Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5760 OF 2009
(Arising out of SLP [C] No.26906 of 2008)

Indian Oil Corporation Ltd. & Ors. ... Appellants

vs.

M/s Raja Transport (P) Ltd. ... Respondent

J U D G M E N T

R. V. Raveendran, J.

Leave granted. This appeal by special leave is filed against the order dated 26.9.2008 of the learned Chief Justice of the Uttaranchal High Court, in a petition filed by the respondent herein, under section 11(6) of the Arbitration & Conciliation Act, 1996 ('Act' for short), whereby he appointed a retired Judge as the sole arbitrator to adjudicate upon the disputes between the parties.

2. Under an agreement dated 28.2.2005, the appellant appointed the respondent as its dealer for retail sale of petroleum products. Clause 69 of the said agreement provided for settlement of disputes by arbitration. The said clause reads thus :

> "69. Any dispute or a difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this Agreement *shall be referred to the sole arbitration of the Director, Marketing of the Corporation or of some officer of the Corporation who may be nominated by the Director Marketing.* The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the contract relates or that in the course of his duties or differences. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Director Marketing as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as arbitrator in accordance with the terms of the agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. *It is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as arbitrator hereunder.* The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the Agreement, subject to the provisions of the Arbitration Act, 1940 or any statutory modification of re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."
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> ***(emphasis supplied)***

3. By letter dated 6.8.2005, the appellant terminated the dealership of the respondent on the recommendation of its Vigilance Department. The respondent filed Suit No.43/2005 in the Court of Civil Judge, Junior Division, Rishikesh, Dehradun for a declaration that the order of termination of dealership dated 6.8.2005 was illegal and void and for a

permanent injunction restraining the appellant from stopping supply of petroleum products to its retail outlet.

4. In the said suit, the appellant filed an application under section 8 of the Act read with Order VII Rule 11 of Civil Procedure Code, praying that the suit be rejected and the matter be referred to arbitration in terms of Clause 69 of the agreement. The learned Civil Judge, by order dated 16.11.2005 allowed the said application filed by the appellant directing the parties to refer the matter to arbitration within two months, with a further direction that appellant shall not stop supplies to the respondent for a period of two months.

5. Both appellant and respondent challenged the order dated 16.11.2005. Respondent filed Civil Appeal No.96/2005 being aggrieved by the restriction of supply for only two months from 16.11.2005. The appellant filed Civil Appeal No.214/2005, being aggrieved by the direction to continue the supply for a period of two months from 16.11.2005. The respondent also filed an application under Section 9 of the Act seeking an interim injunction against the appellant. The two appeals and the application under section 9 of the Act were disposed of by a common order dated 20.1.2006 by the learned District Judge,

Dehradun. He dismissed both the appeals but allowed the application under section 9 of the Act and restrained the appellant herein from interrupting the supply of petroleum products to respondent for a period of two months, and directed the parties to refer the matter to arbitration as per the agreement within the said period of two months.

6. When the said appeals were pending, the respondent issued a notice dated 4.1.2006 through its counsel to the appellant, referring to the appellant's insistence that only its Director (Marketing) or an officer nominated by him could act as the arbitrator, in pursuance of the order of the Civil Judge dated 16.11.2005. The respondent alleged that it did not expect fair treatment or justice, if the Director (Marketing) or any other employee of the appellant was appointed as arbitrator, and that therefore any such appointment would be prejudicial to its interest. It contended that any provision enabling one of the parties or his employee to act as an arbitrator was contrary to the fundamental principle of natural justice that no person can be a judge in his own cause. The respondent therefore called upon the appellant by the said notice dated 4.1.2006, to fix a meeting at Dehradun between the officers of the appellant and respondent within seven days so as to mutually agree upon an independent arbitrator. The appellant submits that the said request, apart from being contrary to

the arbitration agreement, was also contrary to the subsequent order dated 20.1.2006 which directed that the disputes should be referred to the arbitrator as *per the agreement* and therefore, it did not agree to the said request for an outside arbitrator.

7. In this background, the respondent filed an application (Arbitration Application No.2/2006) under section 11(6) of the Act in March 2006 before the Chief Justice of Uttaranchal High Court praying for appointment of an independent arbitrator to decide the dispute relating to the validity of the termination of the dealership, contending as follows :-

> "That a dispute between the parties has arisen and by notice dated 4.1.2006, the applicant served the respondent a notice calling upon them to appoint an independent arbitrator, but in spite of expiry of reasonable time, no independent arbitrator has been appointed."

The said petition was resisted by the appellant by contending that an arbitrator can be appointed only in terms or clause 69 of the agreement. The learned Chief Justice, after hearing the parties allowed the application by the impugned order dated 26.9.2008, and appointed a retired High Court Judge as sole arbitrator to decide the dispute. The learned Chief Justice assigned the following two reasons to appoint a

retired Judge as Arbitrator, instead of the person named in the Arbitration Agreement :-

(i) The Director (Marketing) of the appellant, being its employee, should be presumed not to act independently or impartially.

(ii) The respondent had taken steps in accordance with the agreed appointment procedure contained in the arbitration agreement and the directions of the civil court, by issuing a notice dated 4.1.2006 calling upon the appellant to appoint an arbitrator. After the receipt of the notice dated 4.1.2006, the appellant had to refer matter for arbitration to its Director Marketing, but it did not do so. Nor did it take any step for appointment of the Arbitrator. By not referring the matter to arbitration to its own Director, despite receipt of the notice dated 4.1.2006, the appellant had failed to act as required under the agreed procedure.

8. The said order of the Chief Justice is challenged by the appellant. On the rival contentions urged by the parties, the following questions arise for our consideration :

(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or impartially?

(ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?

(iii) Whether respondent herein had taken necessary steps for appointment of arbitrator in terms of the agreement, and the appellant had

failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?

Re : Questions No.(i)

9. Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the Arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he can not subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the

disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause.

10. It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable. We may refer to a few decisions on this aspect.

10.1) *In Executive Engineer, Irrigation Division, Puri vs. Gangaram Chhapolia* – 1984 (3) SCC 627, this Court was considering the validity of appointment of the Arbitrator where the arbitration required that the disputes shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. This Court held :

> "The use of the expression "Superintending Engineer, State Public Works Department" in Clause 23 qualified by the restrictive words "unconnected with the work" clearly manifests an intention of the parties that all questions and disputes arising out of a works contract shall be referred to the sole arbitration of a Superintending Engineer of the concerned department. From the very nature of things, a dispute arising

out of a works contract relating to the Department of Irrigation has to be referred to a Superintending Engineer, Irrigation as he is an expert on the subject and it cannot obviously be referred to a Superintending Engineer, Building & Roads. The only limitation on the power of the Chief Engineer under Clause 23 was that he had to appoint a "Superintending Engineer unconnected with the work" i.e. unconnected with the works contract in relation to which the dispute has arisen. The learned Subordinate Judge was obviously wrong in assuming that since D. Sahu, Superintending Engineer, Irrigation was subordinate to the Chief Engineer, he was not competent to act as an Arbitrator or since he was a Superintending Engineer, Irrigation, he could not adjudicate upon the dispute between the parties. The impugned order passed by the learned Subordinate Judge is accordingly set aside."

10.2) In *Eckersley vs. Mersey Dock and Harbour Board* – 1894 (2) QB 667, it was held :

"The rule which applies to a Judge or other person holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties, does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the court in saying that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish, at least, a probability that he will, in fact, be biased in favour of one of the parties in giving his decision..... Where, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employer in respect of the carrying out of the contract."

10.3) In *Secretary to Government, Transport Department, Madras* v. *Munuswamy Mudaliar* – 1988 (Supp) SCC 651, the contract between the respondent and State Government contained an arbitration clause providing that the Superintending Engineer will be the arbitrator. Disputes arising in respect of cancellation of the contract by the

department were referred to the said Arbitrator. An application under section 5 of Arbitration Act, 1940 was filed by the contractor for removal of the arbitrator on the ground of apprehended bias on the part of the arbitrator as he was an employee of the State Government and was subordinate of the chief Engineer who took the decision to cancel the contract. This Court negatived the said contention and held :-

> "When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration. .... Unless there is allegation against the named arbitrator either against his honesty or mala fide or interest in the subject matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act.
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> This Court in *International Authority of India v. K.D.Bali and Anr*. [1988 (2) SCC 360] held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal."

10.4) In *S.Rajan v. State of Kerala* – 1992 (3) SCC 608, this Court held :-

> "Clause (3) of the agreement says that "the arbitrator for fulfilling the duties set forth in the arbitration clause of the Standard Preliminary Specification shall be the Superintending Engineer, Building and Roads Circle, Travandrum". Thus, this is a case where the agreement itself specifies and names the arbitrator. *In such a situation, it was obligatory upon the learned Subordinate Judge, in case he was satisfied that the dispute ought to be referred to the arbitrator, to refer*

> *the dispute to the arbitrator specified in the agreement. It was not open to him to ignore the said clause of the agreement and to appoint another person as an arbitrator.* Only if the arbitrator specified and named in the agreement refuses or fails to act, does the court get the jurisdiction to appoint another person or persons as the arbitrator. This is the clear purport of Sub-section (4). It says that the reference shall be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. To repeat, only in cases where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator."
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> ***[emphasis supplied]***

10.5) In *M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd*. - 1996 (1) SCC 54, this Court held:

> "Shri Desai submits that respondent No.3 may not be required to arbitrate inasmuch as he being an appointee of the Chairman and Managing Director of the appellant himself, respondents' case may not be fairly examined. He prays that any retired High Court Judge may be appointed as an arbitrator by us. We have not felt inclined to accept this submission, because arbitration clause states categorically that the difference/dispute shall be referred "to an arbitrator appointed by the Chairman and Managing Director of IPDL" (Indian Drugs & Pharmaceutical Limited) who is the appellant. This provision in the arbitration clause cannot be given a go-bye merely at the askance of the respondent unless he challenged its binding nature in an appropriate proceeding which he did not do."

10.6) In *Union of India v. M.P.Gupta* (2004) 10 SCC 504, this Court was considering an arbitration agreement which provided for appointment of two Gazetted railway officers as arbitrators. But a learned Single Judge of the High Court while allowing an application under section 20 of the Arbitration Act, 1940, appointed a retired Judge as the sole arbitrator and

a Division Bench affirmed the same. Reversing the said decision, this Court held that having regard to the express provision in the arbitration agreement that two Gazetted railways officers shall be the Arbitrators, a retired Judge could not be appointed as sole Arbitrator.

10.7) In *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd*. [2007 (5) SCC 304], this Court considered a somewhat similar clause of another petroleum corporation which also provided that the arbitration will be by its Director (Marketing) or some other officer nominated by the Director (Marketing). The contractor expressed an apprehension about the independence and impartiality of the named arbitrator and prayed for appointment of a retired Judge as Arbitrator in his application under section 11(6) of the Act. This Court held :

> "In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation (by contending) that if any person of the respondent BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact."

11. The learned counsel for the respondent attempted to distinguish the said decisions. He submitted that except the last two decisions, all others

were rendered with reference to the provisions of the Arbitration Act, 1940, whose provisions were different from the provisions of the Arbitration and Conciliation Act, 1996. It was also submitted that the last two decisions merely followed the legal position enunciated with reference to the old Act, without considering the provisions under the new Act. It is contended that the provisions of the Arbitration and Conciliation Act, 1996, in regard to appointment of arbitrators, are materially different from the provisions of the old Act. It was submitted that several provisions of the new Act lay stress upon the independence and impartiality of the Arbitrator. Reference was invited to sub-section (8) of section 11, sub-sections (1) and (3) of section 12 and Section 18 of the Act. It is contended by the respondent that in view of the emphasis on the independence and impartiality of an arbitrator, in the new Act, and having regard to the basic principle of natural justice that no man should be judged in his own cause, any arbitration agreement to the extent it nominates an officer of one of the parties as the arbitrator, would be invalid and unenforceable.

12. While the provisions relating to independence and impartiality are more explicit in the new Act, it does not mean that the old Act (Arbitration Act, 1940) enabled persons with bias to act as Arbitrators.

What was implicit under the old Act is made explicit in the new Act in regard to impartiality, independence and freedom from bias. The decisions under the old Act on this issue are therefore not irrelevant when considering the provisions of the new Act. At all events, *M. P. Gupta* and *Ace Pipeline* are cases under the new Act. All the decisions proceed on the basis that when senior officers of government/statutory corporations/public sector undertakings are appointed as Arbitrators, they will function independently and impartially, even though they are employees of such Institutions/organisations.

13. We find no bar under the new Act, for an arbitration agreement providing for an employee of a government/ statutory corporation/public sector undertaking (which is a party to the contract), acting as Arbitrator. Section 11(8) of the Act requires the Chief Justice or his designate, in appointing an arbitrator, to have due regard to "(a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent or impartial arbitrator". Section 12(1) requires an Arbitrator, when approached in connection with his possible appointment, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Sub-section 12(3) enables the Arbitrator

being challenged if (i) the circumstances give rise to justifiable doubts as to his independence or impartiality, or (ii) he does not possess the qualifications agreed to by the parties. Section 18 requires the Arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case. Nothing in sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement, naming the Arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement. Sub-section (2) of section 11 provides that parties are free to agree upon a procedure for appointment of arbitrator/s. Sub-section (6) provides that where a party fails to act, as required under the procedure prescribed, the Chief Justice or his designate can take necessary measures. Sub-section (8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator. The power under sub-section (8) is intended to be used keeping in view the terms of the arbitration agreement. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality of lack of independence on his part.

14. There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/ public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.

15. The position may be different where the person named as the Arbitrator is an employee of a company or body or individual other than the state and its instrumentalities. For example, if the Director of a private company (which is a party to the Arbitration agreement), is named as the Arbitrator, there may be valid and reasonable apprehension of bias in

view of his position and interest, and he may be unsuitable to act as an Arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named Arbitrator, then the court has the discretion not to appoint such a person.

16. Subject to the said clarifications, we hold that a person being an employee of one of the parties (which is the state or its instrumentality) cannot *per se* be a bar to his acting as an Arbitrator. Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias.

17. Before parting from this issue, we may however refer to a ground reality. Contractors in their anxiety to secure contracts from government/ statutory bodies/public sector undertakings, agree to arbitration clauses providing for employee-arbitrators. But when subsequently disputes arise, they balk at the idea of arbitration by such employee-arbitrators and tend to litigate to secure an "independent" arbitrator. The number of litigations seeking appointment of independent Arbitrator bears testimony to this vexed problem. It will be appropriate if governments/statutory authorities/public sector undertaking reconsider their policy providing for

arbitration by employee-arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in Arbitrators. A general shift may in future be necessary for understanding the word "independent" as referring to someone not connected with either party. That may improve the credibility of Arbitration as an alternative dispute resolution process. Be that as it may.

Re : Question No. (ii)

18. Where the arbitration agreement names or designates the arbitrator, the question whether the Chief Justice or his designate could appoint any other person as arbitrator, has been considered by this Court in several decisions.

18.1) In *Ace Pipeline Contract Pvt. Ltd*. (supra), a two-Judge Bench of this Court held that where the appointing authority does not appoint an arbitrator after receipt of request from the other party, a direction can be issued under section 11(6) to the authority concerned to appoint an arbitrator as far as possible as per the arbitration clause. It was held that normally the court should adhere to the terms of the arbitration agreement except in exceptional cases for reasons to be recorded or where both parties agree for a common name.

18.2) In *Union of India v. Bharat Battery Manufacturing Company Pvt. Ltd*. [2007 (7) SCC 684], another two-Judge Bench of this Court held that once the notice period provided for under the arbitration clause for appointment of an arbitrator elapses and the aggrieved party files an application under section 11(6) of the Act, the right of the other party to appoint an arbitrator in terms of the arbitration agreement stands extinguished.

18.3) The divergent views expressed in *Ace Pipeline* (supra) and *Bharat Battery* (supra) were sought to be harmonised by a three-Judge Bench of this Court in *Northern Railway Administration* v. *Patel Engineering Co. Ltd.* [2008 (11) SCALE 500]. After examining the scope of sub-sections (6) and (8) of section 11, this Court held :

> "The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures". This expression has to be read along with requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitration.
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> *A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated*

by him to appoint the named arbitrator or arbitrators. But at the same time due regard has to be given to the qualifications required by the agreement and other considerations.

The expression 'due regard' means that proper attention to several circumstances have been focused. The expression 'necessary' as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable step required to be taken...

... It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment, the twin requirements of sub-section (8) of section 11 have to be kept in view, considered and taken into account."

(emphasis supplied)

19. While considering the question whether the arbitral procedure prescribed in the agreement for reference to a named arbitrator, can be ignored, it is also necessary to keep in view clause (v) of sub-section (2) of section 34 of the Act which provides that an arbitral award may be set aside by the court if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with any provision of Part-I of the Act from which parties cannot derogate, or, failing such agreement, was not in accordance with the provisions of Part-I of the Act). The legislative intent is that the parties should abide by the terms of the arbitration agreement. If the arbitration agreement provides for arbitration by a named Arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by *Northern Railway*

Administration, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the Arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent Arbitrator in accordance with section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named Arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons.

20. This takes us to the effect of the condition in the arbitration agreement that "it is also a term of this contract that no person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as Arbitrator." Such a condition interferes with the power of the Chief Justice and his designate under section 11(8) of Act to appoint a suitable person as arbitrator is appropriate cases. Therefore, the said portion of the arbitration clause is

liable to be ignored as being contrary to the Act. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by designation) as the Arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all parties, as the Arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the non-availability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may.

21. In the light of the above discussion, the scope of section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an Arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of

section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) & (5), such a time bound requirement is not found in sub-section (6) of section 11. The failure to act as per the agreed procedure within the time limit prescribed by the arbitration agreement, or in the absence of any prescribed time limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that (i) a party failing to act as required under the agreed appointment procedure; or (ii) the parties (or the two appointed arbitrators), failing to reach an agreement expected of them under the agreed appointment procedure; or (iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of section 11 *shall endeavour to give effect to the appointment procedure prescribed in the arbitration* clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by

ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

Re : Question (iii)

22. In this case, the respondent approached the Chief Justice of the High Court by alleging that it had acted in terms of the agreed procedure under the arbitration agreement, and that the appellant had failed to act as required under the appointment procedure. Therefore, the respondent invoked the power of the Chief Justice under sub-section (6) of section 11. In view of it, what falls for consideration is whether the appellant had failed to act as required under the appointment procedure. This pre-supposes that the respondent had called upon the appellant to act as required under the agreed appointment procedure. Let us examine whether the respondent had in fact called upon the appellant to act in accordance with the agreed procedure.

23. When the dispute arose, the respondent did not seek arbitration, but went to civil court. It was the appellant who sought reference to arbitration in terms of the arbitration agreement. The order dated 16.11.2005 of the Civil Judge, Junior Division directing reference to arbitration within two months from 16.11.2005 was challenged by both

the parties. The District Judge, Dehradun by its order dated 20.1.2006 directed the parties to refer the dispute to arbitrator as per agreement, within two months. Therefore, the order dated 16.11.2005 stood merged with the order of the District Judge dated 20.1.2006, which directed reference of the dispute to arbitration as per the agreement, within two months. But there was no direction by the court to appoint an independent arbitrator contrary to the terms of the arbitration agreement. In view of the order dated 20.1.2006, the respondent ought to have referred the dispute to the Director (Marketing) of the appellant within two months from 20.1.2006. It failed to do so. Therefore, it was the respondent who failed to act in terms of the agreed procedure and not the appellant. In fact, as the Arbitrator was already identified, there was no need for the respondent to ask the appellant to act in accordance with the agreed procedure. On the other hand, the respondent ought to have directly referred the disputes to the Director (Marketing) of the appellant corporation in terms of the arbitration agreement.

24. We may now deal with the notice dated 4.1.2006 by which the respondent notified the appellant that it was not willing for appointment of arbitrator in terms of the agreement and that both should therefore hold discussions to decide upon an independent arbitrator. The letter dated

4.1.2006 cannot, be construed as a step taken by the respondent for invoking arbitration in terms of the arbitration agreement, as it is a demand in violation of the terms of arbitration agreement. It required the appellant to agree upon an arbitrator, contrary to the provisions of the arbitration agreement. If the respondent wanted to invoke arbitration in terms of the arbitration agreement, it ought to have referred the disputes to the Director (Marketing) in term of section 69 of the contract agreement for arbitration. Alternatively, the respondent ought to have at least called upon the appellant, to refer the dispute to the Director (Marketing) for arbitration. In the absence of any such a demand under clause 69, it cannot be said that the respondent invoked the arbitration clause or took necessary steps for invoking arbitration in terms of the arbitration agreement. If the respondent had called upon the appellant to act in a manner contrary to the appointment procedure mentioned in the arbitration agreement, it cannot be said that the appellant failed to respond and act as required under the agreed procedure. As the letter dated 4.1.2006 could not be construed as a valid demand for arbitration, the finding of the learned Chief Justice that non-compliance with such request would enable the respondent to appoint an independent arbitrator, is clearly illegal. What is significant is that even subsequent to the order dated 20.1.2006 passed by the District Court, the respondent did not refer

the disputes to the Director (Marketing) of the appellant nor called upon the appellant to refer to the disputes in terms of the arbitration agreement, nor withdraw its earlier letter dated 4.1.2006 demanding appointment of an independent arbitrator contrary to the agreed procedure under the arbitration agreement.

25. In the circumstances, the third question is answered in the negative. Consequently, the learned Chief Justice erred in having proceeded on the basis that the respondent had performed its duty in terms of the arbitration agreement in seeking reference to arbitration and that the appellant had failed to act in the matter and therefore, there was justification for appointing an independent arbitrator.

26. The appellant is therefore entitled to succeed on both the points. The appeal is, therefore, allowed. The order dated 26.9.2008 of the High Court is set aside. The Director (Marketing) of the appellant Corporation is appointed as the sole arbitrator to decide the disputes between the parties.

.....J
[R. V. Raveendran]

.....J
[D. K. Jain]

New Delhi;
August 24, 2009.