

Bombay High Court

B.T. Patil & Sons Belgaum ... vs Konkan Railway Corporation Ltd. & ... on 5 December, 1997

Equivalent citations: 1998 (4) BomCR 111, (1998) 1 BOMLR 744

Author: M Shah

Bench: M Shah

ORDER M.B. Shah, J.

1. It is the contention of the applicant a Private Limited Company, that it is a registered contractor in several States, including the State of Maharashtra and Karnataka. The applicant is engaged in civil engineering works contracts etc., particularly pertaining to Tunnelling and Hydro Power Projects. Respondent No. 1 is the Konkan Railway Corporation Ltd. and respondent No. 2 is the Chief Engineer (North) of the said Corporation. It is contended that, on 10th November, 1993, respondent No. 1 accepted the tender submitted by the applicant for construction of Karbude Tunnel- Tunnel No. 20 for Konkan Railway Project. The cost of construction was estimated at Rs. 3,48,41,163.84 and stipulated date of completion of the contract was 9th November, 1994. It is submitted that, as soon as the applicant started the work, several impediments were raised by the respondents in the said work. However, the applicant was in a position to complete the work by May, 1995. Still, however, the respondent failed in settling claims and disputed accounts pertaining to the contract. It is contended that, by letter dated 10th June, 1995 the applicant requested the second respondent to settle the several claims enumerated in the said letter. As the respondents did not settle the claims raised by the applicant, by letter dated 29th June, 1996, the applicant informed the Chairman and Managing Director of respondent No. 1 that disputes have arisen between the parties, and, therefore arbitration proceedings be initiated under the provisions of General Conditions of Contract. As the respondents failed to appoint Arbitrators, this application is filed under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") for referring the dispute to arbitration as provided under the said section.

2. The respondent have filed affidavit, wherein it has been stated that they have not objected to reference of the dispute raised by the applicant to Arbitrators as contained in clause 63.3 of the General Conditions of the Contract. It is also contended that the contract between the parties is of technical nature and requires investigation into various technical details. Therefore, for that purpose, the Corporation will send the panel of more than three officers of the Corporation to the contractor, who will be asked to suggest three name out of the said list. Thereafter, the Chairman and Managing Director of the Corporation will appoint one Arbitrator out of the three names suggested by the contractor and then appoint Second Arbitrator of equal status, ensuring that one of the Arbitrators shall be nominated from the Accounts Department. It is also pointed out that, as per the Agreement between the parties, there will be no objection to the officers of the Corporation being appointed as Arbitrators. Clause 63.3(f) of the General Conditions of the Contract provides that an Arbitrator shall not be one of those who had an opportunity to deal with the matter to which the contract relates or who has in course of his duties expressed any view on any of the matters in dispute. It is contended that this is fair and reasonable arbitration clause which is binding between the parties. With regard to the facts alleged by the applicant, the respondents have denied the same.

3. By a further Affidavit dated 20th June, 1997, it has been also stated that, as per clause 63.1.1 of the General Conditions of the Contract the applicant is required to present its final claim on disputed matters and after 90 days, but before 180 days of his submitting the final claim, it has to demand in writing for arbitration. It is contended that the applicant made representation to the respondents on 20th December, 1995, which was rejected by the respondents on 25th March, 1996 giving detailed reasons for each sub-claim, and, thereafter, the applicant has not pressed its final claim. It is also contended that, though the applicant has not demanded in writing to refer the matter for arbitration within specified time after 90 days and within 180 days of the presentation of the final claim, still, however, the respondents are willing to refer the dispute to arbitration under the procedure prescribed by Clauses 62 and 63 of the General Conditions of the Contract.

4. Affidavit-in rejoinder is filed by the applicant, wherein it has been contended that the respondents have taken inconsistent stand in the two affidavits filed by them. It is also contended that, on 7th August, 1995, the applicant submitted to the respondents the final bill for the contract and requested to settle the final bill at the earliest. The applicant did not receive any reply to the same nor have the respondents settled and paid the final bill of the applicant. Hence, on 22nd January, 1996, the applicant sent the letter to the respondents, stating therein that, since the Corporation has not settled the claim as submitted on 7th August, 1995 and the period of 90 days has expired, the Corporation may forward the list of officers of the Corporation for choice of the applicant under the provision of Clause 63.3(b) of the General Conditions of the Contract. However, the respondents failed to comply with the said request.

5. At the time of hearing of this matter, the learned Counsel for the parties have submitted Written Submissions, which are kept on file.

6. Before referring to the contentions raised by the parties, I would refer to Arbitration Clauses of the General Conditions of Contract for Works by the Konkan Railway Corporation Ltd. Relevant clauses are clauses 62 to 63.3.(g), which are as under:-

"SETTLEMENT OF DISPUTES MATTERS FINALLY DETERMINED BY THE CORPORATION

62. All disputes of differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of contract, shall be referred by the Contractor to the Corporation and the Corporation shall within a reasonable time after the receipt of the Contractor's representation make and notify decisions thereon in writing. The decision, directions and certificates given and made by the Corporation, or by the Engineer on behalf of the Corporation, with respect to any matters decision of which is specially provided for by Clauses 17, 21.5, 37, 43(a), 53.2, 60.2 and 61.1(b) of these conditions (which matters are referred to hereinafter as "excepted matters") shall be final and binding on the Contractor provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

DEMAND FOR ARBITRATION 63.1.1. 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 Corporation of any certificate to which the contractor may claim to be entitled to, or if the Corporation fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 62 of these conditions, the Contractor after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

63.1.2. The demand for arbitration shall specify the matters which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

63.1.3. If the Contractor does not prefer his specific and final claims in writing within a period of 90 days of receiving the intimation from the Corporation that the final bill is ready for payment, he will be deemed to have waived his claims and the Corporation shall be discharged and released of all liabilities under the contract in respect of these claims.

OBLIGATION DURING PENDENCY OF ARBITRATION 63.2. Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Corporation shall be withheld on account of such proceedings provided however it shall be open for the Arbitrator or Arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.

ARBITRATION 63.3(A). Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:-

(i) A sole Arbitrator, who shall be an officer of the Corporation nominated by the Chairman & Managing Director of Corporation in that behalf in cases where the claim in question is below Rupees Five Lakhs and where the issues involved are not of a complicated nature, The Chairman & Managing Director shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

(ii) Two Arbitrators, who shall be Corporation Officers of equal status to be appointed in the manner laid down in Clause 63.3(b) for all claims of Rupees Five Lakhs and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The Chairman & Managing Director 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 opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause 63.3(b) for his decision.

63.3(b) For the purposes of appointing two Arbitrators as referred to in Clause 63.3(a)(ii) above, the Corporation will send a panel of more than three names of officers of the appropriate status of the Corporation to the contractor, who will be asked to suggest a panel of three names out of the list so sent by the Corporation. The Chairman and Managing Director will appoint one arbitrator out of this panel as the Contractor's nominee, and then appoint a second Arbitrator of equal status as the

Corporation's nominee either from the panel or from outside the panel ensuring that one of the two Arbitrators so nominated is from the Accounts Department. Before entering upon the reference the two Arbitrators shall nominate an Umpire who shall be an officer of the Corporation to whom the case will be referred to in the event of any differences between the two Arbitrators.

63.3(c) If the Sole Arbitrator appointed under clause 63.3(a)(i) or one or both of the Arbitrators appointed under clause 63.3(b) above resigns his appointment/resign their appointments or vacates his office/vacate their offices or is/are unable or unwilling to act for any reason whatsoever or dies/die, the Chairman & Managing Director may appoint a new Arbitrator/Arbitrators to act in his/their place in accordance with the provision of clause 63.3(a)(i) or 63.3(b) as the case may be. Such Arbitrator/Arbitrators, as the case may be, shall be entitled to proceed with the reference from the stage at which it was left by the previous Arbitrator/Arbitrators.

63.3(d). The Arbitrator or Arbitrators or the Umpire shall have power to call for such evidence by way of affidavits or otherwise as the Arbitrator/Arbitrators or Umpire shall think proper, and it shall be the duty of the parties hereto(to) do or cause to be done all such things as may be necessary to enable the Arbitrator or Arbitrators or Umpire to make the award without any delay.

63.3(e). In cases where the claim is up to Rupees Three Lakhs, the Arbitrator(s)/Umpire so appointed, as the case may be, shall give the award in all matters referred to Arbitration indicating therein break-up of the sums awarded separately one each individual item of dispute. In cases where the claim is more than Rupees Three Lakhs, the Arbitrator(s)/Umpire so appointed, as the case may be shall give intelligible award (i.e. the reasoning leading to the award should be stated) with the sums awarded separately on each individual item of dispute referred to arbitration.

63.3(f). It will be no objection that the person/persons appointed as Arbitrator/ Arbitrators/Umpire are Officers) of the Corporation. If however, the Arbitrator/ Arbitrators/Umpire is/are Officers(s) of the Corporation, he/they shall not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Officer(s) of the Corporation has/have expressed views on all or any of the matters in dispute or difference. The award of the Arbitrator or Arbitrators or Umpire as the case may be shall be final and binding on the parties to the contract.

63.3(g). Subject as aforesaid Arbitration Act, 1940 and the Rules thereunder and any statutory modification thereof shall apply to the Arbitration proceedings under this clause."

Under Clause 62, the Contractor is required to refer the dispute or difference of any kind to the Corporation and the Corporation is required to make and notify decision thereon in writing within a reasonable time. It also provides that the decision made by the Corporation with respect to any matter decision of which it specially provided for by Clauses 17, 21.5, 37, 43(a), 53.2, 60.2 and 61.1(b) of these conditions shall be final and binding on the Contractor, and they are to be considered as excepted matters. With regard to the excepted matters, they are excluded from the purview of the arbitration clause and are not required to be referred to arbitration. Rest of the matters, which are not excepted matters, are required to be referred to arbitration as provided in

Clause 63.

Further, under Clause 63.1.1, the Contractor, after 90 days but within 180 days of presenting his final claim on disputed matters, is required to demand in writing that the dispute or difference be referred to arbitration. Under Clause 63.1.2, a demand for arbitration shall specify the matters which are in question, dispute or difference and only such dispute or difference in respect of which a demand has been made is to be referred to arbitration.

Clause 63.1.3 specifically provides that if the Contractor does not prefer his specific and final claims in writing within a period of 90 days of receiving the intimation from the Corporation that the final bill is ready for payment, he will be deemed to have waived his claims and the Corporation shall be discharged and released of all liabilities under the contract in respect of his claims.

Clause 63.3 provides the procedure or machinery for referring the matter to arbitrator, that is, whether it is to be referred to the Sole Arbitrator or two Arbitrators, and further procedure of appointing Arbitrators.

7. Learned Counsel for the respondents submitted that as stated in the Affidavit-in-reply respondents are ready to refer the matter to arbitration as provided under Clause 63.3 of the General Conditions of the Contract and that they have not refused reference.

8. However, learned Counsel, Mr. Tulzapurkar, appearing on behalf of the applicant, submitted that, as the respondents have not acted as per the contract and have not appointed Arbitrators, even though demanded by the applicant by various letters, as stated above, at present, there is no question of appointing Arbitrators as per procedure prescribed in clause 63.3 of the General Conditions of the Contract. He pointed out that the applicant, by its first letter dated 10th June, 1995, demanded certain amounts and subsequently, by letter dated 7th August, 1995, submitted the Final Bill to the respondents for taking necessary action and for payment. There was no response to the said letter and, in the said Final Bill itself, the applicant has stated that, if the Corporation was not agreeing for making payment of the amount as claimed, then the matter be referred to Arbitrators, in accordance with the provisions of the General Conditions of the Contract. There was no response to the reminders dated 22nd January, 1996 and 29th June, 1996, wherein specific demand is made by the applicant for referring the matter to Arbitrators. The learned Counsel, therefore, submitted that the respondents now cannot claim that Arbitrators should be appointed as per procedure prescribed in clause 63 of the General Conditions of the Contract and the respondents have forfeited their right to make appointment of Arbitrators in terms of the General Conditions of the Contract. He submitted that even though under sub-section (4) of section 20 of the Arbitration Act, 1940, the Court was required to make reference to the Arbitrators appointed by the parties, but, in such cases also, the Apex Court has held that, where a notice was given to the contracting party to appoint an Arbitrator in terms of the Agreement, and if no action had been taken, it must be deemed that he neglected to act upon the Agreement and it results in the forfeiture of the power to appoint an Arbitrator in terms of the Agreement. In support of this contention, reliance is placed upon the decision rendered by the Supreme Court in the case of G. Ramachandra Reddy & Co. v. Chief Engineer, Madras Zone, Military Engineering Service, and particularly upon following observation

in paragraph 6 thereof:-

"Thus when the notice given to the opposite contracting party to appoint an Arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. When no agreement was reached, even in the Court between the parties, the Court gets jurisdiction and power to appoint an arbitrator. Even if section 8(a) per se does not apply, notice was an intimation to the opposite contracting party to act upon the terms of the contract and his/its non-availing entails the forfeiture of the power to appoint an Arbitrator in terms of the contract and gives right to the other party to invoke the Court's jurisdiction under section 20. In the instant case the respondent did not appoint an Arbitrator, after the notice was received. The respondent averred in the written statement that it was under consideration.

Even before the learned Single Judge he did not even state that he was willing to appoint an Arbitrator. The learned Single Judge rightly exercised the power under section 20(4) of the Act and appointed the Arbitrator. The Division Bench, therefore, was not right in holding that the respondent had by giving option to the appellant to agree for appointment of an Arbitrator out of five named persons had left it to the appellant to appoint an Arbitrator and allowing appellant to appoint an Arbitrator. On the other hand, the appointment of an Arbitrator made by the learned Single Judge must be deemed to have been approved by us."

He therefore, submitted that, as the respondents failed to act in accordance with the agreement despite notices, the case falls under section 11(6) of the Arbitration Act and the Court should appoint Arbitrators by referring to sub-section (8) of section 11.

He also contended that under section 11(6) there is no question of taking necessary measures of appointing Arbitrators as provided in the Agreement.

9. As against this, Mr. Dada, learned Additional Solicitor-General appearing on behalf of the respondents, submitted as follows :--

(i) The parties have agreed that the Contractor's 'representation' under clause 62 of the General Conditions of the Contract is not the final claim of the Contractor under Clause 63.1.1.

(ii) Unless the Contractor submits its final claim under Clause 63.1.1 the arbitration process does not start.

(iii) After the contractor submits its final claim, it has to wait for a period of 90 days (presumably for the Corporation to act) and thereafter within 180 days from the date of submission of the final claim has to demand in writing for arbitration.

(iv) In the demand for arbitration the contractor has to specify matters which are in dispute :

Only after the contractor complies with all the four steps as above the contractor can claim that the Corporation should follow the procedure for appointment of Arbitrators under clause 63.3.

He pointed out that the applicant submitted the representation on 10th June, 1995, without waiting for decision of the respondents. He also submitted that the claim made by the applicant by its letter dated 22nd January, 1996 was replied by the Corporation as contained in Clause 62 of the General Conditions of the Contract and thereafter, the applicant did not submit its final claim. Subsequently, on 29th June, 1996, the applicant called upon the Corporation to appoint Arbitrators under the General Conditions of the Contract, without there being specific demand. He further submitted that the Corporation by its letter dated 11th February, 1997 called upon the applicant for conciliation but it appears that, meanwhile, the applicant has already approached this Court, and, hence, after receipt of the notice, the Corporation has sent its letter dated 29th April, 1997 showing its willingness to appoint Arbitrators. In the alternative, he contended that, under the provisions of section 11, the Court is required to appoint Arbitrators by following the agreed procedure.

10. In view of the above submissions, the questions which require determination in this matter, are :

(1) Whether the applicant has followed the procedure provided in Clause 63.1.1 and has demanded in writing that the dispute or difference be referred to arbitration within the time prescribed therein ?

(2) If it has done so then, whether the respondents have also followed the said procedure?

(3) If so, whether the Court should appoint Arbitrators as provided under Arbitration clause or as provided under section 11(6) and (8) of the Arbitration Act?

11. For deciding these contentions, it would be necessary to refer to certain documents produced by the applicant on record.

12. By letter (Exhibit 'C') dated 10th June, 1995, the applicant informed the Chief Engineer (North), Konkan Railway Corporation Ltd., that the applicant has completed the contractual work and additional work entrusted to him 20 days back and the final accounts were not yet settled. It was stated that certain anomaly occurred in making 'on account' payments for the work done for certain items in Schedule of items and quantities and also series of claims submitted by the applicant at various stage of the work were yet to be settled. Thereafter, it has enumerated a list of such items. It was, therefore, requested to pay the amounts claimed therein with interest at 24% per annum from the dates they became payable till the date of payment. A copy of that letter was sent to the Chairman & Managing Director, Konkan Railway Corporation Ltd. Subsequently, on 7th August, 1995, applicant sent a Final Contract Bill bearing No. 17 for the receivable amount of Rs. 16,00,28,805.50. It was stated therein that the Bill was prepared in conformity with the provisions of the subject contract as spelt out in letter dated 10th June, 1995. It was stated that, at a huge amount was outstanding since considerable long period, the accounts should be settled at the earliest. The applicant has demanded interest at 24% per annum on all the amounts claimed from the dates they become payable till the date of payment. It is also stated in the said letter as follows :--

"If the Corporation is not agreeing for the amounts and issues claimed in enclosed Final Bill No. 17 dated 7-8-1995, the same may please be referred for 'Arbitration' in accordance with the provisions of subject Contract."

13. Again, reminder dated 22nd January, 1996 was sent by Registered Post A/D to the Chairman & Managing Director, Konkan Railway Corporation Ltd. By the said letter, the Corporation was informed that the Corporation has not settled the claims submitted by the applicant and that the period of 90 days specified in Clause 63.1.1. of the General Conditions of the Contract has also lapsed. Hence, a request was made to forward the list of the officers of the appropriate status of the Corporation for the applicant's choice of one of the Arbitrators forthwith under the provisions of Clause 63.3(b) of the General Conditions of the Contract.

14. Again, reminder was sent to the Chairman & Managing Director of the Corporation by Registered Post A/D dated 29th June, 1996, wherein it was stated that, even though a period of more than four months lapsed, the Corporation has not chosen to favourably settle the outstanding claims and that disputes have arisen between the parties. Hence, the Corporation was requested to initiate the process of appointment of Arbitrators in terms of Clause 63.3(b) of the General Conditions of the Contract taking into cognizance the implications of the Arbitration and Conciliation Ordinance, 1996. It was pointed out that disputes are contained in the applicant's letters dated 7th August, 1995, 22nd January, 1996, 12th February, 1996, 15th April, 1996 and 13th May, 1996. It was further stated that the matter may be expedited or otherwise the applicant would be compelled to adopt remedy provided under the Arbitration and Conciliation Ordinance, 1996.

15. The aforesaid facts are not denied by the respondents nor the respondents have produced any letter written by them to the applicant in response to the letters referred to above which are exhibited at Exhibits 'C', 'D', 'E' and 'F' to the application. Hence, from the facts stated above it is clear that the applicant has followed the procedure prescribed under Clauses 62 and 63 of the contract. First by writing letter dated 10th June, 1995 applicant claimed the amount mentioned therein with interest at 24% per annum. Again by letter dated 7th August, 1995, with which a final contract bill was sent, the applicant demanded an outstanding amount of Rs. 16,00,805.50 with interest thereon at 24% on all items from the date they became payable. The applicant also requested that if Corporation was not agreeable, the matter be referred to arbitration. Again reminder was sent on 22nd January, 1996 stating that the Corporation has not settled the claim within 90 days as specified in Clause 63.1.1 of the contract. Hence a request was made to forward a list of names of the officers of the appropriate status for appointing Arbitrators. Again reminder was sent on 29th June, 1996, yet there was total inaction on the part of the Corporation. Therefore there is no substance in the contention of the learned Counsel for the respondents that the applicant has not complied with Clauses 62 and 63.1.1 of the contract. There was total inaction on the part of respondents to act as agreed procedure.

16. Therefore, the other question for determination is whether in such circumstances the stand taken by the Corporation that Arbitrators should be appointed as provided under Clause 63 requires to be accepted or whether Arbitrators should be appointed as prescribed under section 11(6) and (8) of the Arbitration Act. For deciding this, it would be necessary to refer to section 11 of the

Arbitration Act. Relevant sub-sections of section 11 are as under :--

"(1) A person of any nationality may be an Arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-sections (6) the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators.

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

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

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

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

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

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

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

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

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

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

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

(a) any qualification required of the Arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial, Arbitrator."

Section 11 reproduced above provides the procedure for appointment of Arbitrator. Under sub-section (1), a person of any nationality can be appointed as an Arbitrator unless there is any agreement to the contrary. Under sub-section (2), parties are free to agree on a procedure for appointment of Arbitrator or Arbitrators. In a case where three Arbitrators are required to be appointed as per the agreement between the parties and on account of failure of an agreement between the parties with regard to the procedure for appointment of Arbitrator, then, under sub-section (3), each party is entitled to appoint one Arbitrator and the two appointed Arbitrators are required to appoint a third Arbitrator who would act as Presiding Arbitrator. Sub-section (4) provides that in a case where appointment procedure prescribed under sub-section (3) applies and a party fails to appoint an Arbitrator or the two appointed Arbitrators fail to agree on the third Arbitrator, then on a request of a party appointment of Arbitrator is to be made by the Chief Justice or the person designated for appointment of arbitrators. In a case where sole arbitrator is required to be appointed for arbitration and if parties fail to agree on the Arbitrator, then, under sub-section (5), the Arbitrator is to be appointed by the Chief Justice or any person designated by him upon a request of a party. In cases where appointment procedure is agreed upon by the parties and still the parties fail to abide by it, sub-section (6) provides for the procedure for securing appointment of Arbitrators. Under clause (a) of sub-section (6), if a party fails to act as required procedure, the Chief Justice or the person designated by him is required to appoint Arbitrator or Arbitrators. Under Clause (b) of sub-section (6) the parties or the two appointed Arbitrators under sub-section (3) fail to reach an agreement expected of them under that procedure, then also the Chief Justice or the person designated by him is required to take action and appoint Arbitrator. Similarly, under Clause (c) of sub-section (6), if a person fails to perform any function entrusted to him or it under the procedure prescribed for appointment of Arbitrator, then also, at the request of the parties the Chief Justice or the person designated by him is required to appoint Arbitrator/Arbitrators. However, this appointment procedure under sub-section (6) is subject to a further condition as laid down under subsection (6) i.e. "unless the agreement on the appointment procedure provides other means for securing appointment". Sub-section (8) prescribes the objective criteria for appointment of Arbitrators by the Chief Justice or the person designated by him. It provides that before appointing an Arbitrator, due regard should be had to (a) the qualifications required of the Arbitrator by the agreement of the parties and (b) other considerations as are likely to secure appointment of an independent and impartial Arbitrator.

17. Considering the aforesaid scheme of section 11, it is apparent that parties to the dispute are free to agree on a procedure for appointing the Arbitrator or Arbitrators. If the parties fail to act as required under the procedure, then the party aggrieved can request the Chief Justice to take necessary measures unless the agreement for the appointment procedure provides other means for securing the appointment of Arbitrator. Admittedly, in this case, agreement between the parties does not provide other means for securing appointment of Arbitrator/Arbitrators. Hence, the relevant provision applicable in the present case would be sub-section (6), which provides that where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, the party may request the Chief Justice to take the necessary measure. As

discussed above, the respondents have failed to act as required under the agreed procedure and in that set of circumstances, at the request of the applicant, Arbitrators are required to be appointed by observing the criteria laid down under section 11(8). Sub-section (6) or (8) of section 11 does not provide that even if parties have failed to abide by the agreement prescribing the procedure for appointment of an Arbitrator, yet the Chief Justice or the person designated by him should appoint the Arbitrator as per the agreed procedure. At the same time, the Chief Justice or the person designated by him is required to bear in mind the qualifications of the Arbitrator as required under the arbitration agreement and also to secure independent and impartial Arbitrator who can do justice between the parties.

18. Further, in a case where a party refuses to act or does not act as per the agreed procedure under the contract for referring the matter to arbitration, such party cannot insist that Arbitrators should be appointed as per the machinery provided under the contract. This could result in giving premium to a defaulting party who may be interested only in delaying the proceedings. In my view, the agreed machinery gets exhausted on such refusal or inaction. Thereafter the only procedure which is required to be followed for appointment of Arbitrators would be under sub-section (6) read with sub-section (8) of section 11, subject to the other condition that agreement on the appointment procedure does not provide other means for securing the appointment of Arbitrators. Sub-section (11) nowhere directs that the Chief Justice should appoint the Arbitrators mentioned in the agreement.

19. The learned Counsel for the applicant rightly referred to the judgment of the Supreme Court in the case of *G. Ramachandra Reddy & Co. v. Chief Engineer, Madras Zone, Military Engineering Service* (supra), and submitted that even under section 8(1)(a) of the Arbitration Act, 1940, in such a situation, Court could appoint Arbitrators other than named persons in the arbitration clause. He rightly contended that the provisions of section 11(6) and (8) give wider jurisdiction to the Chief Justice than the provisions of section 8 of the repealed Arbitration Act. In the aforesaid case the Court held that when the notice was given to the opposite contracting party to appoint an Arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract and the Court gets jurisdiction and power to appoint an Arbitrator. The Court observed that "notice was an intimation to the opposite contracting party to act upon the terms of the contract and his/its non-availing entails the forfeiture of the power to appoint an Arbitrator in terms of the contract".

20. In this view of the matter, it would be difficult to accept the contention of the respondents that as the respondents have shown their willingness to abide by the contract and appoint Arbitrators as stated in Affidavit-in-reply filed before this Court, the Court should direct the respondents to appoint Arbitrators as provided in Clause 63.3. In my view, this would amount to putting premium on total inaction on the part of the respondents in appointing Arbitrators, as provided under the said clause, within a reasonable time from the date of the notice issued by the applicant.

21. Learned Counsel for the applicant Mr. Tulzapurkar, submitted that, under subsection (8) of section 11 of the Arbitration Act the Court is required to consider the qualifications of the Arbitrator specified in the agreement of the parties yet it would not mean that the Court should appoint any of

the persons required to be appointed under Clause 63 of the contract. He submitted that no part of the appointment procedure prescribed under Clause 63 of the contract should be followed, as the respondents have failed to act as per the agreement. He also submitted that the contention of the respondents that in sub-section (6) of section 11 the following words :

"to appoint Arbitrators in accordance with the contract" after the words:

"to take the necessary measure"

should be added or read is not tenable. He submitted that no such addition can be made because Legislature has given discretion to the learned Chief Justice to appoint Arbitrators by taking necessary measure under sub-section (8) of section 11 of the Act. He also pointed out that in the present case the words "unless the agreement of the appointment procedure provides other means for securing appointment" would also be of no consequence because no alternative procedure for appointment of Arbitrators is prescribed under the contract.

22. As against this, learned Counsel for the respondents submitted that the procedure prescribed in the arbitration clause for appointing Arbitrator cannot be given a go by. For this purpose, a reference is made to the decision rendered by the Supreme Court in the case of Union of India v. Prafulla Kumar Sanyal, . In that case it was contended that when arbitration agreement contains adequate and exhaustive machinery for appointment of Arbitrator, it must be construed as the Arbitrator having been appointed under sub-section (4) of section 20. Dealing with this contention and after referring to its earlier decision in the case of Dhanrajmal Gobinaram v. M/s. Shamji Kalidas & Co., , the Supreme Court held that the said decision did not consider whether under section 20(4) the Court is bound to appoint an Arbitrator who has actually not been appointed but for whose appointment adequate and exhaustive machinery has been provided for. The Court negated the said contention by holding (in paragraphs 4 & 5) as under :--

"Taking into account the wording of the sub-section the Court shall make an order of reference to the Arbitrator appointed by the parties, we do not feel that the sub-section required the Court to appoint an Arbitrator, who had not actually been appointed, but for whose appointment adequate provisions have been made."

"5 In the instant case as an Arbitrator has not been appointed by the parties and as the parties are not agreed upon an Arbitrator the Court may proceed to appoint an Arbitrator, but in so doing it is desirable that the Court should consider the feasibility of appointing an Arbitrator according to the terms of the contract....."

23. Even considering the aforesaid decision, it is apparent that the Court under section 20(4) of the repealed Arbitration Act need not appoint Arbitrator as provided under the agreement. At the same time, in appointing an Arbitrator it would be desirable that Court should consider the feasibility of appointing an Arbitrator according to the terms of the contract. If this aspect is read along with sub-section (8) of section 11, it would be clear that while appointing Arbitrator Court is required to take into consideration the qualification of the Arbitrator as prescribed under the contract. Court is

also required to see that independent and impartial Arbitrator is appointed. The Legislature has specifically provided that the Chief Justice should take necessary measure of appointing arbitrators and has not restricted the power of the Chief Justice to appoint Arbitrators only as agreed under the contract. The result would be that once the parties fail to act in accordance with the agreed procedure of appointing Arbitrators, the Chief Justice is required to appoint Arbitrators after taking into consideration the provisions of sub-section (8) of section 11.

24. In the present case, under Clause 63.3 of the General Conditions of the Contract, three Arbitrators required to be appointed as the claim of the applicant or the disputed amount is for more than Rs. 5 lacs. Further, appointment of only two Arbitrators as provided in Clause 63.3(a) would not be consistent with the provisions of section 10(1) of the Arbitration Act, which provides that :

"The parties are free to determine the number of Arbitrators provided that such number shall not be an even number."

Hence, appointment of three Arbitrators is a must. Considering the dispute involved, it would be just and reasonable to follow the procedure prescribed under the agreement for appointment of the Arbitrators.

25. Hence it is directed that, for the purpose of appointing two Arbitrators as referred to in clause 63.3 the Corporation shall send a Panel of more than three names of officers of appropriate status in the Corporation to the Contractor, who shall suggest a panel of three names out of the list so sent by the Corporation, and the Chairman and Managing Director of the Corporation will appoint one Arbitrator out of his panel as the Contractor's nominee, and thereafter the second Arbitrator of equal status as Corporation nominee either from the panel or outside the panel, ensuring that one of the two Arbitrators so nominated is from the Accounts Department, who will be appointed as the Corporation's nominee.

26. With regard to the third arbitrator, it would be reasonable to appoint a totally independent, impartial and disinterested person as the Presiding Arbitrator. Mr. Tulzapurkar, learned Counsel for the applicant, submitted that Justice S.C. Pratap be appointed as the third Arbitrator. The suggestion is accepted and Mr. S.C. Pratap (Retired Chief Justice of the Andhra Pradesh High Court) is appointed as the third Arbitrator and Presiding Arbitrator.

27. The Office to send a copy of this order to the Presiding Arbitrator.

28. On behalf of the respondents, it is submitted that the arbitration proceedings may be held at Panaji. As against this the learned Counsel for the applicant submits that the arbitration proceedings may be held at Bombay or Belgaum and not at Panaji. The applicant is having its Administrative Office at Belgaum. Considering these submissions, it is ordered that the arbitration proceedings shall be held at Bombay.

29. Application stands disposed of accordingly.

30. Order accordingly.