

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION APPLICATION (L) NO. 1360 OF 2015**

1. Arohi Infrastructure Pvt. Ltd.)
Marg Axis, 4/318, Rajiv Gandhi Salai,)
Kottivakkam, Chennai 600 041)
Tamil Nadu)

2. Ambar Nivas Private Limited)
Old No. 12 New No.8,)
Mangan St Villinayur Main Road oulgrat))
Commune, Reddiarpalayam)
Pondicherry – 605010)

3. Rainbow Habitat Pvt. Ltd.)
Panneru Kalva Road,)
Tiruchanur Bye Pass Road,)
Thuukivakam Post, Renigunta Mandal)
Tirupati – 517520)

4. Akhil Infrastructure Pvt. Ltd.)
Marg Axis, 4/318,)
Old Mahabalipuram Road,)
Kottivakkam, Chennai 600 041)
Tamil Nadu)

5. Kanchanjunga Infra Developers)
Private Limited,)
Marg Axis, 4/318,)
Old Mahabalipuram Road, R.G.Salai,)
Chennai 600 041, Tamil Nadu)

6. Navita Estates Private Limited)
Marg Axis, 4/318,)
Old Mahabalipuram Road, R.G.Salai,)
Chennai 600 041, Tamil Nadu)

7. M/s.Grand Lokin School Pvt. Ltd.)
No.64, C.P.Ramaswamy Road, Alwarpet,)
Chennai 600 018, Tamil Nadu)

8. Mr. G.Ramakrishna Reddy)
Old No.24, New No.17, South Mada Street)
Srinagar Colony, Saldapet,)
Chennai 600 015, Tamil Nadu)

9. Exemplarr Worldwide Limited)
141, Rajiv Gandhi Salai,)
Kottivakkam, Chennai 600 041)
Tamil Nadu)

10. Marg Limited)
Marg Axis, 4/318, Rajiv Gandhi Salai,)
Kottivakkam, Chennai 600 041)
Tamil Nadu)

11. Marg Capital Markets Limited)
Sri Sai Subhodaya Apartments,)
No.57/2B, East Coast Road,)
Thiruvanmiyur, Chennai 600 017)

..... Applicants

Versus

Tata Capital Financial Services Ltd.)
having its office at One Forbes,)
Dr.V.B.Gandhi Marg, Fort, Mumbai 400 001)
and Tower A, Peninsula Business Park,)
G.K.Marg, Lower Parel, Mumbai 400 013)

..... Respondent

Mr.Sharan Jagtiani, i/b. Mr.Subir Kumar for the Applicants.

Mr.Mayur Khandeparkar, a/w. Ms.Aparna Wagle, i/b. MDP Partners for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 21st OCTOBER, 2015

PRONOUNCED ON : 2nd DECEMBER, 2015

JUDGMENT :

By this application filed under section 11(6) of the Arbitration and Conciliation Act, 1996 the applicants seek appointment of the sole arbitrator to adjudicate upon the disputes between the parties. Some of the relevant facts for the purpose of deciding this application are as under :-

2. On 25th August, 2011, the parties entered into a Debenture Subscription-cum-Option Agreement on the terms and conditions recorded therein. On 28th September, 2011, the parties entered into Debenture Subscription-cum-Option Agreement on the terms and conditions recorded therein. Some of the applicants also executed Corporate Guarantee dated 28th September, 2011 read with Supplementary Corporate Guarantee. Dispute arose between the parties.

3. On 10th September, 2014, the respondent through its advocate issued a demand notice upon the applicants alleging various defaults under various agreements referred to aforesaid and called upon the applicants to pay a sum of Rs.64,96,23,799/- with further interest thereon and informed that if the amount was not paid within the time prescribed under the said notice, the said notice shall be treated as notice invoking arbitration against all the applicants under clause 16.4.2 of the two Debenture Subscription cum Option Agreement and under clause 24 of the Corporate Guarantee dated 25th August, 2011 and 28th September, 2011. The respondent also invoked the arbitration clause in the other corporate guarantee dated 28th September, 2011, Supplementary Corporate Guarantee dated 28th March, 2014 executed by few other applicants. In reply to the said letter dated 10th September, 2014, the applicants replied by their letter dated 16th June, 2015.

4. Sometimes in the month of November 2014, the respondent filed a

petition under section 9 of the Arbitration and Conciliation Act, 1996 against the applicants for interim measures. The applicants were served with the papers and proceedings in the said matter. Various interim orders are passed by this court in the said arbitration petition. The said arbitration petition was served upon the applicants by the respondent on 15th November, 2014.

5. On 16th June, 2015 the applicants through their advocates addressed a letter to the advocates representing the respondent alleging that the disputes and differences had arisen. By the said letter, the applicants invoked arbitration under the arbitration agreement recorded between the parties in various agreements and suggested the names of two former Supreme Court judges and a retired Chief Justice of Allahabad High Court for appointment of one of them as the sole arbitrator for adjudication of the disputes between the parties. In the said notice, the applicants made it clear that if the respondent did not revert to the said letter within seven days, the respondent would be constrained to adopt the appropriate legal proceedings.

6. The respondent by their advocates' letter dated 26th June, 2015 replied to the said notice dated 16th June, 2015 and denied the allegations made therein. The respondent denied that the respondent was not willing to refer the dispute before the arbitral tribunal or such alleged act of the respondent was in contravention to the contentions in the notice dated 10th September, 2014. The respondent invited the attention of the applicants to clause 16.4.2 of the Debenture Subscription-cum-Option Agreements dated 25th August, 2011 and 28th September, 2011 and conveyed that the respondent had right to appoint a sole arbitrator and the said right was not available to the applicant. The respondent conveyed that the respondent had every intention to appoint sole arbitrator and refer dispute to

arbitration and pursuant thereto the respondent appointed Mr.B.A.Shelar, Ex. Additional Chief Metropolitan Magistrate as a sole arbitrator to adjudicate the disputes amongst the parties.

7. The applicants through their advocates letter dated 27th June, 2015 replied to the said letter dated 26th June, 2015 of the respondent's advocate and denied the contention raised therein. Insofar as the appointment of the arbitrator is concerned, it was stated in the said reply by the applicants that the name of the sole arbitrator referred in the letter of the respondent was not agreeable to the applicants since according to the applicants the said learned arbitrator was not suitable to adjudicate the commercial dispute which was to the tune of Rs.65 crores and thus was required to be adjudicated by the sole arbitrator having experience of resolving the commercial disputes. In the said letter, it was stated that the sole arbitrator appointed by the respondent was not agreeable for the reasons mentioned in paragraph 1(f) of the said letter.

8. On 3rd July, 2015, the applicants filed the present application under section 11(6) of the Arbitration Act in this court inter alia praying for appointment of a sole arbitrator. The present application however was served upon the respondent by the applicants on 23rd July, 2015.

9. The respondent by their advocates' letter dated 14th July, 2015 addressed to the learned arbitrator Mr.B.A.Shelar placed on record that the respondent herein had appointed him as a sole arbitrator. By their letter dated 26th June, 2015 under clause 16.4.2 of both the agreements which provided that the respondent herein only has a right to appoint a sole arbitrator. The respondent also forwarded a copy of the letter dated 16th June, 2015 of the applicant and reply of

the respondent herein dated 26th June, 2015 and also the letter dated 27th June, 2015 addressed by the applicants through their advocates to the learned arbitrator for his ready reference. The respondent requested the learned arbitrator to confirm his acceptance to act as a sole arbitrator. A copy of the said letter was also sent to all the applicants.

10. The learned arbitrator by his letter dated 17th July, 2015 after referring to the letter dated 26th June, 2015 addressed by the respondent herein and the reply dated 27th June, 2015 given by the applicants herein informed the advocates representing the respondent that he did not wish to act as a sole arbitrator to settle the alleged disputes between the parties as in his opinion, it would not be proper on his part to accept the appointment as a sole arbitrator to resolve the alleged dispute.

11. The respondent vide their letter dated 20th July, 2015 appointed Mr.Mahesh Shah Advocate as a sole arbitrator under clause 16.4.2 of both the agreements in view of the erstwhile arbitrator Mr.B.A.Shelar having conveyed his regret to act as a sole arbitrator in his letter dated 17th July, 2015. A copy of the said letter was also sent to the applicants and their advocates.

12. The applicants vide letter dated 21st July, 2015 addressed to Mr.B.A.Shelar, the erstwhile arbitrator and also the advocates representing the respondent contended that the name of Mr.B.A.Shelar as a sole arbitrator proposed by the respondent was not agreeable to the applicants and accordingly the same was communicated to the respondent for the reasons for such disagreement. The applicants informed the respondent about filing of the present arbitration application on 3rd July, 2015 and that the same would come for hearing on 29th July, 2015 before the learned designate of the Chief Justice. The applicants contended

that the proceedings before the present arbitrator cannot commence as the same was not agreeable to the applicants.

13. The applicants vide their letter dated 21st July, 2015 to the advocates representing the respondent contended that the name proposed by the advocates for the respondent herein was not agreeable to the applicants. Along with the said letter, the applicants served a copy of the present arbitration application along with the exhibits upon the advocates representing the respondent and about the proposed letter herein of the said application.

14. The applicants by their advocates' letter dated 22nd July, 2015 to Mr. Mahesh Shah the learned arbitrator and also to the advocates representing the respondent informed that the present arbitration application was listed for hearing before this court on 29th July, 2015. The applicants were not agreeable to the name of the sole arbitrator as the same had been done without intimation to the advocates of the applicants. The applicants reiterated the contents of the letters dated 16th June, 2015, 27th June, 2015 and 21st July, 2015. The applicants requested the learned arbitrator not to act on the letter sent by the respondent herein for fixing any date and contended that his appointment was not done as per law.

15. Mr. Mahesh R. Shah, advocate by his letter dated 31st July, 2015 to the advocates representing the respondent confirmed his acceptance as a sole arbitrator and fixed a preliminary meeting on 12th August, 2015 in his office. A copy of the said letter was also sent to the applicants.

16. The applicants vide their advocates' letter dated 3rd August, 2015 addressed to the learned arbitrator as well as to the advocates representing the

respondent challenged the constitution of the learned arbitrator on the ground that the same had been done allegedly contrary to law as the respondent herein had lost their right to appoint any arbitrator and thus the learned arbitrator had no jurisdiction to give any direction in the matter. The learned arbitrator was informed that the applicants would appear before the learned arbitrator under protest in view of the fact that learned arbitrator had issued such letter without looking into the fact that no right to appoint arbitrator vested with the respondent herein. The learned arbitrator was also informed about the pendency of the present arbitral proceedings.

17. Mr.Jagtiani, learned counsel appearing for the applicants invited my attention to various correspondence referred to aforesaid and submits that though the respondent had issued a recall notice dated 10th September, 2015 and had invoked the arbitration agreement in view of non-compliance with the said notice by the applicants, the respondent did not take any steps to appoint any arbitrator for a period of about 9 months. He submits that in view of the gross delay on the part of the respondent to appoint any arbitrator in accordance with the provisions of the arbitration agreement, the respondent had lost their right to appoint any arbitrator in accordance with the arbitration agreement. He submits that the applicants therefore invoked arbitration agreement and suggested three names of the retired judges for appointment of one of them as a sole arbitrator.

18. It is submitted that admittedly the respondent had not informed Mr.B.A.Shelar about his alleged appointment till the applicants had filed arbitration application in this court. He submits that once arbitration application was lodged, it was within the public domain and merely because the said application was not served upon the respondent till 23rd July, 2015, the respondent

could not have appointed arbitrator after filing of the arbitration application by the applicants. He submits that since the respondent had failed to take any steps to appoint any arbitrator since September 2014, the respondent could not have appointed any arbitrator at all under the said arbitration agreement. It is submitted that the appointment of Mr.B.A.Shelar was made for the first time on 14th July, 2015 which was after filing of the arbitration application by the applicant on 3rd July, 2015. Learned counsel placed reliance on the judgment of Supreme Court in case of ***Datar Switchgears Ltd. vs. Tata Finance Ltd. and another (2000) 8 SCC 151*** and in particular paragraphs 8 to 14 and 18 and 19 and submits that since the respondent had failed to appoint any arbitrator within a reasonable period of time since September 2014 and in any event before the applicants having filed an application under section 11(6) of the Arbitration Act, the appointment of the learned arbitrator Mr.B.A.Shelar made after filing of the arbitration application by the applicants is illegal and is of no consequence.

19. It is submitted that since the appointment of Mr.B.A.Shelar was illegal in view of the respondent having lost their right to appoint him as a sole arbitrator, the appointment of Mr.Mahesh Shah, advocate as a sole arbitrator in place of Mr.B.A.Shelar is also illegal and is of no consequence. He submits that only the designate of the Hon'ble Chief Justice therefore can appoint an independent arbitrator in view of the respondent having lost their right to appoint any arbitrator. Learned counsel placed reliance on judgment of this court in case of ***Voltas Limited vs.Rolta India Limited (2011) Vol.113(1) Bom.C.R.0393*** and would submit that unless the communication of the appointment of the learned arbitrator was made to the learned arbitrator as well as to the parties, such appointment was not complete or concluded. He submits that since Mr.B.A.Shelar was not informed about his appointment and was not appointed prior to the date of the applicants'

filing present application, this application is maintainable under section 11(6) of the Arbitration Act.

20. It is submitted by the learned counsel for the applicants that since there was no time prescribed under the arbitration agreement for appointment of the sole arbitrator by the respondent, the respondent ought to have appointed a sole arbitrator within a reasonable period of time and in any event within 30 days from the date of the notice of demand issued by the respondent in the month of September 2014.

21. Mr.Khandeparkar, learned counsel for the respondent on the other hand invited my attention to the correspondence exchanged between the parties and also between the parties and the learned arbitrator and also to the arbitration agreement recorded in various agreements entered into between the parties. He submits that it is not disputed by the applicants that the right to appoint a sole arbitrator exclusively vested in the respondent under those arbitration agreements. He submits that under the said arbitration agreements there was no time prescribed for an appointment of an arbitrator. The respondent had issued a recall notice dated 10th September, 2014 and had invoked arbitration agreements. The respondent had filed proceedings under section 9 of the Arbitration Act against the applicants for various interim measures. The said petition was pending. Various interim orders were passed by this court in the said arbitration petition. The applicants did not issue any notice for appointment of an arbitrator till 16th June, 2015.

22. It is submitted by the learned counsel that the said notice dated 16th June, 2015 issued by the applicants through their learned advocate suggesting three

names of the retired judges was not in accordance with the arbitration agreements entered into between the parties. He submits that the applicants did not have any right to suggest any name for the purpose of appointment of a sole arbitrator and the said right exclusively vested only in the respondent. Arbitration application filed by the applicants is thus not maintainable on this ground alone. He submits that vide letter dated 16th June, 2015, the respondent had already appointed Mr.B.A.Shelar as a sole arbitrator. Merely because the said letter was not addressed to the learned arbitrator, the applicants cannot be allowed to contend that the appointment of Mr.B.A.Shelar was not complete. He submits that the applicants themselves have admitted in the correspondence as well as in the arbitration application that Mr.B.A.Shelar was already appointed by the respondent by letter dated 26th June, 2015. He submits that the submission of the learned counsel for the applicants that the appointment of Mr.Shelar was not made by the respondent prior to the date of applicants' filing an application under section 11 is contrary to their own stand taken in the letters addressed by the applicants as well as contrary to their averments made in the arbitration application.

23. It is submitted by the learned counsel for the respondent that since the respondent had already appointed Mr.Shelar as a sole arbitrator prior to the date of filing the arbitration application by the applicants and within 30 days from the date of the said notice 16th June, 2015, the arbitration application under section 11(6) of the Arbitration Act is not maintainable on that ground also.

24. Mr.Khandeparkar, learned counsel for the respondent then submits that the respondent would not loose their rights to appoint an arbitrator under the arbitration application merely on the applicants filing an application under section 11(6) of the Arbitration Act. He submits that admittedly the said arbitration

application was served by the applicants on the respondent only on 23rd July, 2015 whereas the respondent had already appointed the learned arbitrator much prior to the date of service of the arbitration application upon the respondent by the applicants. He submits that the respondent thus in any event has not lost their right to appoint a sole arbitrator even if this court comes to the conclusion that Mr.Shelar was appointed by letter dated 14th July, 2015 and not prior to the date of filing arbitration application by the applicants. Mr.Khandeparkar, learned counsel for the respondent also placed reliance on various parts of the judgments of Supreme Court in case of ***Datar Switchgears Ltd. (supra)*** in support of his submission that since there was no default on the part of the respondent to appoint an arbitrator, the respondent had not lost their right to appoint the sole arbitrator. Reliance is also placed on the judgment in support of the submission that since the notice issued by the applicants was defective, the arbitration application filed by the applicants is not maintainable on that ground also.

25. Insofar as judgment of this court in case of ***Voltas Limited (supra)*** relied upon by the applicants is concerned, Mr.Khandeparkar, learned counsel appearing for the respondent also placed reliance on paragraphs 19, 20, 22 to 24 of the said judgment and would submit that communication of the appointment of the arbitrator to the learned arbitrator or to the parties is not mandatory for the purpose of the appointment of the arbitrator coming into effect. He submits that in any event, since the applicants themselves had admitted that the said Mr.B.A.Shelar was already appointed by the respondent as far back as on 26th June, 2015, the judgment of this court in case of ***Voltas Limited (supra)*** would assist the respondent and not the applicants.

26. Learned counsel appearing for the respondent also placed reliance on

the judgment of Punjab and Haryana High Court in case of ***M/s.G.J.Singh and Co. vs. Haryana State Agriculture Marketing Board and another*** in Arbitration Case No.37 of 2012 delivered on 23rd November, 2012 in support of the submission that since the notice given by the applicants suggesting three names of the retired judges to appoint one of them as a sole arbitrator was defective and contrary to arbitration agreement, the application filed under section 11(6) of the Arbitration Act by the applicants is not maintainable.

27. Learned counsel appearing for the respondent also placed reliance on the judgment of Supreme Court in case of ***National Highways Authority of India & Anr. vs. Bumihway DDB Ltd. (JV) & Ors. 2006(3) R.A.J. 482(SC)*** and in particular paragraphs 30, 31, 33, 34 and 44 and would submit that section 11(6) of the Arbitration Act would be attracted only if there is a default on the part of the other party. He submits that since there was no default on the part of the respondent in appointing the sole arbitrator, the arbitration application itself is not maintainable.

28. Insofar as appointment of Mr. Mahesh Shah is concerned, he submits that clause 16.4.2 of the arbitration agreement empowers the respondent to make re-appointment of the arbitrator or to appoint a new arbitrator in case of the earlier arbitrator having failed to act as an arbitrator or in other eventualities provided in the arbitration agreements since Mr.Shelar had refused to act as a sole arbitrator in view of the allegations made by the applicants about his competency. He submits that the appointment of Mr.Shelar is also thus valid and the respondent had rightly appointed by excising the power under arbitration agreement. He submits that 30 days period has to be read with section 11(6) of the Arbitration Act. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court

in case of ***Datar Switchgears Ltd. (supra)***. He submits that the applicants ought to have given 30 days notice to the respondent for appointment of an arbitrator. It is submitted that in any event the respondent had already appointed arbitrator within 10 days from the date of such notice though defective. There was thus no failure on the part of the respondent to appoint an arbitrator.

29. Mr.Jagtiani, learned counsel appearing for the applicants in rejoinder submits that the dispute was crystallized on 10th September, 2014 when the respondent had invoked arbitration agreement and thus the respondent ought to have appointed an arbitrator within a reasonable period of time from the date of crystallization of the dispute. The failure on the part of the respondent to appoint a sole arbitrator started on 10th September, 2014. By letter dated 16th June, 2015, the applicants had only requested to appoint arbitrator by suggesting names of three retired judges.

30. Insofar as judgment of Supreme Court in case of ***Datar Switchgears Ltd. (supra)*** is concerned, learned counsel for the applicants made an attempt to distinguish the said judgment on the ground that in the said matter, arbitration application was filed after appointment of the arbitrator by the respondent and in that context, the Supreme Court took a view that right to appoint an arbitrator is not lost even if an arbitrator is not appointed within 30 days from the date of receipt of the notice but if appointed before the applicants filing an application under section 11(6) of the Arbitration Act. Insofar as judgment of Supreme Court in case of ***National Highways Authority of India & Anr. (supra)*** is concerned, learned counsel appearing for the applicants submits that there is no dispute about the proposition of the law laid down by the Supreme Court and in that judgment section 11(6) of the Act is attracted in the case of failure on the part of the authority

to appoint arbitrator. He submits that in this case there is a complete failure on the part of the respondent to appoint the sole arbitrator since September 2014.

Reasons and Conclusions :-

31. I have heard the learned counsel appearing for the parties at length and have given my anxious consideration to the rival submissions made by the learned counsel appearing for both the parties. Before I deal with the rival submissions, it will be appropriate to extract the arbitration agreements recorded in Articles 16.4.1 and 16.4.2 of both the agreements as under :-

“16.4.1 This Agreement shall be governed by and construed in accordance with the laws of India.

16.4.2 In the event of any dispute or differences arising directly or indirectly out of this Agreement or otherwise, the parties undertake to use all reasonable endeavours to restore such disputes amicably. If disputes and differences cannot be settled amicably, then all disputes and differences arising between the parties hereto in connection with this Agreement or the interpretation hereof or anything done or omitted to be done pursuant hereto or the performance or non-performance of this Agreement shall be referred to arbitration by a sole arbitrator to be appointed by TCL. In the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, TCL shall appoint a new arbitrator. The seat of arbitration shall be at Mumbai and the arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof or any statute enacted for replacement therefore. Expenses of the arbitration shall be borne in such manner as the arbitrator may determine. The award including interim awards of the arbitration shall be final, conclusive and binding on all parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct the arbitration proceedings in such manner as he considers appropriate.”

32. A perusal of the arbitration agreements clearly indicates that the

disputes and differences arising between the parties in connection with the said agreements or the interpretation thereof etc. has to be referred to arbitration by a sole arbitrator to be appointed by the respondent herein. It further provides that in the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, the respondent shall appoint a new arbitrator.

33. It is not in dispute that on 10th September 2014, the respondent had issued a recall notice demanding repayment of the amount due and payable by the applicants to the respondent. In the said notice, the respondent had also made it clear that in case of non-compliance of the said demand, the said notice shall be treated as a notice invoking arbitration agreement. The respondent had thereafter filed a petition under Section 9 of the Arbitration Act before this Court against the applicants for interim measures. Various interim orders were passed in the said arbitration petition.

34. The applicants for the first time by their advocate's letter dated 16th June 2015 invoked the arbitration agreement and suggested three names of the retired judges of this Court for appointment of one of them as a sole arbitrator for adjudication of the dispute between the parties. By the said notice, the applicants had given 7 days' time to the respondent to reply to the said letter and threatened to adopt appropriate legal proceedings in case of non-compliance. It is not in dispute that the respondent through their advocate's letter dated 26th June 2015 responded to the said letter dated 16th June 2015 and appointed Mr.B.A.Shelar, Ex. Additional Chief Metropolitan Magistrate, Mumbai as the sole arbitrator to adjudicate upon the disputes amongst the parties.

35. It is not in dispute that the present arbitration application came to be

filed by the applicants on 3rd July 2015 and a copy thereof was served upon the respondent only on 23rd July 2015. The respondent had already appointed the learned arbitrator by exercising their rights under the arbitration agreements much prior to the date of filing of the present arbitration application by the applicants under Section 11(6) of the Arbitration Act. The question that arises for consideration in the present proceedings is whether there was any default on the part of the respondent in appointing the sole arbitrator in accordance with the arbitration agreements entered into between the parties. The present application has been filed by the applicants under Section 11(6) of the Arbitration Act.

36. Learned counsel appearing for the applicants has urged before this Court that since the letter dated 26th June 2015 addressed to the learned advocate representing the applicants purporting to appoint Mr.B.A. Shelar as the learned arbitrator was not communicated to the learned arbitrator and the learned arbitrator had not accepted his appointment pursuant to the said letter dated 26th June 2015 prior to the date of the applicants filing the present application under Section 11(6) of the Arbitration Act, the respondent had not appointed any arbitrator in accordance with the arbitration agreements and in any event before the date of filing of the present arbitration application by the applicants. It is urged by the learned counsel for the applicants that the respondent had requested for consent of the learned arbitrator Mr.B.A.Shelar which fact was after filing of the arbitration application and thus the respondent not having appointed any arbitrator in accordance with the arbitration agreement and in any event before filing of the arbitration application by the applicants, the respondent has lost their right to appoint an arbitrator under the arbitration agreement.

37. In my view, there is no substance in this submission of the learned counsel for the applicants for the reason that the respondent by their advocate's letter dated 26th June 2015 which was in response to the letter dated 16th June 2015 informed the applicants that the respondent had appointed Mr.B.A.Shelar, Ex. Additional Chief Metropolitan Magistrate, Mumbai. The applicants contended that the name of the sole arbitrator proposed by the respondent was not suitable to adjudicate the commercial dispute in view of the claim sought to be recovered was to the tune of Rs.65 crores and the same was required to be adjudicated upon by a sole arbitrator having experience of resolving the commercial disputes. Further correspondence exchanged between the applicants and the respondent even thereafter clearly indicates that the applicants had all throughout contended that the appointment of Mr.B.A.Shelar was already made by the respondent vide their letter dated 26th June 2015.

38. A perusal of the arbitration application filed by the applicants and in particular averments made in paragraphs 4, 6 (f) and 10 clearly indicate that even in the arbitration application, it was the case of the applicants that the respondent had appointed Mr.B.A.Shelar as the sole arbitrator, however, the said appointment was not agreeable to the applicants since the nature of the dispute was of a commercial nature and thus the appointment of a retired judge of this Court or of the Supreme Court would be more appropriate. In my view, the submission now urged before this Court that Mr.B.A.Shelar was not appointed as the sole arbitrator by the respondent before filing of this arbitration application by the applicants is thus contrary to their own stand taken in the correspondence as well as in the arbitration application. The applicants cannot be allowed to take a contradictory stand to seek their convenience.

39. It would be appropriate to deal with this issue also by referring to the judgment of this Court in the case of ***Voltas Limited Vs. Rolta India Limited (supra)*** relied upon by the learned counsel for the applicants and more particularly paragraphs 19, 20, 22 and 24 thereof. It is held by this Court in the said judgment that Section 11(6) does not require acceptance of the appointment by the arbitrator. Once a party appoints an arbitrator, it cannot be said that the party has failed to act as required under the appointment procedure merely because the arbitrator takes time to respond to the appointment by accepting or refusing the same. Once a party appoints an arbitrator, the time taken by the arbitrator to respond to his appointment cannot constitute a failure on their part as regards the appointment of the arbitrator. It is further held that either under the Arbitration Act, nor in the arbitration agreements between the parties there is a provision which required the arbitrator to accept his appointment before it could be said that the respondent had appointed an arbitrator. In my view, the judgment of this Court in the case of ***Voltas Limited Vs. Rolta India Limited (supra)*** supports the case of the respondent and not the applicants.

40. A perusal of the arbitration agreements makes it clear that there is no such appointment procedure agreed between the parties which mandates communication of the appointment of the learned arbitrator by the respondent to the arbitrator himself or for seeking his consent before his appointment as an arbitrator. The right to appoint an arbitrator is solely vested in the respondent.

41. The next question that arises for consideration in this application is whether the respondent had committed any default in making appointment of the learned arbitrator or whether the respondent had lost their right to appoint a sole arbitrator in accordance with the arbitration agreement.

42. It is not in dispute that though the respondent had made a demand for recovery of their alleged dues as far back as September 2014 and had invoked the arbitration agreement, the applicants did not take any steps to apply for appointment of any arbitrator to be made by the respondent till 16th June 2015. Within 10 days from the date of the receipt of the said letter dated 16th June 2015, the respondent appointed Mr.B.A.Shelar as the sole arbitrator. The said appointment has been admittedly made within 30 days from the date of the receipt of the said letter, even if the said notice is considered as a proper notice for the sake of argument.

43. The Supreme Court in the case of ***Datar Switchgears Limited (supra)*** has considered the similar facts and similar arbitration agreement which vested exclusive right to appoint an arbitrator in the finance company, the respondent therein. One of the submissions urged by the petitioner before the Supreme Court was that the respondent did not appoint the arbitrator within a reasonable period and that amounted to failure of the procedure contemplated under the agreement. There was no notice period prescribed for appointment of the arbitrator in this case also. In that matter also, the finance company had filed a petition under Section 9 of the Arbitration Act for interim measures. The petitioner had not applied for appointment of any arbitrator during pendency of the said arbitration petition filed under Section 9 by the respondent. It is held by the Supreme Court that a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Arbitration Act and no time limit has been prescribed under Section 11(6) of the Arbitration Act. It is held that 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

make 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 moves the Court under Section 11, that would be sufficient. The right to make appointment is not forfeited even if no appointment was made within 30 days of demand but such right continues till an application is filed under Section 11 for seeking appointment of an arbitrator.

44. In my view, the said judgment of the Supreme Court in the case of ***Datar Switchgears Limited (supra)*** applies to the facts of this case. In this case, there was no time prescribed for appointment of the arbitrator in the arbitration agreements. Even if the notice dated 16th June 2015 issued by the applicants is considered as notice under the provisions of Section 11, the respondent had appointed an arbitrator in accordance with the arbitration agreement within 30 days from the date of the receipt of the said notice. There was thus no default on the part of the respondent in appointing a sole arbitrator in accordance with the arbitration agreement. Since there was no default on the part of the respondent in appointing the sole arbitrator in accordance with the arbitration agreement, application filed under Section 11(6) of the Arbitration Act which can be filed only in case of default of opposite party is thus not maintainable.

45. In my view, since the respondent had already appointed the arbitrator within 30 days from the date of the receipt of the notice dated 16th June 2015 which was much prior to the date of the applicants filing the present application, the question of the respondent losing their right to appoint a sole arbitrator does not arise. There is thus no merit in this submission of the learned counsel for the applicants.

46. The Supreme Court in the case of the ***National Highways Authority of India (supra)*** has also considered similar issue at length and had held that if there was no failure on the part of the concerned party as per the arbitration agreement to fulfill his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11 (6) of the Act for appointing a substitute arbitrator, the proceedings filed under Section 11(6) are not maintainable. The Supreme Court has reiterated the view taken in the case of ***Datar Switchgears Limited (supra)***. The said judgment of the Supreme Court also squarely applies to the facts of this case.

47. In so far as the submission of the learned counsel for the applicants that there was substantial delay on the part of the respondent in appointing any arbitrator from September 2014 is concerned, even the applicants did not take any steps to call upon the respondent to appoint any arbitrator from September 2014 till June 2015. This issue has also been dealt with by the Supreme Court in the case of ***Datar Switchgears Limited (supra)*** and similar argument has been negatived by the Supreme Court. The said judgment would squarely apply, in my view, to reject this submission made by the learned counsel for the applicants.

48. In so far as the submission of the learned counsel for the applicants that since appointment of Mr.B.A.Shelar itself was illegal, the respondent could not have appointed Mr.Mahesh Shah, Advocate as the sole arbitrator in place of Mr.B.A.Shelar is concerned, in my view, there is no infirmity in the appointment of Mr.B.A.Shelar as the sole arbitrator by the respondent as the right to appoint sole arbitrator under the arbitration agreement was exclusively vested in the respondent. The said appointment was already made before expiry of 30

days from the date of receipt of the notice dated 16th June 2015. Since the said arbitrator Mr.B.A.Shelar reclused himself to act as an arbitrator under the arbitration agreements, the respondent had exclusive right to appoint another arbitrator in place of erstwhile arbitrator. There is thus no merit in this submission of the learned counsel for the applicants.

49. In my view, Mr.Khandeparkar, learned counsel appearing for the respondent is right in his submission that the application even otherwise was not maintainable on the ground that the notice dated 16th June 2015 issued by the applicants was a defective notice. In my view, since the right to appoint an arbitrator solely vested in the respondent, the applicants at the first instance could not have suggested any names of proposed arbitrators in the said notice. The said notice itself was not in accordance with the arbitration agreements and was defective. The present arbitration application based on such defective notice which notice was mandatory before filing the application under Section 11, the present arbitration application is not maintainable even on that ground. There was thus no default on the part of the respondent in appointing any arbitrator. In my view, the arbitration application is totally devoid of merits and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)