Karnataka High Court J.L. Prasad vs The General Manager, Southern ... on 28 September, 2001 Equivalent citations: 2002 (1) KarLJ 491 Bench: R Raveendran ORDER The Court 1. Petitioner claims that the respondent [Southern Railway] entrusted the work of "Bangalore City - Mysore conversion from MG to EG -Earthwork in forming bunds and cutting and construction of bridges for the proposed diversion of track from Ch. No. 19350 to 21690 [KM 19//-8 to 21/11-12] between Kengeri and Hejjala stations - Detour No. 1" to the petitioner under agreement dated 14-8-1987, subject to the annexed general conditions. The petitioner claims Clause 63 of the General Conditions provide for settlement of disputes by arbitration. 2. The petitioner alleges that the work was completed by him on 31-3-1991; that the respondent committed several breaches of contract and thus became liable to pay compensation for the losses suffered by the petitioner; that petitioner issued a notice dated 13-9-1997 calling upon the respondent to settle the claims or in the alternative appoint an arbitrator for adjudication of disputes arising on account of non-settlement of his claims; and that there was no response. As there was no response, petitioner has filed this petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act' for short) seeking appointment of a sole arbitrator from among the panel of arbitrators of Indian Council of Arbitration, New Delhi or any one from the list enclosed to the petition. 3. The respondent has resisted the petition on several grounds: that the claims are not tenable and without basis; that the claims are hopelessly barred by limitation; and that they are not arbitrable. The respondent, however, does not dispute the existence of the arbitration agreement between the parties. 4. The scope of a petition under Section 11 of the Arbitration and Conciliation Act, 1996 [for short, the "Act"] is limited. It deals with appointment of arbitrator or Arbitral Tribunal and nothing more. The function of the Authority exercising power under Section 11 is administrative and not judicial. Therefore, if existence of arbitration agreement is admitted, the limited functions under Section 11 is to appoint an arbitrator/Arbitral Tribunal. While exercising jurisdiction under Section 11 of the Act, it is not for the Authority to decide whether the disputes are arbitrable or not; but to appoint an arbitrator and leave it to the arbitrator to decide about the arbitrability or maintainability of the disputes vide Konkan Railway Corporation Limited and Ors. v. Mehul Construction Company . 5. In view of above, the several contentions raised by the respondent, regarding tenability, admissibility, maintainability and arbitrability including the ground of limitation are all matters to be raised before and decided by the arbitrator/s. Hence, this petition will have to be allowed. 6. At this juncture, the learned Counsel for the petitioner submitted that the petitioner issued a notice dated 13-9-1997 seeking reference of the disputes to arbitration under Clause 63 of the General Conditions of Contract; that the said notice was served on the respondent on 15-9-1997; that the respondent did not, within thirty days from the date of receipt of said notice, take steps to appoint an arbitrator in accordance with the arbitration clause; and therefore it should be held that the arbitration procedure prescribed under the arbitration agreement (Clause 63) no longer applies and the power under Section 11 should be exercised by appointing an independent arbitrator, by ignoring the

appointment procedure prescribed in Clause 63. 7. On the other hand, learned Counsel for the respondent submits that if an arbitrator is to be appointed, such appointment should be only in accordance with the appointment procedure agreed between the parties and not otherwise. 8. For convenience, the relevant portions of the arbitration agreement between the parties (Clause 63 of the General Conditions of Contract) are extracted below: "(1) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, but except in any of the"Excepted Matters" referred to in Clause 62 of these conditions, the contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question dispute or difference and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration. (2)xxx xx (not relevant)

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

(i) A sole arbitrator who shall be the General Manager or a person nominated by him in that behalf in cases where the claim in question is below Rs. 5,00,000.00 and in cases where the issues involved are not of a complicated nature. The General Manager, shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

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

(b) For the purpose of appointing two arbitrators as referred to in sub-clause (a)(ii) above, the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments of the Railway to the Contractor, who will be asked to suggest to the General Manager one name out of the list for appointment as the Contractor's nominee. The General Manager while so appointing the Contractor's nominee, will also appoint a second arbitrator as the Railway's nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators

so nominated is invariably from the Accounts Department. Before entering upon the reference the two arbitrators shall nominate an Umpire who shall be Gazetted Railway Officer to whom the case will be referred to in the event of any differences between the two arbitrators. Officer of the Junior Administrative grade of the Accounts Department of the Railways shall be considered as of equal status to the officers in the intermediate administrative grade of other departments of the Railway for the purpose of appointment as arbitrators". A perusal of the arbitration agreement shows that the parties have agreed to a procedure for appointing the arbitrator/s. Therefore, the appointment of arbitrator should be in accordance with, unless such procedure is superseded or cancelled by other procedure prescribed by law.

9. Section 11 of the Act deals with appointment of arbitrators. Sub-section (2) provides that subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator/s. Sub-sections (4) and (5) deal with situations where the parties have not agreed an appointment procedure, and one of them fails to appoint his arbitrator or concur in the appointment of sole arbitrator. Sub-section (6) applies where an appointment procedure is agreed upon by the parties, but one of the parties fail to act in terras of it. Sub-section (6) is extracted below: "(6) Where, under an appointment procedure agreed upon by the parties.-

(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment". The difference in wording used in Sub-sections (4) and (5) and the wording used in Sub-section (6) is significant and relevant. Sub-sections (4) and (5) speak of appointment being made by the Chief Justice (or his designate) upon request by a party. On the other hand, Sub-section (6) speaks of Chief. Justice (or his designate) taking necessary measure, upon the request by a party. If the intention of the legislature was that even under Sub-section (6), the Chief Justice (or his designate) should appoint an independent arbitrator as contemplated in Sub-sections (4) and (5), the legislature would have used similar or identical language in Sub-section (6) also.

10. Where there is no agreed appointment procedure, and a party fails to appoint his arbitrator or concur in the appointment of the sole arbitrator upon the request of a party, the Chief Justice (or his designate) appoints the arbitrator. But where the appointment procedure is agreed, and if

a party fails to act as required under the agreed appointment procedure, a party, can only request the Chief Justice or his designate to take the 'necessary measure'. The 'necessary measure' is obviously the measure that has to be taken under the appointment procedure for appointment. 'Necessary measure' is ensuring that parties give effect to the arbitration agreement, firstly by directing them to take steps as per appointment procedure; and secondly, by ensuring that the arbitration agreement is not rendered nugatory by one of the parties refusing to act in terms of the prescribed procedure.

11. The later part of Sub-section (6) is also significant and lends support to the view that the term 'necessary measure' refers to taking steps to give effect to the prescribed appointment procedure. It provides that when a party fails to act as per the appointment procedure, the (other) party may request the Chief Justice (or his designate), to take the necessary measure, unless the agreement on the appointment procedure provides other means for seeking the appointment. Thus the appointment procedure is to be ignored only if the arbitration agreement specifies other means for securing the appointment. For example, if the arbitration agreement containing the appointment procedure, provides that in the event of any party failing to abide by it, the other party can seek appointment without reference to such procedure or can approach the Court for appointment of an independent arbitrator, then there will be no need to proceed in accordance with the appointment procedure. But where the arbitration agreement provides the appointment procedure, but not other means of securing appointment as an alternative, the term 'necessary measure' will refer to the enforcement of the appointment procedure and not ignoring the appointment procedure.

12. Therefore, I am of the view that where a petition is under Section 11(6), the Chief Justice (or his designate) should in the first instance take the measure of activating/enforcing the agreed procedure by directing the parties to act in terms of the appointment procedure contained in the arbitration agreement. If, in spite of such order, either party fails to act in terms of the agreed appointment procedure, within the time frame fixed, then the Chief Justice (or his designate) can then appoint an independent arbitrator or Arbitral Tribunal. I am fortified in this view by some observations of the Supreme Court in Konkan Railway Corporation Limited's case, supra, and the Madhya Pradesh High Court in Subhash Projects and Marketing Limited v. South Kastern Coalfields Limited and the decision of the Kerala High Court in BEL House Associates Private Limited v. The General Manager, Southern Railway, Madras and Anr. 12.1 In Konkan Railway Corporation Limited's case, supra, the Supreme Court observed thus: ".....While Sub-sections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the arbitrator or arbitrators, Sub-section (6) seeks to remove obstacles arising when there is an agreed appointment procedure. These obstacles are identified in Clauses (a), (b) and (c) of Sub-section (6). Sub-

section (6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure i.e., to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Sub-section (6), therefore, aims to removing any deadlock or undue delay in the appointment process". 12.2 In M/s. Subhash Projects and Marketing Limited's case, supra, the Madhya Pradesh High Court observed: "Under Sub-section (6), where the agreement lays down a procedure for appointment of arbitrator referable to Sub-section (2), the Chief Justice has merely to take necessary measures for enforcing the procedure laid down in the agreement for arbitration. Under Sub-section (6) the Chief Justice or his designate has not to make any appointment but to enforce or compel the party to make appointment in accordance with the agreed procedure"'. 12.3 In BEL House Associates Private Limited's case, supra, dealing with the very same clause, the Kerala High Court observed: "The above sub-sections of Section 11 would show that several contingencies in the matter of appointment of arbitrator had been contemplated. Under Sub-section (2) of Section 11, the parties are free to agree on a procedure for appointing an arbitrator or arbitrators. It is Sub-section (6) which applies to cases where an agreed procedure is contemplated in the agreement whereas subsections (3), (4) and (5) would apply in the case whereas procedure had not been agreed upon between the parties regarding arbitration. Sub-sections (3) and (4) of Section 11 would cover contingencies where there are more than one arbitrators to be appointed whereas Sub-section (5) covers the appointment of a sole arbitrator or/and on a notice being given by one of the parties and the other party failing to make appointments. In such cases, the appointments have to be made by the Chief Justice or by any person designated by him. But in the case where the procedure for appointing an arbitrator had been agreed upon by the parties, the Chief Justice has to take"necessary measure" for securing the appointment in accordance with the terms of the arbitration agreement. . . . .". . . . .Sub-sections (4) and (5) authorise the Chief Justice to appoint an arbitrator whereas the wording in Sub-section (6) is different where the Chief Justice has to take necessary measures for securing the appointment. The difference in the language used in the above sub-section would reveal the difference in the approach to be made by the Chief Justice in the appointment of the arbitrator. . . . .In fact, the nature of the order of appointment differs in the case where there is no procedure agreed upon between the parties and when the procedure had been agreed upon, between the parties for appointment of the arbitrator, this Court has only to implement the above procedure and there is no scope for appointing an independent arbitrator at the first instance. Hence, this Court cannot appoint an independent arbitrator as prayed for; but has only to implement the procedure agreed upon between the parties regarding the arbitration. Thus a direction has to be issued to implement the procedure for appointment as contemplated under Clause

64 of the agreement".

13. Learned Counsel for petitioner relied on the decision of the Andhra Pradesh High Court in Deepak Galvanizing and Engineering Industries Private Limited v. Government of India, the decision of the Delhi High Court in Nucon India (Private) Limited v. Delhi Vidyut Board (DESU) and the decision of the Bombay High Court in B.T. Patil and Sons v. Konkan Railway Corporation Limited . The decisions of Andhra Pradesh and Bombay High Courts hold that where the party who is called upon to appointed an arbitrator in accordance with the arbitration agreement, fails to do so, such party cannot subsequently contend that the arbitrator should be appoint only in terms of the appointment procedure and such a party should be deemed to have waived and forfeited its right to appoint an arbitrator in terms of the arbitration procedure; and consequently, the Court, exercising power under Section 11 of the Act can appoint an independent arbitrator of its choice to decide the dispute between the parties. Lastly, reliance is placed on the following passage from decision of the Bombay High Court in Larsen and Toubro Limited v. Konkan Railway Corporation Limited, extracted in Law of Arbitration and Conciliation (by Justice Dr. B.P. Saraf, 2000 Edition): "On a careful consideration of the provisions of Section 11 of the Act, I am of the clear opinion that under Sub-section (6) of Section 11 of the Act the Chief Justice should make the appointment himself. He cannot and should not order the recalcitrant Appointing Authority to act under the procedure provided in the agreement. The words"to take necessary measure" in Sub-section (6) of Section 11 of the Act mean that the Chief Justice should make the appointment himself"."Moreover it is also clear on a conjoint reading of Sub-sections (6) and (8) of Section 11 of the Act that the power of the Chief Justice is to appoint arbitrator or arbitrators himself and not to direct the Appointing Authority to do so because while appointing the arbitrator/arbitrators, the Chief Justice has to have regard to the considerations as are likely to secure appointment of independent and impartial arbitrator/arbitrators, if the Chief Justice is merely to direct the Appointing Authority to appoint the arbitrator/arbitrators in accordance with the procedure agreed upon by the parties, there would be no occasion to have regard to the considerations set out in Sub-section (8) of Section 11 of the Act". 14.1 respectfully disagree with the views of the Bombay and Andhra Pradesh High Courts, as they do not either deal with or correctly bring out the purport of the words 'necessary measure' employed in Sub-section (6). The Andhra Pradesh High Court in Deepak Galvanizing and Engineering Industries Private Limited's case, supra, does not deal with Sub-section (6) at all. The Bombay High Court seeks to take support from Sub-section (8) which will come into play only where the Chief Justice (or his designate) is appointing an independent arbitrator and not while taking 'necessary measure' under Sub-section (6). As rightly observed by the Kerala High Court, while Sub-sections (4) and (5) authorise the Chief Justice to appoint an arbitrator, Sub-section

(6) intentionally uses a different language and requires the Chief Justice or his nominee to take 'necessary measure' for securing the appointment.

14. The learned Counsel for petitioner attempted to draw support from the decision of the Supreme Court in Datar Switchgears Limited v. Tata Finance Limited, wherein it is held that if a party having the responsibility of appointing an arbitration does not do so within 30 days of the demand being made by the other party, and the other party moves the Court under Section 11, the party having the responsibility of appointing the arbitrator, ceases to have such right of making the appointment. But the said decision is of no assistance to determine the scope of the words 'necessary measure' in Section 11(6) of the Act. The decision of Delhi High Court in Nucon India (Private) Limited's case, supra, is of no assistance, as it merely reiterates the principle laid down in the decision of the Supreme Court in Datar Switchgears Limited.
15. The arbitration agreement contemplates, the umpire entering into the picture only if the two arbitrators are divided in their opinion. But having regard to Section 10(1) which provides that reference shall not be to an even number of arbitrators, the umpire shall be the presiding arbitrator who shall participate and decide the matter along with the two other arbitrators.
16. In the result, this petition is allowed in part as follows:

(i) The dispute between the parties shall be referred to arbitration by an Arbitral Tribunal with three arbitrators, under Clause 63(3)(a)(ii) of the General Conditions of Contract, to be appointed in the manner stated in Clause 63(3)(b). The respondent shall send a panel to the petitioner within thirty days from today and the petitioner shall suggest one name from the panel within 15 days therefrom. The appointment of contractor's nominee and Railway's nominee shall be completed within two months from today.

(ii) The two arbitrators shall appoint the presiding arbitrator within 15 days thereafter.

(iii) If there is failure, liberty is reserved to seek further measures by appointment of an

For this purpose, list the matter on 1-12-2001 for reporting compliance or further orders for appointment of arbitrator/s.