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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 12.04.2012

Date of decision : 02.05.2012

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FAO (OS) Nos.597-598/2006

M/S NATIONAL THERMAL POWER CORPORATION Appellant

Through: Mr.S.K.Taneja, Sr.Adv. with Mr.Puneet
Taneja and Mr.Amrit Anand, Advocates.

Versus

M/S TECHNO ELECTRIC & ENGINEERING CO.LTD..... Respondent

Through: Mr. Narender Sharma and Mr.Sachin Mittal,
Advocates for R-1.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J.

1. A contract was entered into between the parties on 12.05.1977 for laying and termination of power/control/excitation and communication cable, installation of cable trays, support, pipes and accessories etc. by the respondent. The agreement *inter se* the parties contained an arbitration clause i.e. Clause 25 which *inter alia* provided that “no person other than a person appointed by the Chairman, Central Electricity Authority or member (Thermal) Central Electricity Authority should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.”

2. In view of the disputes arising *inter se* the parties, the respondent filed an application under Section 20 of the Arbitration Act, 1940 ('the said Act' for short) which was registered as Suit No.28-A/1979. The appellant also had certain counter claims. The matter was directed to be referred to arbitration in terms of the order dated 09.05.1979 which called upon the designated authority to do the needful within 2 months.
3. The Chairman, Central Electricity Authority claims to have appointed Sh.C.S.Sreenivasan as the sole arbitrator to adjudicate the disputes vide an order dated 05.07.1979 and this fact is stated to have been communicated to the Registrar, High Court of Delhi on 13.07.1979. The respondent, however, denies knowledge of any such order being brought to its notice.
4. It appears that the respondent was engaged as a contractor in two other contracts with the appellant where also disputes had arisen *inter se* the parties and the respondent had requested for appointment of an arbitrator in all the three contracts including the one in dispute. Some correspondence is stated to have been exchanged for settlement of disputes in relation to all the three contracts which resulted in the appellant issuing a letter dated 23.07.1980 qua the three contracts. The letter specifies that in view of the earlier correspondence exchanged qua settlement of disputes in connection with the three contracts, as per request of the respondent and without prejudice to the legal rights of the appellant, the Chairman and Managing Director of the appellant had nominated Sh.C.K.Varughese as the sole arbitrator in the disputes arising out of the aforesaid contracts subject to the respondent withdrawing all court cases from the court within 15

days from the date of issue of this letter and to also arrange for extension of validity of all bank guarantees for a period of 5 months from the date of withdrawal of the cases. The letter also sought confirmation from the respondent. It, however, emerges that no finalization in this behalf could take place and thus as per the appellant vide letter dated 12.03.1981 a quietus was put to the issue of an overall settlement. The appellant then addressed a letter dated 08.05.1981 to Mr.C.S.Sreenivasan with reference to his earlier appointment as an arbitrator and requested him to enter upon reference at his immediate convenience. A copy of this letter was sent to the respondent. This letter was responded to by the respondent on 13.05.1981 alleging that there was a contradiction between the earlier letter dated 23.07.1980 and the subsequent letter dated 08.05.1981 since as per the letter of 23.07.1980 Mr.C.K.Varughese had been appointed as a sole arbitrator whereas in the subsequent letter dated 08.05.1981, the reference was to Mr.C.S.Sreenivasan as the sole arbitrator. The appellant then issued a letter dated 22.05.1981 stating that there was no contradiction as the letter dated 23.07.1980 was without prejudice to the legal rights of the appellant and that issue had been brought to an end vide the letter dated 12.03.1981. Since the respondent had not withdrawn the court cases, it was presumed that they were not interested in the settlement of disputes outside the Court and that chapter had been closed. The dispute qua the contract in question was alleged to have resulted in appointment of Mr.C.S.Sreenivasan as the sole arbitrator.

5. Mr.C.S.Sreenivasan thereafter issued the first letter as an arbitrator on 01.10.1981. Since this letter is of some importance and much of

the dispute flows from what this letter intends, it would be appropriate to reproduce the contents of the said letter:

“No.1/11/81-Arb./745 Dated 1st October, 1981
Before

Shri C.S.Sreenivasan, Chief Engineer, Chief Engineer,
HCM, Central Electricity Authority, West Block II,
Wing 6, R.K.Puram, New Delhi

IN THE MATTER OF ARBITRATION BETWEEN
MS/ TECHNO ELECTRIC AND ENGINEERING
CO.LTD.

P-46A, RADHA BAZAR LANE, CALCUTTA-
700001.

.....CLAIMANTS

AND

NATIONAL THERMAL POWER CORPORATION
BADARPUR THERMAL POWER PROJECT
BADARPUR DIVISION
NEW DELHI – 110044

.... RESPONDENT

NAME OF WORK: LAYING OF POWER CABLES
IN BADARPUR THERMAL POWER PROJECT
(CONTRACT AGREEMENT NO.1-A/77-78 DATED
12.05.1977)

Whereas, I Sreenivasan, Chief Engineer have been
appointed as arbitrator in the above case by Chairman,
CEA, as per the orders of the Hon'ble Delhi High Court
dated 9th May, 1979 passed in Suit No.28A/79.

And whereas, I accept the said appointment and
issue the following directions to the parties to the
dispute:-

1. That M/s Techno Electric & Engineering.Co.Ltd., the claimants shall deliver their statement of claims to me and to Badarpur Thermal Power Project NTPC within 15 days of the receipt of this letter.
2. That Badarpur Thermal Power Project, NTPC shall deliver their reply in defence and counter claims if any, to me and to the claimants within 15 days from the receipt of the statement of the claims.
3. If there is counter claim by the respondent, the claimants shall deliver their reply to the counter claims within 15 days of the receipt of the counter claims.
4. The parties shall exchange the list of documents relied upon the list of witnesses etc. which they intend to produce at the hearing in support of their cases under intimation to me within 15 days after the receipt of the reply from the claimant to the counter claim by the respondent.
5. The respondent is directed to submit the authentic copy of the agreement immediately.
- 6. *After the receipt of said documents I will enter upon the reference.*** Thereafter, the parties will have to present themselves at the hearing on the date, time and place which will be notified to them.
7. Both the parties shall note that whenever they send nay communication either to the arbitrator or to the other party, copies of such communications should invariably be endorsed to the opposite party/arbitrator respectively.

If, either parties intend to be represented at the hearing in the above case by a counsel, notice of such intention shall be given to the other party immediately on receipt of this notice to enable him to be similarly represented by a counsel should he so desire.

If no documents are received by the arbitrator before or on the due dates specified hereinabove, it will be presumed that the party concerned does not intend to produce the documents and the case will be decided accordingly.

Further as the arbitration has been pending since long both the parties are directed to extend the time for making the award by 4 months from the issue of this notice.

Sd/-
ARBITRATOR
CHIEF ENGINEER, HCM,
CENTRAL ELECTRICITY AUTHORITY,
WEST BLOCK II, WING 6, R.K.PURAM,
NEW DELHI-22”

6. The legal principle is really not in dispute that the arbitrator can enter upon reference vide his communication or even specify an effective date from which he would be entering upon reference. This letter, however, appears to have some contradiction since after laying down the schedule for filing of the pleadings, in para 6, it was stated that the arbitrator would enter upon reference “after the receipt of the documents.” However, in the last paragraph of the letter, the factum of there being considerable delay and the arbitration being pending since long has been noticed with a

direction to the parties to extend the time for making the award by 4 months from the issue of the notice. The second communication has emanated from the arbitrator on 22.01.1982 which notices that the respondent has not lodged any claim but that the appellant has filed a statement of claim. The respondent was called upon to file the reply and statement of claim positively by 09.02.1982 and to appear before the arbitrator on 23.02.1982. Once again, the letter records “the parties are also directed to extend the time for making the award by 4 months from the issue of this notice.”

7. The aforesaid communication became crucial because one of the major controversies in the present case is as to whether the arbitrator can be said to have entered upon reference on 01.10.1981 or 23.02.1982 when the respondent was proceeded ex parte as it did not participate in the proceedings and ultimately an ex parte award was passed on 11.03.1982. If the subsequent date is the relevant date, then the award is within the specified period of 4 months while if the relevant date is 01.10.1981, then the award is beyond the stipulated time of 4 months. The award rendered by the arbitrator on 11.03.1982 awarded a sum of Rs.13,07,660.70 along with interest at the rate of 10% per annum from the date mentioned in the claims till realization.
8. In view of the award being rendered in favour of the appellant, the appellant filed an application under Section 14 of the said Act which was registered as Suit No.569A/1982 and the award was filed in those proceedings. On the award being filed, the respondent filed objections under Section 30 & 33 of the said Act registered as IA No.4174/1982. There appears to have been another suit filed being Suit No.545A/1982 by the appellant which purports to be an

application under Section 14 of the said Act for making the award Rule of the Court while SuitNo.569A/1982 was for filing the award in the Court along with the relevant documents. This subsequent suit was disposed of on 07.11.2005 as there appears to be an overlapping. The appellant filed an application under Section 28 of the said Act in Suit No.28A/1979, but the same was rightly registered separately as OMP No.58/1982. This OMP was disposed of on 13.07.1993 with the following order:

“I am informed that this OMP calls for no further orders since the award has already been published and the matter is proceeding in respect of the said award in Suit No.569A/1982. In the circumstances, this OMP stands disposed of without any further orders.”

9. Thus the question of enlargement of time for making the award, post the award being rendered, was still at large.
10. In the objections filed by the respondent, a plea was taken that the designated person i.e. the Chairman, Central Electricity Authority had failed to nominate the arbitrator within the time specified by the learned single Judge in the order dated 09.05.1979 in Suit No.28A/1979 i.e. within 2 months and thus the authority did not remain with the designated authority to appoint the arbitrator, but would exclusively vest with the Court.
11. This plea is predicated on the fact that the order dated 05.07.1979 was never communicated to the respondent (No copy is marked to the respondent). It has been further alleged that as per the own stand of the arbitrator, time had to be extended for making the award by 4 months from the issue of its notice dated 01.10.1981, yet the arbitrator proceeded to make the award which was beyond the period of 4 months from entering upon reference.

12. It has been further alleged that the confusion was created by the first appointment of Mr.C.K.Varughese and thereafter the appointment of Mr.C.S.Sreenivsan. and this fact had been brought to the notice of the appellant in the communication referred to aforesaid. The reason given for the non appearance of the respondent was that the arbitrator had already become *functus officio* and there being a confusion created in view of there being two arbitrators. On the other hand, the appellant alleges that till the arbitrator had not entered upon reference, the period of 4 months would not start to run and thus the award was not beyond time. Even if, there was some delay, the learned single Judge would be well within its rights to extend the time for making of the award. The alleged confusion is denied as the appointment of Mr.C.K.Varughese as an arbitrator was only to settle the disputes qua all the three contracts which did not bear any fruits and the chapter was closed.
13. The learned single Judge in terms of the impugned order dated 06.09.2006 has, however, set aside the award with a direction to the Chairman, Central Electricity Authority to appoint a fresh arbitrator within 30 days of the receipt of the order and for the arbitrator to complete the proceedings within four months of entering upon reference. The learned single Judge, while coming to this conclusion, has noticed that no doubt the court could extend the time for making of the award *ex post facto* under Section 28 of the said Act, but that in the facts of the present case, the power was firstly invoked by filing OMP No.58/1982 but the counsel for the appellant was somehow satisfied with the disposal of the OMP on account of the award being filed in the suit No.569A/1982 without

there being an order passed for extension of time. This order has been observed to be neither here nor there as it did not grant the prayer made by the appellant. Learned counsel for the appellant had urged before the learned single Judge that there was no need to move the application under Section 28 of the said Act for the reason that the period of 4 months commenced from the date of entering upon reference. This was so as the appellant does not accept that the arbitrator had entered upon reference on 01.10.1981.

14. Another aspect which has weighed with the learned single Judge is that it was an *ex parte* award where a confusion may have been caused on account of conflicting letters of the NTPC qua the nomination of Sh.C.K.Varughese as an arbitrator while simultaneously claiming that it was Mr.C.S.Sreenivsan who was the arbitrator. This was apart from the fact that Mr.C.S.Sreenivasan had done nothing in the matter for over two years starting from 05.07.1979. There were only two aspects which were urged before us by the learned counsel for the appellant.

i) The arbitral award is not without jurisdiction as it is not beyond the period of 4 months from the date of entering upon reference.

ii) There was no misconduct of the arbitrator in proceeding *ex parte* against the respondent as there could not have been any confusion as to who is the arbitrator.

FIRST ISSUE

THE ARBITRAL AWARD IS NOT WITHOUT JURISDICTION AS IT IS NOT BEYOND THE PERIOD OF 4 MONTHS FROM THE DATE OF ENTERING UPON REFERENCE.

15. It would be necessary to look to the various legal pronouncements on the issue as to when the arbitrator is stated to have entered upon reference.
16. In Iossifoglu v. Coumantaros; (1941) 1 K.B.396 it was held by the court of appeal that the arbitrators enter upon reference as soon as they accept the appointment and communicate with each other about the reference. In this behalf, the contentions of the appellant was repelled that: i) There could not be any disagreement on the principle that the arbitrator cannot be said to have entered upon reference unless they have met and discussed the matter. ii) The endeavour to fix a date for entering upon a reference is a preliminary step to the reference, and is not an entering upon a reference. iii) Thus, there is a distinction between an arbitrator accepting office and his entering upon reference and an arbitrator does not enter upon reference when he accepts the office of the arbitrator. The aforesaid view was contrary to the view in Baker v. Stephens; (1866-67) L.R.2.Q.B. 523 that the arbitrator can be said to have entered upon reference not from the time he merely takes upon himself the office of the arbitrator by accepting the reference, but from the time he takes upon himself and exercises the functions of arbitrator. The entering upon reference was also held to mean something else than merely accepting the office and could bear the meaning of beginning to hear the parties. This, judgment, however, was not brought to the notice of the court which expressed its views in Iossifoglu v. Coumantaros's case (supra).
17. A Division Bench of the Calcutta High Court in Bajranglal Laduram V. Ganesh Commercial Co.; AIR 1951 Calcutta 78

opined that the law laid down in Iossifoglu v. Coumantaros's case (supra) should be followed and thus the arbitrators entered upon reference when they accepted their appointment and took steps in concert to obtain from the parties necessary statements and papers to enable them to decide the matter and make the award.

18. A learned single Judge of the Bombay High Court in Dr. Babubhai Vanmalidas Mehta Vs. Prabhod Pranshankar Joshi; AIR 1956 Bom 146, however, held that an arbitrator cannot be said to have entered upon reference only when he starts hearing the case, but simultaneously, was hesitant in holding that the moment the arbitrator accepts an appointment, he enters upon reference. The exercise of a function does not necessarily mean hearing the matter on merits and where an arbitrator holds a preliminary meeting and gives directions to the parties as to the progress of arbitration proceedings before him, he was said to have assumed the office of an arbitrator and exercised the functions of an arbitrator because in no other capacity would he be entitled to give any directions with regard to the progress of the arbitration proceedings.
19. To the same effect are the observations in M/s S.D. Ghai & Co. Vs. Punjabi University, Patiala; AIR 1973 P&H 410 concluding that an arbitrator enters upon the reference when he accepts the office and exercises some functions as an arbitrator by applying his mind i.e. fixes the date for hearing or issues directions regarding pleadings.
20. A Full Bench of the Calcutta High Court of five Hon'ble Judges had the occasion to consider the matter in Ramnath Aggarwal Vs. Messrs. Goenka & Co & Others; AIR 1973 Cal 253. A slightly divergent view was taken from the view taken in Bajranglal Laduram V. Ganesh Commercial Co.'s case (supra) by concluding

that an arbitrator does not enter upon reference as soon as he assumes office of an arbitrator nor when he does any of the ministerial acts connected with his office nor does he enter upon reference when he actually commences the decision of the matter in the presence of both the parties or *ex parte*, but an arbitrator enters upon reference when he first applies his mind to the dispute or controversy before him which depends on the facts and circumstances of each case.

21. A Division Bench of the Bombay High Court in M/s Jolly Steel Industries Pvt. Ltd, Poona v. Union of India; AIR 1979 Bom 214 held that the arbitration proceedings consist of two stages – i) Ministerial acts and ii) Effective adjudicative acts in furtherance of the arbitration. The arbitrator cannot be said to have entered upon reference until the second stage is reached where proceedings are held to decide controversies between the parties whether arising out of the main dispute or procedural aspects in the disposal thereof.
22. A single Judge of this Court in National Research Development Corporation of India vs. Synthite Industrial Chemicals Pvt. Ltd & Anr; 69 (1997) DLT 1005, while considering the divergent views in England and in India, held that the arbitrator does not enter upon reference when he accepts his office nor when he sends notices calling upon the parties or does any other ministerial acts. The arbitrator enters upon reference on the date when he applies his mind towards the adjudicative part of his function as an arbitrator in the presence of the parties or *ex parte* after due notice to them.
23. The Andhra Pradesh High Court in A.P.S.R.T.C. vs. P. Vankata Reddy & Ors; AIR 1999 AP 110 held that an arbitrator can be said

to have entered upon reference only when he applies his judicial mind to the disputes between the parties and hears the submissions made by both the parties and not the time when he calls for the statements from the parties.

24. We are informed that there has been no direct judgment of the Supreme Court dealing with the aspect as to when an arbitrator can be said to have entered upon reference, but we find that there is some discussion in Hari Shankar Lal vs. Shambhunath Prasad & Ors; (1962) 2SCR 720. In the said judgment, the Supreme Court was dealing with the distinction between the arbitrator being ‘called upon to act’ and ‘to enter upon reference’. The two expressions were held to be different. A notice to ‘act’ may be given before or after the arbitrators have entered upon reference. The period of 4 months to make the award would be computed from the date they enter upon reference when the notice to ‘act’ is given before they enter upon reference. However, if a party gives notice to act within four months after the arbitrator has entered upon reference then the arbitrator can make an award within four months from the date of such notice and in that event after expiry of the said four months, the arbitrator becomes the functus officio unless the period is extended by Court under Section 28 of the said Act.
25. The majority opinion was rendered by K.Subba Rao, J. and concurring opinion was given by Raghubar Dayal, J. who set out his own reasons. It is in this concurring opinion that the learned Judge had observed in para 23 of the judgment that he does not consider it necessary to decide in that case as to when arbitrators can be said to enter upon reference or what is meant by “their being

called upon to act' by notice under Rule 3 of the First Schedule of the said Act. The learned Judge, however, notes that he agrees with the view expressed in Iossifoglu v. Coumantaros's case (supra) that the arbitrators enter upon reference as soon as they have accepted their appointment and have communicated with each other about the reference. This is a stage earlier than starting the proceedings in the presence of the parties or under peremptory order compelling the arbitrators to conclude the hearing *ex parte*.

“23. I also do not consider it necessary to decide in this case as to when arbitrators can be said to enter on the reference or what is meant by ‘their being called upon to act’ by notice under Rule 3 of the First Schedule. *I simply note that I agree with the view expressed in Iossifoglu v. Coumantaros that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference.* This is a stage earlier than their starting the proceedings in the presence of the parties or under some per-emptory order compelling them to conclude the hearing *ex prate*. “Calling upon the arbitrators to act” does include asking the arbitrators to enter on the reference, but may also include asking them to do anything in connection with the reference except asking them to do the routine acts connected with the enquiry.”

26. The analysis of the aforesaid judgments does show an element of divergence of views. We have, however, endeavoured to cull out the stands which in our view correctly reflects the legal position:
- i) The views expressed in Iossifoglu v. Coumantaros's case (supra) have received the imprimatur of the Raghubar Dayal, J. in Hari Shankar Lal vs. Shambhunath Prasad & Ors. This is a concurring opinion while simultaneously observing that the learned

Judge does not consider it necessary to decide in the case as to when the arbitrators can be said to have entered upon reference.

ii) The pre-dominance of the legal opinion of the various High Courts of this country including of the learned single Judge of this Court appears to be that the arbitrator does not enter upon reference as soon as he assumes the office of an arbitrator nor when he does any of the ministerial acts connected with his office, but does something more than that which would require application of his mind. As to when an arbitrator applies his mind would depend on the facts and circumstances of each case. To that extent, the opinion diverts from the view expressed in Iossifoglu v. Coumantaros's case (supra).

27. If we analyze the facts of the present case now keeping in mind the aforesaid principles, we find that the first act of the arbitrator is vide the letter dated 01.10.1981 after he was called upon by the appellant vide letter dated 08.05.1981. Thus, there is a hiatus of almost 5 months in the arbitrator acting in pursuance to the letter dated 08.05.1981. The said letter of the arbitrator, as noted by us, has an element of contradiction as on the one hand it seeks to defer the date of entering upon reference to after the receipt of the documents of the parties as per the schedule laid down while simultaneously bringing to the notice of the parties that since arbitration has been pending since long, both the parties should extend the time for making the award by four months from the issue of the notice. The latter part seems to suggest that the arbitrator was actually entering upon reference and was thus wanting a period of 4 months to be specified for making the award. Even, the second letter of the arbitrator dated 22.01.1982 records

the direction to the parties to extend the time for making the award by four months from the date of issue of the letter. The most material aspect is that in the award itself the arbitrator in the recital has stated as under:

“And whereas I entered upon the reference on 1st of October, 1981 and issued a registered AD Notice to the parties to the reference.”

28. The arbitrator thus categorically himself records in the award, which is the culmination of the proceedings, that he had entered upon reference on 01.10.1981. We have already observed aforesaid that as to when an arbitrator has applied his mind to the facts of a case and has entered upon reference would depend on the factual matrix of each case. It is the arbitrator who decides when he had actually applied his mind to the matter in issue. When the arbitrator in the award himself specifies that he has entered upon reference on 01.10.1981 (i.e. applied his mind to the matter in issue), no other conclusion is possible. We are thus of the view that the date of the arbitrator entering upon reference is 01.10.1981 and the arbitrator was required to make the award within four months of the said date. The award is, however, beyond the period of four months.
29. The aforesaid would not have been fatal as even after making of the award, recourse could be had to Section 28 of the said Act. Surprisingly, after having filed OMP No.58/1982 under Section 28 of the said Act, the appellant seems to have abandoned that course of action by requiring the learned single Judge not to pass any further orders ostensibly on the ground that the award has already been published. If the award was beyond time, a specific order ought to have been invited extending the time, which did not happen. The explanation given by the learned counsel for the

appellant for this is that the appellant was under the impression that the award had been made within four months and thus abandoned that course of action.

30. In our considered view, the appellant committed a folly by not inviting specific orders for extension of time under Section 28 of the said Act in OMP No.58/1982 and the learned single Judge has, thus, rightly observed that the orders passed on the OMP were neither here nor there depriving the appellant of the opportunity of curing the defect of the award being published beyond four months of the date of entering upon reference. This, in our considered view, is fatal.

SECOND ISSUE

THERE WAS NO MISCONDUCT OF THE ARBITRATOR IN PROCEEDING EX PARTE AGAINST THE RESPONDENT AS THERE COULD NOT HAVE BEEN ANY CONFUSION AS TO WHO IS THE ARBITRATOR.

31. The learned single Judge appears to have concluded that the conflicting communications from the appellant could have caused confusion as to who is the arbitrator which may be the cause for the absence of the respondent.
32. We may note that in terms of the orders passed on 09.05.1979 in Suit No.28A/1979 on the application of the respondent under Section 20 of the said Act, the designated authority had to appoint an arbitrator within two months thereafter. The designated authority claims to have appointed Sh.C.S.Sreenivasan as the sole arbitrator vide order dated 05.07.1979. This order was duly communicated to the Registrar, High Court of Delhi on 13.07.1979, but no communication has been placed on record to show that his order was intimated to the respondent and the

respondent has specifically denied knowledge of any such order. On the other hand, the respondent was taking up the issue of settlement of dues not only qua the contract in question, but two other contracts. This resulted in the appellant issuing a letter dated 23.07.1980 qua all the three contracts, albeit conditionally, appointing Sh.C.K.Varughese as the sole arbitrator.

33. It is the say of the appellant that since the respondent did not consent to withdraw all the cases, this endeavour did not bear fruits. We are, however, surprised as to how there could have been a second appointment of an arbitrator if the earlier arbitrator already stood appointed. If the endeavour was to find an amicable resolution, a person could have been appointed to settle the disputes or to mediate, but there could not have been two arbitrators appointed over the same subject matter. The appellant seems to suggest as if Mr.C.S.Sreenivasan was appointed to adjudicate upon the disputes qua the contract in question, then Sh.C.K.Varughese was appointed as the sole arbitrator to adjudicate upon the disputes qua all the three contracts, respondent not having withdrawn the cases from the court, the pre-condition of appointment of Sh.C.K.Varughese was not fulfilled and thus once again Sh.C.S.Sreenivasan had to proceed with the arbitration. Thus letter dated 12.03.1981 was issued by the appellant to the respondent.
34. We find that this would logically create some confusion in the mind of the respondent as to how there could be two arbitrators especially when the appointment of Sh.C.S.Sreenivasan a sole arbitrator earlier had not been marked to the respondent. No doubt, the appellant issued the letter dated 22.05.1981 stating that there

was no contradiction as the appointment of Sh.C.K.Varughese vide letter dated 23.07.1980 was without prejudice to the legal rights of the appellant.

35. Be that as it may, a doubt could certainly arise in the mind of the respondent when thereafter there was silence for a number of months till the communication emanated from Sh.C.S.Sreenivasan dated 01.10.1981. We are thus in agreement with the view of learned single Judge that the possibility of confusion would definitely remain in these facts.

CONCLUSION:

36. We are of the view that the learned single Judge has rightly set aside the impugned award dated 11.03.1982 and yet preserved the rights of the parties to get their disputes settled through arbitration by calling upon the designated authority of the appellant to appoint a fresh arbitrator within 30 days of the receipt of the order. The designated authority thereafter on 16.10.2006 appointed Sh.R.K.Jain as the sole arbitrator in pursuance to that order, but the appellant simultaneously had also filed the present appeal on 27.09.2006 just prior to the issuance of the letter appointing a new arbitrator. Sh.R.K.Jain, the new arbitrator, held proceedings on 20.11.2006 when both the sides were represented. Since there was no stay operating, the request of the appellant to keep the arbitration proceedings in abeyance was turned down. Since the operation of the impugned order was stayed on 01.12.2006, no further progress was made.
37. We are thus of the view that if Sh.R.K.Jain is available, he may proceed with the arbitration in accordance with law, but if for any reason he is not available, the designated authority of the appellant

may appoint a fresh arbitrator within one month of the receipt of this order.

38. The appeal is accordingly dismissed in the aforesaid terms leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

MAY 02, 2012
dm

RAJIV SHAKDHER, J.