(2005) 08 AP CK 0008

Andhra Pradesh High Court

Case No: AA No. 24 of 2005

Pampa Hotels Ltd.		APPELLANT
	Vs	
A.P. Tourism Development Corporation Ltd. (APTDCL) and Another		RESPONDENT

Date of Decision: Aug. 16, 2005

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(5), 11(6), 16, 7

Citation: (2005) 6 ALD 43 : (2005) 6 ALT 37

Hon'ble Judges: N.V. Ramana, J

Bench: Single Bench

Advocate: M.P. Chandra Mouli, for the Appellant; Nandigam Krishna Rao, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

N.V. Ramana, J.
By this application, filed u/s 11(5) of the Arbitration and Conciliation Act, 1996, the applicant, namely M/s. Pampa Hotels Limited, represented by its Managing Director, prays this Court to appoint an Arbitrator for resolution of the disputes, which have arisen out of an agreement dated 30-3-2002, entered into between the applicant and the respondent.

2. In response to the Notification dated 2-12-2000, issued by the respondent, namely M/s. Andhra Pradesh Tourism Development Corporation Limited (APTDC), inviting bids for development and management of a Three Star Hotel at Alipiri, Tirupathi, Chittoor District, M/s. Sudalagunta Hotels Limited, which submitted its bid, was found to be the highest bidder. M/s. Sudalagunta Hotels Limited, for the purpose of implementation of the said project, it is averred, has promoted and got

incorporated the applicant as a company under the provisions of the Companies Act, 1956. Pursuant to its incorporation, the applicant states that the respondent entered into a Development and Management Agreement as well as Lease Agreement with it on 30-3-2002. According to the applicant, the Lease Agreement is for a period of 33 years, and is provided with a renewal clause.

3. In terms of the Development and Management Agreement and the Lease Agreement, the applicant states that he deposited an amount of Rs. 8,85,600/- towards advance lease amount for 12 months and Rs. 5,00,000/- towards Security Deposit and Rs. 4,00,000/- towards Project Development Charges. Though as per Article 4.2 of the Development and Management Agreement, the applicant shall commence the project on or before the scheduled date of commencement, but not later than 60 days from the date of signing the said agreement, the applicant states that the work could not be commenced as the respondent had delayed the handing over the site by four months, and in fact, had handed over the site only on 4-8-2002.

4. After the handing over of the site by the respondent, the applicant states that he mobilized men and machinery and commenced the work by demolishing the Guest House Building which existed therein and removed the debris and dug four borewells and obtained electric and telephone connection and even constructed store rooms and watchmen quarters. While the work was in progress, the applicant states that one Smt. Rani Naidu, filed a suit in OS No. 1298 of 2002 on the file of the Additional Junior Civil Judge, Tirupati, seeking permanent injunction against the applicant and obtained an order of temporary injunction in IA No. 1804 of 2002, dated 4-12-2002 in respect of 6 m x 6 m of land in Sy. No. 48/3, Alipiri Road. As orders of temporary injunction were granted only in respect of some portion of the land, the applicant states that he decided to proceed with the construction, and at that point of time, Smt. Rani Naidu filed an application in IA No. 326 of 2003 seeking his detention. The applicant states that when he brought all these facts to the notice of the respondent vide his letter dated 21-12-2002, the respondent filed application in IA No. 346 of 2003 to implead them as party-defendant, and another application in IA No. 27 of 2003, to advance the hearing of the implead application, which initially was allowed, and later was dismissed as not pressed at the instance of the respondents.

5. The applicant states that Articles 11.1, 11.2.2 and 11.3.1 of the Development and Management Agreement and Clauses 15, 15(b)(ii) and 15(d)(v) of the Lease Agreement contain Force Majeure and non-political Force Majeure clauses, which inter alia provide for suspension of the obligations/responsibilities to be performed by both the parties and also provide for non-payment of ground rent of the site during the currency of the said clauses. Though the order of temporary injunction, granted by the Additional Junior Civil Judge, Tirupati, was in existence, and by reason of non-political Force Majeure clause, the agreements stood suspended, the applicant states yet the respondent had collected the rents from the applicant. The

applicant states that apart from the amounts already deposited, as agreed to in the Development and Management Agreement and Lease Agreement, from the date of handing over the site to him, he started paying the rents, and till the end of July, 2004, he paid an amount of Rs. 18,04,648/- towards rent. Thus, in all the applicant claims to have paid an amount of Rs. 35,90,248/- to the respondent.

6. The applicant states that the respondent vide letter dated 24-4-2003 informed him that as per the Development and Management Agreement, he was required to begin the construction work not later than 60 days from the date of its execution, and that further 30 days time is granted to the applicant to begin the construction, else the Development and Management Agreement, would be terminated. In response to the said letter, the applicant vide letter dated 24-5-2003 informed the respondent that the site was handed over to them with delay of four months, and this apart, due to passing of orders of temporary injunction by the Additional Junior Civil Judge, Tirupati, the construction work could not be taken up, and requested the respondent to extend the period of the Development and Management Agreement by fifteen months from the date of its expiry. In reply thereto, the respondent vide letter dated 15-7-2003 informed the applicant that the order of temporary injunction would not come in their way, and extension of time would be considered in terms of Clause 5.13 of the Lease Agreement on condition of the applicant paying Rs. 20,000/- towards Liquidated Damages for a period of 90 days. In answer to the said letter, the applicant again addressed another letter dated 3-8-2003 reiterating the facts.

7. While the matters stood thus, the applicant states that the Deputy Manager (Projects) of the respondent addressed a letter dated 5-9-2003 notifying certain modifications to the DPR and informed the applicant that his request for extension of time is being considered by the respondent and that the applicant may submit the modified DPR and plans after extension of time, and in that regard, the applicant states some correspondence ensued between the parties. While so, the applicant states that the respondent addressed a letter dated 24-1-2004 to him for payment of rents and sought for submission of revised DPR, drawings and financial closure etc., and in reply thereto, the applicant addressed letter dated 26-3-2004 informing that the drawings do not require any changes for the reasons given in the letter and requested for approval of the DPR and the drawings.

8. The applicant states that the respondent without considering his request, had vide letter dated 21-4-2004 terminated the Development and Management Agreement and Lease Agreement. In response thereto, the applicant states that he addressed a letter dated 27-4-2004 to the respondent narrating the sequence of events and required to have mutual discussions in terms of Article 18 of the Development and Management Agreement. But the respondent instead of responding to the said letter, had vide their letter dated 6-5-2005, called upon the applicant to handover the site. Thereupon, the applicant claims to have met the

Chairman and Managing Director of the respondent on 21-5-2004 and in the elaborate discussions, it was decided that the applicant has to pay to the respondent a sum of Rs. 18,00,000/- at the rate of Rs. 20,000/- per day for 90 days for extending the period by two years. The applicant states that he has agreed to the said proposal and vide his letter dated 31-5-2004 informed the respondent to take the approval of their Board.

9. The applicant states that the respondent without honouring the proposal put forth by them, had called upon the applicant vide letter dated 15-6-2004 to deposit a sum of Rs. 18,00,000/- towards liquidated damages and also the rent due from February, 2004 at the rate of Rs. 77,490/- per month, and thereafter, the representation shall be made for change of project implementation. Pursuant thereto, the applicant states that he paid rental dues to the tune of Rs. 4,64,940/- by way of demand draft sent vide letter dated 7-7-2004 and requested to grant their approval for extension of time. The applicant states that the respondent without confirming the extension of time, vide their letter dated 5-7-2004 directed the applicant to deposit the amounts, and in reply thereto, the applicant addressed letter dated 13-7-2004 informing that he is ready and willing to pay Rs. 18.00 lakhs immediately after the time is extended. The respondent vide their letter dated 13-8-2004, informed the applicant that his request for extension of time by two years is not acceptable to them and directed the applicant to handover possession of the site on or before 21-8-2004 and, ultimately on 21-8-2004, the respondent faxed a message to the applicant stating that they had taken over possession of the site. Thereupon, the applicant made a representation to the CMD of the respondent on 24-8-2004 for amicable settlement of the disputes, but there was no response.

10. The applicant states that when the respondent tried to take forceful possession of the site, he filed a suit in OS No. 2773 of 2004 on the file of the Chief Judge, City Civil Court, Hyderabad, u/s 9 of the Arbitration and Conciliation Act, 1996 restraining the respondent from interfering with his possession till award is passed by the Arbitrator, and obtained orders of interim injunction in IA No. 3485 of 2004 on 9-11-2004. Thereafter, having regard to the arbitration clause in Article 18 of the Development and Management Agreement and Clause 16 of the Lease Agreement, he got issued legal notice dated 29-11-2004 to the respondent calling upon them to refer the disputes to arbitration, but the respondent in spite of receiving the said notice, neither replied nor referred the disputes to arbitration even though the statutory period of notice expired. Hence, the applicant filed the present application.

11. Heard the learned Counsel for the applicant and the learned Counsel for the respondent.

12. The learned Counsel for the applicant submitted that the applicant could not commence the work in time as the respondent delayed the handing over of the site by four months, and though immediately after handing over the site, the applicant commenced the work, and in fact, while the work was in progress, one Smt. Rani

Naidu, filed a suit in OS No. 1298 of 2002 on the file of the Additional Junior Civil Judge, Tirupati, seeking permanent injunction against the applicant and obtained temporary injunction, and therefore, the applicant could not proceed with the work further.

13. The learned Counsel for the applicant submitted that the applicant had even brought this to the notice of the respondent. He submitted that having regard to non-political Force Majeure clauses in Article 11.2.2 and Clause 15(b)(ii) in the Development and Management Agreement and the Lease Agreement entered into between the parties, which inter alia provide for suspension of obligations/responsibilities arising under the said Agreements, the applicant suspended the work.

14. However, it is submitted that the respondent, curiously vide their letter dated 24-4-2004 called upon the applicant to begin the construction work, and in reply thereto the applicant vide his reply letter dated 24-5-2004 informed the respondent 2005(6) FRF4 that they had handed over the site with four months delay and requested the respondent to extend the period by fifteen/twenty months. The learned Counsel for the applicant further submits that the respondent having received the said letter, informed the applicant that their request for extension of time would be considered if he is ready and willing to pay liquidated damages for a period of 90 days, and though the applicant expressed his readiness and willingness to pay the liquidated damages and also paid the rents as agreed to in the Lease Agreement, the respondent vide their letter dated 13-8-2004 informed the applicant that his request for extension of time is not acceptable to them, and called upon him to handover the site, and accordingly they sent a fax message on 21-8-2004 to the applicant stating that they had taken over the site.

15. Thereafter, it is submitted by the learned Counsel for the applicant that the applicant made representation dated 24-8-2004 to the CMD of the respondent to settle the disputes amicably, but there was no response, and therefore, the applicant having regard to Article 18 of the Development and Management Agreement and Clause 16 of the Lease Agreement, which provides for settlement of disputes through arbitration, called upon the respondent vide legal notice dated 29-11-2004 to refer the disputes raised by him to the Arbitrator, and as the respondent in spite of receiving the said notice and even after expiry of the statutory notice period, neither replied nor referred the disputes to arbitration, the applicant filed the present application, which has to be allowed. In support of his submissions, the learned Counsel for the applicant placed reliance on a recent judgment of the Apex Court in Shree Subhlaxmi Fabrics Pvt. Ltd. v. Chand Mal Baradia II (2005) CLT 23 (SC).

16. The Managing Director of the respondent filed an exhaustive counter. The learned Counsel for the respondent reiterated the averments made in the counter-affidavit. He mainly contended that as on the date of entering into the

Development and Management and the Lease Agreement, i.e., on 30-3-2002 by the respondent with the applicant, the applicant was not having legal existence, in that it was not registered under the Companies Act, 1956 with the Registrar of Companies, it was registered only on 9-4-2003, i.e., one year and ten days after entering into the agreements, and therefore, the said agreements are unenforceable, as they are invalid and not at all agreements in the eye of law. In support of his contention that when an agreement itself is invalid, even the arbitration clause therein becomes invalid, and the validity of the said agreement should be decided by the Court, and should not be left to the Arbitrator to decide, placed heavy reliance on the judgment of the five-Judge Bench of the Apex Court in Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., .

17. The learned Counsel for the respondent submitted that though respondent No. 1 accepted the bid of M/s. Suddalagunta Hotels Limited on 17-4-2001, it is only after issuing legal notice dated 22-3-2002, it was informed to them that the applicant was incorporated for the purpose of execution of the project and entering into agreements, and accordingly, the Development and Management Agreement and the Lease Agreement, was entered into by the respondent with the applicant. In fact, respondent is contemplating to file a case of cheating and fraud against the applicant. He submitted that as the site mentioned in the notification was not of rectangular shape, at the request of the applicant to make it rectangular, delay had taken place in handing over the site to the applicant. He submitted that as per Schedule V of the Development and Management Agreement, the date of handing over of the site is 5-4-2002 and the commercial operations are to commence from March, 2004 i.e., the work is to be completed within eighteen months although an enlarged period of 20 months is provided thereunder. He submitted that even if 4-8-2002, the date on which the site was handed over by the respondent to the applicant is taken as the appointed date, the applicant will have to complete the project by 3-2-2004, from which date commercial operations should have commenced.

18. He submitted that though Smt. Rani Naidu had filed the suit in O.S. No. 1298 of 2002 on the file of the Additional Junior Civil Judge, Chittoor, seeking permanent injunction and also obtained interim orders, the fact remains, she had filed the suit in respect of the land in Sy. No. 48/3 and not in respect of the land in Sy. No. 48/2 which was handed over to the applicant, and as such, the Force Majeure clauses in the Development and Management Agreement and the Lease Agreement have no application to the applicant for suspending the obligations/responsibilities arising under the Agreements, and at any rate, the applicant has not taken any steps to get the said order of injunction vacated till 2004. It is submitted that the applicant except referring to the existence of order of temporary injunction, never attended the review meetings held on 21-12-2002, 16-1-2003 etc., and though the applicant was called upon to submit detailed project report, drawings and financial closure of the project, as agreed to by him in the meeting held on 11-11-2002, vide letter dated

20-11-2002, which was followed by reminders dated 9-12-2002, 7-1-2003 and 13-3-2004, the applicant did not submit them till date.

19. He submitted that as no progress was achieved, the respondent issued notice of termination on 24-4-2003 to which the applicant replied vide reply notice dated 24-5-2003 reiterating the very same plea that there is an order of injunction subsisting. The applicant had sent the first set of detailed project report, designs and drawings of the project on 9-7-2003, and the revised detailed project vide letter dated 26-3-2004, and as regards his request for extension of time by fifteen/twenty months, the applicant was informed that it would be considered for a period of 90 days on payment of liquidated damages at the rate of Rs. 20,000/- per day, and that of the applicant fails to achieve the commercial operations, the respondent reserves the right to terminate the agreements. As the project implementation time expired, the respondent invoking Article 4.14 of the Development and Management Agreement, issued notice of termination dated 21-4-2004 to the applicant, and in reply thereto, the applicant vide letter dated 27-4-2004 sought to invoke the non-political Force Majeure clause, but the same was rejected as having no application, for the reasons given by the respondent in the letter dated 6-5-2004. Pursuant thereto, though the applicant on 21-5-2004 requested for extension of time, he was informed that the matter has to be placed before the Board, and that before placing of the matter before the Board, he has to pay liquidated damages, which he did not pay. Therefore, the respondent had taken over the site on 21-8-2004, and suppressing this fact, the applicant filed a civil suit in O.S. No. 2773 of 2004, and obtained an order of status quo in LA. No. 3485 of 2004 on 9-11-2004.

20. He submitted that termination of agreement cannot be treated as a dispute. Though the respondent received the legal notice dated 29-11-2004 got issued by the applicant, calling upon them to appoint an Arbitrator, but having regard to the fact that there is no arbitrable dispute and no arbitrable powers can be invoked in relation to termination of the Development and Management Agreement and the Lease Agreement, the respondent did not act or reply to the said notice, and as such, the present application for appointment of Arbitrator is not maintainable, and is liable to be dismissed.

21. Admittedly, the applicant and the respondent entered into Development and Management Agreement and Lease Agreement on 30-3-2002. The Development and Management and the Lease Agreement, admittedly, contain arbitration clauses in Article 18 and Clause 16 respectively. Save to the not finding an acceptable solution within the period specified in Article 18 and Clause 16, which is 60 days and 30 days respectively, both Article 18 and Clause 16 are in pari materia with each other. Article 18 of the Development and Management Agreement, reads thus :

In the event of dispute(s) best efforts shall be made to resolve them by mutual discussions amicably. In the event of the parties not finding any acceptable solution to the dispute(s) within 60 (sixty) days the same shall be referred to arbitration in

accordance with the procedure specified in Arbitration and Conciliation Act, 1996.

22. A reading of the above, would make it clear that in spite of best efforts having been made by the parties to resolve the disputes by mutual discussions, if no acceptable solution is found within the period mentioned in the arbitration clause, the disputes shall be referred to arbitration in accordance with the procedure specified in the Arbitration and Conciliation Act, 1996.

23. According to the applicant, when the respondent sought to take possession of the site and terminate the agreements, there arose disputes between them, and in spite of best efforts made, when no acceptable solution was found to the disputes raised by him within the time mentioned in Article 18 and Clause 16 of the Development and Management Agreement and the Lease Agreement, he called upon the respondent vide statutory notice dated 29-11-2004, to refer the disputes to arbitration, and in spite of expiry of the statutory period, the respondent neither replied nor referred the disputes to arbitration, and therefore, he filed the present application. The respondent, in its counter fairly admitted the fact that it received the legal notice got issued by the applicant, but did not reply to the same nor referred the disputes raised by the applicant to arbitration because the Development and Management Agreement and the Lease Agreement entered into by the respondent with the applicant, are invalid and no agreements in the eye of law, for the reason that as on the date of entering into the agreements, the applicant was not having any legal existence, in that it was not incorporated under the provisions of the Companies Act, it was incorporated as a company only on 9-4-2003 i.e., one year and ten days after entering into the said agreements.

24. The dispute whether the Development and Management Agreement and the Lease Agreement, entered into by the applicant and the respondent are invalid and not agreements in the eye of law, and as such, the arbitration clause therein, also become invalid and cannot be looked into, is a contentious issue. Likewise, the disputes whether the respondent handed over the site to the applicant in time or with delay and, whether the political and non-political Force Majeure clauses in the agreements, are applicable to the case of the applicant, in support of his case for extension of time for completion of the project, are contentious issues.

25. The law is well settled that in an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator, this Court shall not go into contentious issues, for contentious issues are matters for the Arbitrator to decide, and what all the Court is required to keep in mind while appointing an Arbitrator is the qualification of the Arbitrator to decide the nature of disputes in terms of the arbitration agreement and his impartiality to the contesting parties.

26. A three-Judge Bench of the Apex Court in Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., , observed that at the stage when a party approached the Chief Justice for appointment of an Arbitrator, the contentious

issues should not be decided at that stage and the aggrieved party should be asked to raise all the objections including the objection regarding non-existence of an arbitration clause before the Arbitral Tribunal. Observing so, it held thus :

When the matter is placed before the Chief Justice or his nominee u/s 11 of the Act, it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage, it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same....

27. In its another judgment, the Apex Court in M/s. Konkan Railway Corpn. Ltd. and Another Vs. M/s. Rani Construction Pvt. Ltd., , observed that the Chief Justice or his designate does not perform adjudicatory function u/s 11 of the Arbitration and Conciliation Act, 1996. Observing so, it held thus :

Section 11 did not require the Chief Justice or his designate to perform any adjudicatory function. All that the Chief Justice or his designate was required to do was to nominate an Arbitrator if a party to an arbitration agreement had failed to do so within the specified time after a request to it to do so had been made, and in so nominating an Arbitrator the Chief Justice or his designate was to have regard to the qualifications that were required of the Arbitrator by the agreement of the parties and to other considerations which were likely to secure the appointment of an independent and impartial Arbitrator. This the Chief Justice or his designate had to do on a ex facie basis; no element of adjudication came into it.

28. To the very same effect is another judgment of the apex Court in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., , wherein it held thus :

There is nothing in Section 11 of the Arbitration and Conciliation Act, 1996 that requires the party other than the party making the request to be noticed. It does not contemplate a response from the other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an Arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an Arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the Arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial Arbitrator also cannot lead to the conclusion that the Chief Justice or

his designate is required to perform an adjudicatory function. That the word "decision" used in the matter of the request by a party to nominate an Arbitrator does not of itself mean that an adjudicatory decision is contemplated.

29. In the very same judgment, the apex Court further held as follows :

As we see it, the only function of the Chief Justice or his designate u/s 11 is to fill the gap left by a party to the arbitration agreement or by the two Arbitrators appointed by the parties and nominate an Arbitrator. This is to enable the Arbitral Tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the Arbitrator is made by a person occupying high judicial or his designate, who would take due care to see that a competent, independent and impartial Arbitrator is nominated.

30. The apex Court in Canara Bank and Others Vs. S. Ramalingam, , upon considering the provisions of Sections 8 and 16 of the Arbitration and Conciliation Act, 1996 held thus :

The language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an Arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an Arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the lower Courts. If that be so, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred the dispute to arbitration. Section 16 has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. It is clear from the language of the Section, that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal. The Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case.

31. This Court, following the judgments of the apex Court in Konkan Railway Corporation Ltd. v. Rani Constructions Pvt. Ltd. (supra) and H.P. Corporation Ltd. v. Pinkcity Midway Petroleums, (supra) in Surender Singh Bajaj Vs. Harmeet Singh Sethi and Another, , while observing that Section 11 of the Arbitration and Conciliation Act, 1996 merely contemplated that the Court should see whether 30 days period of notice has expired before filing the arbitration application, rejected the contention of the party opposing the application for appointment of Arbitrator on the ground that the very agreement being a fabricated one, the contents thereof,

including the arbitration clause therein, cannot be looked into and it cannot be acted upon, and held thus :

The foremost consideration either for the Chief Justice or his designate in an application u/s 11 of the Arbitration and Conciliation Act, 1996 is to see whether the 30 days period of notice has expired and nothing more, and his only function to be discharged is to fill the gap left by a party to the arbitration agreement. In the instant case, it is admitted by the respondents that they have received the notice got issued by the applicant requesting appointment of an Arbitrator for resolution of the disputes existing between them, but they have ignored the same on the ground that the alleged agreement, basing on which the applicant made a request for appointment of an Arbitrator, is a fabricated agreement and could not be acted upon. Once it is admitted by the respondents that they have received the notice requesting appointment of an Arbitrator, irrespective of the fact, whether the disputes raised by the applicant are arbitrable disputes or not and whether the alleged agreement, basing upon which, the applicant sought to invoke the arbitration proceedings, is a forged or fabricated document, the respondents are left with no other choice, but to name an Arbitrator, but on their failure to do so, it becomes incumbent upon the Court to appoint an Arbitrator, when a request in that regard is made by a party to the agreement. Even assuming that the contentions raised by the applicant are not genuine and the agreement relied upon by him to invoke the arbitration clause, is a fabricated agreement, yet having regard to the limited scope of Section 11 of the Arbitration and Conciliation Act, 1996, namely that of nominating an Arbitrator, this Court cannot go into such issues and record its findings, and it is for the Arbitrator appointed by this Court to rule on such contentious issues.

32. In the case on hand, admittedly, the respondent having received the notice got issued by the applicant, neither offered his reply nor appointed an Arbitrator, even though the statutory notice period of 30 days had expired, and as such, the applicant had made out a case for appointment of Arbitrator for resolution of the disputes.

33. Though the respondent contended that the Development and Management and the Lease Agreement are invalid and no agreements in the eye of law, the fact remains that u/s 7 of the Arbitration and Conciliation Act, 1996 "arbitration agreement" is defined to mean an agreement by the parties to submits to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, and includes an arbitration agreement in the form of an arbitration clause in a contract or a separate agreement or an arbitration agreement which is in writing and is contained in a document signed by the parties, exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement or exchange of statements of claim and defence in which the existence of the

agreement is alleged by one party and not denied by the other.

34. In the case on hand, the respondent though received the notice sent by the applicant, as observed supra, neither replied to the notice nor denied the existence of the agreement, and in fact, it is their admitted case in the counter filed before the Court that they entered into the Development and Management Agreement and the Lease Agreement with the applicant, but their only plea is that the said agreements are invalid and no agreements in the eye of law for the reason that as on the date of entering into the said agreements, the applicant had no legal existence. The respondent having not disputed the entering into the Development and Management Agreement and the Lease Agreement with the applicant in spite of receiving the notice sent by the applicant, and the respondent, in fact, having acted and entered into substantial correspondence with the applicant in pursuance of the said agreements, and the respondent, in fact, ultimately by its communication dated 21-4-2004, invoking Article 4.14 of the Development and Management Agreement, having terminated the agreements, now when it comes to invoking the arbitration clauses in the agreements upon which it had earlier acted upon, cannot be allowed to contend that they are invalid and no agreements in the eye of law.

35. Be that as it may, this Court in Surender Singh Bajaj v. Harmeet Singh Sethi (supra), has taken the view that merely on the basis of allegations and counter-allegations, it cannot be conclusively said that the agreement relied upon by the applicant is a fabricated agreement, engineered for the purpose of defrauding the respondents. Since in the instant case also the respondent is contending that the Development and Management Agreement and the Lease Agreement, are invalid agreements and no agreements in the eye of law, they cannot be effectively decided by this Court on the basis of affidavits, counters and reply-affidavits.

36. After the coming into force of the Arbitration and Conciliation Act, 1996, the law on the subject of arbitration has changed drastically, as noted in the judgments above, the Act intended to speed up the arbitration process, and merely empowered the Courts to discharge administrative function, namely that of appointing an Arbitrator, and not to adjudicate disputed questions, which are left to the Arbitrator to decide, and this is evident from the scheme of the Arbitration and Conciliation Act, 1996 itself, wherein u/s 16 the Arbitral Tribunal is empowered to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. In this context, reference to the observations made by the apex Court in Konkan Railway Corporation Ltd. v. Mehul Constructions Co. (supra) would suffice, which read as follows :

Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the Arbitrator under the 1996 Act indicates the intention of the Legislature and its anxiety to see that the arbitral process is set in motion. This

being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an Arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an Arbitrator. If this approach is adhered to, then there would be grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act....

37. In view of the above, and having regard to the very narrow and limited administrative role vested in the Court by the Arbitration and Conciliation Act, 1996, namely that of appointing an Arbitrator upon the party approaching the Court satisfying that the other party has failed to refer the disputes to Arbitrator as per the procedure agreed upon to by them in the agreements in spite of receipt of statutory notice and expiry of the notice period, and leaving the other contentious issues for decision by the Arbitrator, and considering the scheme of the Arbitration and Conciliation Act, 1996, as discussed above, I am of the considered opinion that reliance placed by the learned Counsel for the respondent on the judgment of the apex Court in Waverly Jute Mills v. Raymon & Co. (supra), in support of his contention that the Development and Management Agreement and the Lease Agreement being invalid, the arbitration clause therein, is also invalid, and as such, the said agreements, including the arbitration clause therein, cannot be looked into or acted upon, and the validity of the said agreements should first be decided by the Court and not left to the Arbitrator, is of no avail to him, and more so when it was made under the old Arbitration Act, 1940.

38. In the premises, it is fit case to appoint an Arbitrator for resolution of the disputes between the parties. Accordingly, the application is allowed. Sri Justice Y.V. Narayana, a former Judge of this Court is appointed as Arbitrator. The respondent shall refer the disputes raised by the applicant to the Arbitrator. It is open for the respondent to raise all their pleas, including the validity of the agreements, before the Arbitrator. The Arbitrator is at liberty to fix his fee. No costs.