator wherein the court has found that Chief justice was not justified in raising the presumption against bias. If in the case of named arbitrator who is an employee, there can be no presumption as bias in generality unless backed by the cogent evidence. It is difficult to infer any biasness in the present case, where there is panel which is constituted by the respondents by naming three persons as their employees unconnected with the subject contract as proposal for the petitioner, who has by its own inaction not selected one and thereafter the respondents chose Mr. Dinkar Pandit as one which cannot be faulted with.

79. Therefore, Raja Transport Case(Supra) does not advance the case of the petitioner and rather comes to the aid of the respondents.

80. The observations of Denel Limited (supra) also do not aid the case of the petitioner as in that case, the supreme court arrived at the finding that the managing director of the company shall be bound by the superior authorities and therefore, could not independently decide the dispute and thus proceeded to replace such arbitrator. However, in the present case, the arbitrator has already superannuated from the company which has been stated in the reply at paragraph 9 by the respondents. It is also stated that the said arbitrator is unconnected with the same. The

petitioner in response in the rejoinder at para 11 pleads ignorance about the retirement but states that the arbitrator even if unconnected with the work should not be appointed. It shows that the petitioner admits that the arbitrator is unconnected with the work and intends that this court should remove the arbitrator on the general presumption of biasness. Thus, there is no justifiable reason to presume that there will be a biasness when the arbitrator has retired from the respondents Corporation and also unconnected with work. Thus, Denel Limited (Supra) is distinguishable on facts.

81. Similarly in **Northern Railways (Supra)** the Supreme Court has interpreted the interplay between provisions in Sections 11(6) and 11(8) which has been observed by the court in the following manner:

“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.

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 measure"(underlined for emphasis). This expression has to be read along with 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.

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. (Emphasis Supplied)

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."

From the above observations of the Hon'ble Apex court, it becomes clear that while entertaining the application under section 11(6) of the Act, the court has to give due regard to the twin requirements of section 11(8) as well. Even if the present case is tested on the principles enunciated by the Apex court and read holistically with other dictums and guidelines of the Apex court, it becomes amply clear that the mere fact that the employee or former employee is nominated as arbitrator is not sufficient to ascribe bias. It has been pointed out that the said officer Mr. Pandit is the senior officer who has super annuated from the company. The said officer is unconnected with that of the department with which the contract relates. The petitioner nowhere alleges this or disputes this in order to substantiate his case on biasness. In these circumstances, I find that having due regard to provisions of section 11(6) as well as section 11(8) coupled with the guidelines of the apex court which provides for the availability of the cogent evidence to support the case of biasness, in the absence of the same, there is no ground of bias or justifiable apprehension of bias which is made out to replace the existing appointment done as per the agreed procedure.

82. In view of the aforementioned discussion, no ground is made out to replace the existing arbitrator and to exercise the jurisdiction under section 11(6) of the Act. Therefore, the appointment of the sole

arbitrator by the respondents is affirmed and the petition filed by the petitioners deserves dismissal. Hence, the same is dismissed. No costs.

MANMOHAN SINGH, J.

OCTOBER 31, 2011
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