B.H.C. Agro (India) Pvt. Ltd. vs Director Of Horticulture, Government ... on 7 September, 2007

Equivalent citations: 2007(6)ALT327, AIR 2008 (NOC) 23 (A.P.), 2008 AIHC (NOC) 410 (A.P.)

Author: Ramesh Ranganathan

Bench: Ramesh Ranganathan

JUDGMENT

Ramesh Ranganathan, J.

1. Arbitration Application No. 49 of 2007 is filed by M/s BHC Agro (India) Pvt. Ltd., under Section 11 of the Arbitration and Conciliation Act, 1996, against the Director of Horticulture and the Principal Secretary, Agriculture and Co-operative Department, Government of A.P, for appointment of Hon'ble Smt. Justice S.V. Maruthi (Retired) as an arbitrator on behalf of the Applicant, to appoint a competent arbitrator on behalf of the Respondent and to direct both the arbitrators to elect the third arbitrator to act as an umpire as per Clause 9 of the Agreement.

2. The Applicant, a company incorporated under the Companies Act, 1956, claims to be affiliated with persons and entities located in Israel and the United States of America, including Beit Hashita, (a Kibbutz-Cooperative organization), which possess and are willing to make available, through the Applicant, know-how in the field of agricultural development, training and implementation of Israeli technology in land, water and crop management. Applicant submits that the 1st respondent was interested in bringing in, promoting and obtaining Israeli technology for better land, water and crop management in India involving farmers in this transfer of technology and thereby improve farming and income levels of individual farmers in various parts of the State. The first Respondent had recommended the Applicant for adoption of Israeli technology in drought prone areas of Andhra Pradesh. The 1st Respondent, on verification of the Applicant's record, and in furtherance of its objectives of setting up the third phase project called K-III project in western parts of Chittoor District, (a chronically drought affected area), confirmed the competence of the Applicant for transfer of technology in Andhra Pradesh. According to the Applicant, the 1st respondent decided to implement K-III project in Ac.1400.00 of agricultural land in western parts of Chittoor District for a minimum term of three years initially, Ac.10,000-00 in future, and requested the Applicant to facilitate dissemination and promotion of Israeli technology under the K-III project. On the Applicant expressing its willingness to transfer technology, and undertake the K-III project in western parts of Chittoor District, a Memorandum of Understanding was entered into between the parties on 29.1.2003 which provided for completion of the project by 31.12.2005, an interim

evaluation after two years and provision for termination with three months prior notice by either party. Applicant submits that the terms and conditions of the Memorandum of Understanding required it to fully manage the K-III project and specify, augment, facilitate supply of irrigation systems, specify crops, crop cycles, harvests, fertilizer doses and other methods and assist in the technology transfer which included training farmers and officials. The 1St respondent was required to facilitate farmers in getting loans from financial institutions and help the Applicant in successful implementation of the project. Applicant would contend that, in accordance with the terms of the Memorandum of Understanding, they were committed to market the produce from the project area and were required to design and install infrastructure in 14000 acres by 30.9.2004 and, on completion of infrastructure, to issue completion certificate within two months from the date of handing over the developed land as mentioned in Clauses 2.7 and 2.9 of the Memorandum of Understanding. The 1st respondent was required, under the Memorandum of Understanding, to make payment in nine instalments to the Applicant for the management, supervision and participation in implementation, transfer of know-how etc. Each instalment was to be for Rs. 68,46,255/- subject to CPI and the due date of payment was spread over from the date of signing the Memorandum of Understanding till 31.12.2005. Applicant submits that it had commenced and completed the project in accordance with the schedule, that the 1St respondent, after submitting the bills, had paid Rs. 4,48,85,173/-, that payment of their bills was stopped with effect from 30.4.2004 and that the total dues as on 31.12.2005 was Rs. 9,54,23,902/-. Applicant would contend that, despite several demands, no payment was made by the 1st respondent, that finally vide letter dated 17.4.2006 they had requested the 1S1 respondent to clear the dues within 15 days, that the respondents evaded payment on one pretext or the other, that, in view of nonpayment of the dues of the Applicant, a dispute arose between the parties and that the Memorandum of Understanding dated 29.1.2003 provided for resolution of disputes by an Arbitration Tribunal. Applicant, in its notice dated 9.6.2006, called upon the respondent to pay the balance due of Rs. 9,54,23,902/- along with interest and damages. In the said notice dated 9.6.2006 the Applicant, while informing that they had appointed Hon'ble Smt. Justice S.V. Maruthi (Retd) as their arbitrator, called upon the Respondent to nominate their arbitrator within 15 days of receipt of the notice failing which they would be constrained to initiate appropriate action for appointment of an arbitrator and for constitution of the Arbitral Tribunal. It is the Applicant's case that, despite receipt of notice, the Respondent had failed to appoint their arbitrator as a result of which the Applicant was constrained to approach this Court, for appointment of a competent Arbitral Tribunal, under Section 11 of the Arbitration and Conciliation Act, 1996. The Respondent is said to have received the notice on 12.6.2006.

3. In the counter affidavit filed on behalf of the respondents, while stating that, in terms of the Agreement, the Government had paid Rs. 4,48,85,173/- in three instalments, it is contended that, as there were allegations of irregularities, the State Government had issued a notification, in G.O.Ms. No. 371, Agriculture & Cooperation (Horti) Department dated 19.9.2005, appointing Sri Justice T.H.B. Chalapathi as the Commission of Inquiry fixing a consolidated remuneration and limited terms of reference. Subsequently, G.O.Ms. No. 465, Agriculture & Co-operation (Horti) Dept dated 2.12.2005 was issued whereby Justice Sri T.H.B. Chalapathi, retired Judge of the Punjab & Haryana High Court, was appointed as the Commission of Inquiry with the status and salary of a Judge of the High Court and the terms of reference were slightly modified. Respondents would submit that,

pending inquiry, further payment was stopped. While acknowledging receipt of the Applicant's notice dated 9.6.2006, Respondents would state that the Commission of Inquiry had informed that the applicant had been overpaid, that no further amounts could be released to them in terms of the Memorandum of Understanding, that the Government had to examine and arrive at a conclusion whether the Applicant was overpaid or not and that on a decision being taken by the Government, and if the Applicant was aggrieved thereby, it could then invoke the arbitration clause under the Agreement. Respondents would contend that, since the inquiry report submitted by the Commission of Inquiry is required to be examined and a decision taken thereupon, the request for appointment of an arbitrator is premature, that the Government is yet to arrive at a final decision whether the Applicant was overpaid or not and that there is no cause of action at this stage for the Applicant to invoke the arbitration clause seeking appointment of an arbitrator.

4. While the parties in A.A. No. 50/07 are the same as in A.A. No. 49 of 2007 the dispute relates to the Integrated Agricultural Development Project (IADP) in Rangareddy, Mahaboobnagar and Vijayanagaram Districts of Andhra Pradesh. Applicant would state that the project was required to be implemented in Ac.1000-00 of agricultural land in each of these districts for a minimum period of three years, that a Memorandum of Understanding was entered into on 29.1.2003 where under the Applicant was required to manage the IADP to augment and facilitate the supply of irrigation systems, specify crops, crop cycles, harvest, fertilizer doses and other agricultural methods, assist in technology transfer which included training farmers and officials and that the 1st respondent was required to facilitate farmers in getting loans from financial institutions and help the Applicant in successfully implementing the project. The terms and conditions of the Memorandum of Understanding required the Applicant to complete installation of infrastructure and issue a certificate within 2 months from the date of handing over the developed land and to complete implementation as per the time schedule fixed by both parties. Applicant would contend that, under the Memorandum of Understanding, payment was to be made in nine instalments of Rs. 70,20,354/- each subject to CPI or 1,16,161 US dollars subject to CPI and that the due dates of payment were spread over from the date of signing the Memorandum of Understanding till 31.12.2005. Applicant would contend that the 1st respondent had made payment of Rs. 2,50,09,791/-, that all of a sudden they had stopped payment with effect from 31.12.2003, that the total dues as on 5.11.2004 was Rs. 5,55,25,548/-, that, despite several demands, no payment was made and that finally, vide letter dated 17.4.2006, the Applicant had requested the 1st respondent to clear the dues within 15 days despite which no payment was made. While calling upon the respondents to pay the balance due of Rs. 5,55,25,548/-, along with interest and damages, the Applicant, in its notice dated 9.6.2006, while informing that they had appointed Hon'ble Smt. Justice S.V. Maruthi (Retd) as their member, called upon the Respondents to nominate their member within 15 days failing which they would initiate appropriate action for appointment of the arbitrator. Applicant would state that, despite receipt of notice, the Respondents had failed to nominate their member necessitating the Applicant having to approach this Court for appointment of a competent arbitrator and for constitution of an Arbitral Tribunal.

5. In its counter affidavit, while stating that Rs. 2,50,09,791/- was paid, Respondents would contend that the performance of the Applicant was poor and tardy, that only an extent of Ac.290.43 was covered against the targeted area of Ac.3000-00, that the consultancy fees were significantly higher

at Rs. 38,000/- per acre as compared to Rs. 7100/- under Phase III of Kuppam Project, that the Government had terminated replication of the Kuppam project in the districts of Rangareddy, Mahaboobnagar and Vizianagaram, vide G.O.Ms. No. 277 dated 5.11.2004 and, therefore, the question of further payment did not arise. Respondents would contend that, vide G.O.Ms. No. 465 dated 2.12.2005, Justice Sri T.H.B. Chalapathi, Retired Judge of the Punjab & Haryana High Court, was appointed as the Commission of Inquiry, that the Commission had informed that the Applicant had been overpaid and that no amount could be released to them, that the report submitted by the Commission had to be examined and a decision taken thereupon, that the Government had yet to arrive at a decision whether the Applicant was overpaid or not, that the Applicant's request for appointment of an arbitrator was premature and there was no cause of action, at this stage, to invoke the arbitration clause seeking appointment of an arbitrator.

6. Sri R. Raghunandan, learned Counsel for the Applicant, would contend that, since the respondents had failed to nominate their arbitrator, as required of them under the arbitration clause of the Memorandum of Understanding, despite being called upon to do so, the Applicant had no alternative but to invoke the jurisdiction of this Court under Section 11 of the Arbitration and Conciliation Act requesting this Court to take the necessary measure, including that of appointment of an arbitrator on behalf of the Respondents. Learned Counsel would contend that, since the notice sent to the respondents calling upon them to nominate their arbitrator did not elicit any reply, the Applicant was justified in filing the present applications under Section 11 of the Arbitration and Conciliation Act, 1996. Learned Counsel would place reliance on National Aluminium Co. Ltd. v. Metalimpex Ltd. (2001) 6 SCC 372; India Internet Incubator Mauritius Ltd. v. Infraline Technologies India (P) Ltd. (2004) 13 SCC 354; Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd. and Bell House Associates Pvt. Ltd. v. The General Manager, Southern Railway, Madras AIR 2001 Kerala 163.

7. Learned Government Pleader for Agriculture, on the other hand, would contend that the Applications as filed are premature as a Commission of inquiry had been appointed and, on receipt of its report, the matter was still under examination by the Government. Learned Government Pleader would submit that it is only when the Government takes a final decision with regard to the amounts claimed by the Applicant would the question of appointment of an arbitrator arise. Learned Government Pleader would submit that, as at present, no dispute can be said to be in existence since the Government has not as yet taken a decision with regard to payment of the amounts claimed as due by the Applicant, that since a retired Judge of the Punjab and Haryana High Court, appointed as the Commission of Inquiry, had submitted his report, the matter had necessarily to be examined by the Government before a final decision can be taken on the Applicant's claim and that the request for appointment of an arbitrator, even before the Government takes a final decision in the matter, is premature and such a request must, necessarily, be rejected.

8. Before examining the rival contentions, it is useful to extract the arbitration clause of the Memorandum of Understanding entered into between the Applicant and the Respondents. Clause 9 of the K-III Project Memorandum of Understanding dated 29.1.2003 is identical to Clause 9 of the Memorandum of Understanding for the integrated Agricultural Development Project (IADP) entered into on 29.1.2003, and reads thus:

> Disputes, if arise, between the parties of the Government of Andhra Pradesh and the BHC (India) with regard to this MOU including annexure, shall be referred to Arbitration Tribunal consisting of one member nominated by each of the parties and the members so appointed shall elect the arbitrator and will be dealt with in accordance with law in force in India at the time of issuing of the notice for such reference by any of the party.

9. The Applicant, in its notice dated 09.06.2006, called upon the respondents to nominate their arbitrator. As stipulated in the arbitration clause of the MOU the disputes between the parties are to be dealt with in accordance with the law in force in India as on that date i.e., the Arbitration and Conciliation Act, 1996.

10. Chapter III of the Arbitration and Conciliation Act, 1996 relates to Composition of the Arbitral Tribunal and, under Section 10(1), the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Section 11 relates to appointment of arbitrators and, under Sub-section (2) thereof, subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-sections (3), (4) and (5) of Section 11 relate to situations where the arbitration agreement does not prescribe a procedure for appointment of an arbitrator. As the arbitration clause, in the Memorandum of Understanding entered into between the Applicant and the Respondent, prescribes such a procedure it is Section 11 (6) which is applicable. Under Section 11(6) where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as is 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; the 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.

11. While Sub-sections (4) and (5) of Section 11 enable a party to the arbitration agreement to request the Chief Justice or his designate to appoint an arbitrator, Sub-section (6) enables the party to request that "the necessary measure" be taken. The power to take "the necessary measure" is circumscribed and cannot be resorted to where the appointment procedure, prescribed in the arbitration agreement, provides other means for securing the appointment of an arbitrator. Where the arbitration agreement provides other means for securing the appointment resort must be had to such means alone and a party to such an agreement would not be entitled to make a request to the Chief Justice or his designate to take "the necessary measure".

12. While the arbitration clause, in the Memorandum of Understanding, prescribes the appointment procedure and requires each party to the agreement to appoint its arbitrator, who in turn are required to elect the third arbitrator, the appointment procedure does not provide for other means to secure the appointment of an arbitrator in cases where either party to the agreement fail to fulfil their obligations, under the arbitration clause of the Memorandum of Understanding, in nominating their respective arbitrators. As the Respondents have failed to nominate their arbitrator, despite a request to do so, the Applicant is entitled to request the Chief Justice or his designate to take "the

necessary measure".

13. In this context it is useful to refer to the judgments of the Madhya Pradesh High Court, in Subhash Projects & Marketing Ltd. v. South Eastern Coalfields Ltd. and the Kerala High Court in Bell House Associates Pvt. Ltd. (supra). In Subhash Projects & Marketing Ltd. (supra), the Madhya Pradesh High Court held:

> ...Compared to the provisions in Sub-sections (3) to (5) of Section 11, in a case covered by Sub-section (2) of the said Section, where there is an agreed procedure for appointment of an arbitrator or arbitrators, on an approach or request to the Chief Justice under Sub-section (6), the Chief Justice has to take necessary measures in accordance with the arbitration agreement 'for securing appointment'. The above distinction is clearly brought out in the matter of appointment of arbitrator by the Chief Justice on request under Sub-sections (3) to (5) as compared to taking measures for 'securing appointment' of arbitrator under Sub-sections (2) and (6). In Sub-sections (3) to (5), as compared to taking measures for 'securing appointment' of arbitrator under Sub-sections (2) and (6). In Sub-sections (3) to (5), on the failure of the parties after notice to appoint arbitrator or arbitrators, the appointment is to be made by the Chief Justice whereas in a case where an agreed procedure for appointment of arbitrator or arbitrators is not followed, under Sub-section (6) on a request by one of the parties, the Chief Justice has merely 'to take necessary measures' for initiating the arbitration proceedings.... This is a case covered by Sub-sections (2) and (6) of Section 11 of the Act to which the provision of service of a notice for appointment within 30 days as laid down in Sub-section (4) of the said section has no application....
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> As has been noticed above, 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 the appointment in accordance with the agreed procedure...
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> As has been held above, in a case covered by Sub-section (2) of Section 11, in exercise of powers under Sub-section (6), this Court as designate of Chief Justice has merely to take necessary measures for enforcement of the arbitration clause containing the agreed procedure for appointment of arbitrator. ...
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> (emphasis supplied)

14. In Bell House Associates Pvt. Ltd. (supra), 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 Sub-sections (3), (4) and (5) would apply in the case where a procedure had not been agreed upon between the parties regarding arbitration. Sub-section (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 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. The learned Counsel for the respondents placed reliance on a decision of the Madhya Pradesh High Court in Subhash Projects and Marketing Ltd. v. South Eastern Coalfield Ltd. (supra). There it was held:

as has been noticed above, 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 the appointment in accordance with the agreed procedure.

... Sub-sections (4) and (5) authorises 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 subsection 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... .

(emphasis supplied)

15. The distinction between Sub-sections (4) and (5) of Section 11 on the one hand and Sub-section (6) of Section 11 on the other must be borne in mind. While Sub-sections (4) and (5) of Section 11 enable the Chief Justice or his designate to appoint an arbitrator, the power conferred under

Sub-section (6) is merely to take "the necessary measure" for securing the appointment of an arbitrator. If the legislature intended to confer power on the Chief Justice or his designate to appoint an arbitrator nothing prevented it from using the same language in Sub-section (6) as it has employed in Sub-sections (4) and (5) of Section 11. The distinction is relevant. The power of the Chief Justice or his designate under Clause (6) is to take "the necessary measure" for securing the appointment of an arbitrator and not take upon itself the task of appointing an arbitrator merely because one of the parties to the arbitration agreement requests it to do so.

16. Among the purposes, for which the Act was made, is to encourage settlement of disputes between parties through mediation, conciliation or other procedures failing which, alone, was it to be resolved by adjudication by an Arbitral Tribunal. Arbitration is an alternative dispute resolution mechanism and the Act lays stress on a more congenial procedure for resolution of disputes than the acrimonious adversorial system of litigation in Courts. The entire scheme of the Arbitration and Conciliation Act, 1996, is to enable the parties to an arbitration agreement to resolve their disputes amicably and, in case they are not able to do so, to choose their forum for resolution of their disputes. The Act lays emphasis on the parties to the arbitration agreement choosing persons, in whom they repose faith and trust, to amicably settle/resolve the disputes between them and it is only when they are not in a position to do so does the Act provide another mechanism for appointment of an arbitrator.

17. In Datar Switchgears Ltd. v. Tata Finance Limited (2006) 2 SCC 638, the Supreme Court held:

> ...When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause... .
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> (emphasis supplied)

18. Primacy is to be given to the procedure prescribed, and mutually agreed upon, by the parties, under the arbitration agreement for appointment of an arbitrator. Parties should be permitted, and if need be persuaded, to adhere to the procedure of appointment prescribed therein. Appointment of arbitrators by the parties themselves should be the norm and a statutorily imposed arbitrator, the exception.

19. Section 11(6) of the Arbitration and Conciliation Act, 1996, when read in the light of the scheme and object of the Act, would require the Chief Justice or his designate to take "the necessary measure" to secure the appointment of an arbitrator. As Clause (9) of the Memorandum of Understanding requires each party to the agreement to appoint its arbitrator and, since the Applicant has nominated Smt. Justice S.V. Maruthi, (Retd) as its arbitrator, the Respondents are directed to nominate their arbitrator, as is required of them under the arbitrator clause of the

Memorandum of Understanding. That such a direction can be issued by the Chief Justice's designate, under Section 11(6), is no longer in doubt.

20. In Ace Pipeline Contracts (P) Ltd. (supra), the Supreme Court, after considering its earlier judgment in Datar Switchgears Ltd. (supra), held that if the opposite party failed to appoint an arbitrator within 30 days of demand, their right to make the appointment was not forfeited but continued and it was only when such appointment was not made before an Application was made under Section 11 seeking appointment of an arbitrator would the right of the opposite party cease. The Supreme Court, while holding that the limitation of 30 days should not be read into Sub-section (6) of Section 11 of the Act, observed:

> ...It may also not be out of place to mention that we are aware of the departmental lethargy in making appointment of arbitrators in terms of the arbitration clause. Therefore, mandamus can be issued by the courts in exercise of powers under Section 11(6) of the Act but the demand should be in the event of failure by the authorities to appoint arbitrators within the reasonable time. Courts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration clause. But in large number of cases if it is found that it would not be conducive in the interest of parties or for any other reasons to be recorded in writing, choice can go beyond the designated persons or institutions in appropriate cases. But it should normally be adhered to the terms of arbitration clause and appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name... .
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> (emphasis supplied).

21. Now the question whether the Application as filed is premature. Are the Respondents justified in not adhering to their obligations under the M.O.U and in not nominating an arbitrator on their behalf, merely because the report of the Commission of Inquiry, appointed under Section 3(1) of the Commission of Inquiries Act, is still under examination and a final decision, with regard to the Applicant's claim, is yet to be taken? A copy of G.O.Ms. No. 465, Agriculture & Co-operation (Horti) Department dated 2.12.2005 has been placed before this Court by the learned Government Pleader. The said G.O. is a notification issued by the Government, appointing Justice Shri T.H.B. Chalapathi, Retired Judge of the Punjab and Haryana High Court, as the Commission of Inquiry to conduct an inquiry into the irregularities in selection of M/s BHC Agro (India) Pvt. Ltd. as consultants for the Kuppam Project and misappropriation in payment of consultancy charges to the company and undue benefit given to them, etc. Appointment of the Commission of Inquiry is in exercise of the powers conferred by Sub-section (1) of Section 3 of the Commissions of Inquiry Act, 1952. It is well settled that the Commission of Inquiry has no judicial powers. A Commission is appointed, under the Commission of Inquiries Act, only to inquire, investigate, record its findings and make its recommendations. It has no power of adjudication. It is merely a fact finding body and its recommendations have no force "proprio vigore". The recommendations made by the Commission are not binding and it is for the Government to consider and take such action as they deem fit. (Ram Krishna Dalmia v. Justice S.R. Tendolkar , State of J&K v. Bakshi Gulam Mohammad , P.V.

Jagannath Rao v. State of Orissa , Manohar Lal v. Union of India , Mohd Ibrahim Khan v. Susheel Kumar). While the recommendations of the Commission of enquiry may be taken into consideration by the Government in arriving at a decision, the decision of the Government, (a party to the M.O.U. containing the arbitration clause), is not binding on the Applicant which is entitled to seek resolution of the dispute, regarding their claim of non-payment of their dues, in accordance with the arbitration clause of the Memorandum of Understanding.

22. This question can also be examined from another angle. The dispute in the present case relates to payment of amounts, which the Applicant claims as due under the Memorandum of Understanding. In case the Government concurs with the recommendations of the Commission of Inquiry and takes a decision that no amount need be paid to the Applicant then a dispute, with regard to the Applicant's claim for payment, must be held to exist and, in terms of the arbitration clause, such a dispute can only be adjudged by an Arbitral Tribunal of three arbitrators. If, on the other hand, the Government differs with the recommendations of the Commission of Inquiry and is satisfied that the amounts, as claimed by the Applicant, is, indeed, payable to them, even if the dispute relating to non-payment of the Applicant's dues is pending before the Arbitral Tribunal, it could still arrive at a mutually acceptable settlement with the Applicant on the amount to be paid to them. Needless to state that it is always open to the Respondents to raise all contentions in their defence, before the Arbitral Tribunal to be constituted in accordance with Clause (9) of the Memorandum of Understanding, as are available to them in law.

23. Since the counter affidavit is silent as to the period within which a decision, on the Applicant's claim for payment of its dues under the M.O.U, would be taken by the Government, the Applicant cannot be asked to wait indefinitely before it seeks resolution of the dispute by the Arbitral Tribunal to be constituted in accordance with Clause (9) of the Memorandum of Understanding. Viewed from any angle, the Application as filed cannot be said to be premature.

24. I consider it appropriate, therefore, to direct the Respondents to nominate their arbitrator, in accordance with clause 9 of the Memorandum of Understanding, within a period of three months from the date of receipt of a copy of this order. The Arbitrator so nominated by the Respondents, along with Smt. Justice S.V. Maruthi (Retd), (the arbitrator nominated by the Applicant), shall elect the third arbitrator. I do not consider it necessary, at this stage, to fix a time frame for the two arbitrators to elect the third arbitrator as there is no reason to doubt that both the arbitrators would elect the third arbitrator without undue delay.

25. Both A.A. Nos. 49 and 50 of 2007 are, accordingly, allowed.