(2015) 03 MAD CK 0147

Madras High Court

Case No: O.P. No. 107 of 2012

M. Rajkumar		APPELLANT
	Vs	
The General Manager, Southern Railway		RESPONDENT

Date of Decision: March 6, 2015

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6), 11(8), 2(b)(i), 34

Citation: (2015) 2 CTC 353

Hon'ble Judges: Sanjay Kishan Kaul, C.J.

Bench: Single Bench

Advocate: P.S. Raman, Senior Counsel for K.K. Muralitharan, for the Appellant; A.P. Srinivas, Advocates for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Sanjay Kishan Kaul, C.J.
The petitioner/contractor participated in the tenders called for by the respondent/Southern Railways for the Gauge Conversion between Pollachi and Podanur Section and was successful, which resulted in Letter of Acceptance dated 15.09.2010 at a value of Rs. 10,24,33,668/-. A formal contract of agreement was executed on 02.02.2011 with a ten month period prescribed to complete the work up to 14.07.2011.

2. The petitioner claims to have mobilized resources to commence the work, as the contract was to be completed within 10 months from the date of the agreement. There were various special and general conditions of contract that governed the contract. The Letter of acceptance is dated 15.09.2010, and Note (ii) of Clause 1 deals with the issue of Vitiation and Variation. The said clause reads as under:-

(ii) Vitiation and Variation if any will apply as per Clause 44 and 43 of Special Conditions of Contract respectively. Vitiation will be calculated comparing the rates of eligible L2 and L3 i.e., M/s. RSV RAILONE (JV) and M/s..V.K. Engineering Constructions (JV). Vitiation will be worked out and deducted from each and every part bill.

A reading of the Agreement inter se the parties in so far as the Vitiation Clause is concerned, reads as under:-

44.0. VITIATION CLAUSE:-

44.1. In the event of Vitiation occurring due to increase or decrease in quantities among the first, second and third lowest valid tenderers, the vitiation shall be to contractor''s account. The total value of the work done shall be calculated at the rate offered by those tenderers and the amount payable shall be limited to the lowest aggregate value as worked out.

44.2. Vitiation as above shall be worked out as a whole for the Agreement including all variations in quantities.

3. It appears that dispute from various accounts arose including arising from the vitiation clause, mentioned aforesaid, as the petitioner claims that the said clause had no application in the present case, since the petitioner was a lone tenderer and there was no scope for L2 and L3 for the purpose of calculation, as they had withdrawn from the tender. Thus, the rates agreed to between the petitioner and the respondent should have governed the payments, once the contract was concluded, and invocation of rates quoted by others (L1 and L2) to calculate the sum payable, was not permissible.

4. The petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short ''the said Act'') for interim relief and even invoked the arbitration clause in the agreement on 18.4.2011 by submitting the claims. The relevant portion of the arbitration clause has been reproduced herein under:-

64(1)(i) Demand for Arbitration:-

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the ''excepted matters'' referred to in clause 63 of these conditions, the Contractor, after 120 days, but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

5. We may note that this arbitration clause is preceded by Clause-63, which reads as under:-

63. Matters finally determined by the Railway:-

All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor''s representation make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been made in clauses 8(a), 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57-A, 61(1), 61(2) and 62(1)(B) of the General Conditions of Contract or in any clause of the special conditions of the contract shall be deemed as "excepted matters" and decisions of the Railway authority, thereon shall be final and binding on the Contractor; provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

The effect of the aforesaid clause 63 is that certain matters are to be treated as ''excepted matters'', which were not the subject matter of arbitration, but the decision of the railway authority is to be treated as final and binding on the contractor.

6. The communication of the petitioner dated 18.04.2011 sought to refer to arbitration dispute i.e., a declaration that the vitiation clause in the agreement would not apply to the contract inter se the parties. We are informed that on 28.04.2011, the Deputy General Manager, acting on behalf of the General Manager, vide by an Inter-Departmental Communication, called upon the relevant officer of the respondent to examine the case in detail and address an earlier interim reply, besides process the case for arbitration, if so decided. However, no action was taken and ultimately, the petitioner filed the present petition under Section 11(6) of the Act.

7. The application has been opposed by the respondent, who has filed a counter affidavit. The plea in defence is that the vitiation clause is provided in Clause-44 of the Special Conditions of Contract and hence, the same is ''excepted matter'' and not referable to arbitration.

8. The principle question, which arises for consideration in the present matter is, whether the respondent was enjoined to still refer the matter for arbitration, and this question of claim not being arbitrable on account of being ''excepted matter'' be decided by the arbitrator or whether this Court is enjoined to decide this issue.

9. It may be noted at the inception that while the learned counsel for the respondent submitted that no declaration as stated could be sought for as the contract was binding on the parties, i.e., the clause could not be declared illegal,

learned senior counsel for the petitioner submitted that actually what the petitioner was claiming is that the clause had no application in the present case, as there was no L1 and L2, whose rates could have been utilised for the purposes of application under Section 44 of the said Act.

10. Learned counsel for the respondent sought to plead that it is for this Court to first decide whether the claim raised by the petitioner was an excepted matter and only if it is not an excepted matter, could the matter be referred to arbitration. In this behalf, he referred to the judgment of the Supreme Court in General Manager Northern Railways and Another Vs. Sarvesh Chopra, . In the aforesaid case, the Court was concerned with the petition under Section 20 of the Arbitration and Conciliation Act, 1940, and the Supreme Court in that context, found, in respect of a contract with Railways, that if the matter is excepted from the arbitration agreement, the Court shall be justified in withholding a reference. The claim in question was found to be clearly an excepted matter and thus, it was found that reference to arbitration would be an exercise in futility. It also found that, while looking to earlier judgments, there was no authority for the proposition that the question whether a claim is an excepted matter or not must be left to be decided by the arbitrator only and not to be adjudicated upon by the Court while disposing of the petitioner under Section 20 of the 1940 Act.

11. The aforesaid view has been followed in Union of India (UOI) and Another Vs. Raunaq International Ltd., . Under the same 1940 Act, in Madnani Construction Corporation (P) Ltd. Vs. Union of India (UOI) and Others, , the issue related to stage of filing of objections to the award where the award by the arbitrator holding claims to be arbitrable was restored.

12. Under the said Act, while dealing with the objections under Section 34, a view was once again taken in J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, to the effect that the findings of the arbitrator that contractor was not responsible for the delay and the termination of the contract was illegal was not open to challenge, since the finding on the issue was that it was arbitrable and not an excepted matter.

13. Learned senior counsel for the petitioner, however, submits that the issue in question is not really open, in view of the judgment of the Supreme Court in Harsha Constructions Vs. Union of India (UOI), where an arbitrator decided a claim specifically excluded from arbitration by agreement and it was held that such excepted matter could not have been arbitrated upon and should be made severable from the award.

14. However, a closer look at this judgment shows that it was really concerned with the objections under Section 34 of the said Act, where the contractor had objected to arbitrability of the dispute, yet the arbitrator had proceeded to determine the matter on merits. In that context, a finding was reached that all disputes are not

arbitrable and the question posed in paragraph-19, which was answered in that case was whether the arbitrator could have decided the issues which were not arbitrable. This is the ground on which the learned senior counsel for the petitioner sought to distinguish this judgment and rightly so. The finding is that if a non-arbitrable dispute is referred to an arbitrator and even if an issue is framed by the arbitrator in relation to such a dispute, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the arbitrator. In the instant case, the respondent authorities had raised an objection relating to arbitrability before the arbitrator.

15. Learned senior counsel for the petitioner, in fact, contended that it is under the said Act that the matter would have to be looked into and thus, Sarvesh Chopra''s case (supra) would not ipso facto apply. He submitted that there were a number of judicial pronouncements which left little doubt that normally it is the arbitrator who should be called upon to decide the issue, whether a particular dispute was an excepted matter or not.

16. In support of his contention, learned senior counsel for the petitioner referred to the judicial pronouncements hereinafter set out:-

(i) S.B.P. and Company Vs. Patel Engineering Ltd. and Another, .

It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.

(ii) Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, :-

In the aforesaid case, the Supreme Court referred to the earlier judgment in Patel Engineering''s case (supra), and different questions arose for consideration, which included question No. (iv) and the answer to them. The relevant portion reads as under:-

On the contentions urged, the following questions arise for our consideration.

Question No. (iv)

(iv) Whether the subject matter of the suit is arbitrable, that is capable of being adjudicated by a private forum (arbitral tribunal) ; and whether the High Court ought to have referred the parties to the suit to arbitration under Section 8 of the Act.?

Answer:

20. The nature and scope of issues arising for consideration in an application under section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of ''arbitrability'' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under section 34 of the Act, relying upon sub- section 2(b)(i) of that section. But where the issue of ''arbitrability'' arises in the context of an application under section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.
21. The term ''arbitrability'' has different meanings in different contexts.

The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under : (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts). (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided

by arbitration or whether the disputes fall under the ''excepted matters'' excluded from the purview of the arbitration agreement. (iii)Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be ''arbitrable'' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

(iii) National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., .

In the aforesaid case, once again the same portion of the judgment in Patel Engineering''s case (supra) has been quoted, as extracted aforesaid.

17. A reading of the aforesaid judgments shows that the following broad three principles emerge:-

(a) It is open to the Court to determine the issue of arbitrability of the dispute and in that process, even record evidence.

(b) It is equally open to the Court to let the issue of arbitrability be decided by the arbitrator.

(c) If it is an excepted matter found by the arbitrator, then the arbitrator cannot proceed to decide the matter on merits.

18. In fact, while answering Question No. (iv) in Booz Alten and Hamilton''s case (supra), and while referring to Section 11 of the said Act, a distinction has been made between examination under Section 11 and Section 8 of the said Act. Under Section 11 of the said Act, the Chief Justice or his designate is not required to embark upon an examination of the issue of ''arbitrability'' or appropriateness of adjudication by a private forum, once he finds that there is an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, then the aggrieved party will have to challenge the award by filing an application under section 34 of the said Act, relying upon sub- section 2(b)(i) of that Act. This is the normal course of action to be followed.

19. In Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, , it has been held as under:-

115. This aspect of the arbitration law was explained by a two Judge Bench of this Court in the case of Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd., wherein, while referring to the judgment in SBP and Co. (supra) particularly the above paragraph, this Court held that the scope of order under Section 11 of the 1996 Act would take

in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. It held as under:

Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.
(emphasis supplied)

116. Thus, the Bench while explaining the judgment of this Court in SBP and Co. (supra) has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the arbitral tribunal to decide.

20. An order of this Court, passed by the then Acting Chief Justice, in the case of KRV Infrastructures Vs. The General Manager, Southern Railway, on 19.04.2013 in O.P.No. 106 of 2012 has been pointed out, wherein it has been opined that it is for the Arbitral Tribunal to decide whether the claim relating to price variation comes

under excepted matters, so as to be excluded from the purview of arbitration and the issue can be framed by the arbitral tribunal in this behalf.

21. I am, thus, of the unequivocal view that in the present case even the scope of the dispute and the defence, the claim was liable to be referred to the arbitral tribunal, which in turn could examine this issue as to whether the claim made by the petitioner fell in the category of excepted matters or not.

22. Now, turning to the issue of appointment of an arbitrator, suffice to say that the respondent failed to appoint the arbitrator or act at all in pursuance to the request made by the petitioner for reference.

23. In a recent judgment in Eagle Earth Movers Vs. The General Manager, Southern Railways (O.P.No. 745 of 2013, decided on 28.08.2014), I had the opportunity to consider the consequences of the same respondent not following the procedure prescribed under the Arbitration clause and came to the conclusion that the respondent lost the right to appoint an arbitrator having slept over the matter. The relevant observations contained in paragraphs 10 and 11 are as under:-

10. The learned counsel for the petitioner submits that in the conspectus of the aforesaid facts and circumstances, he seeks appointment of an arbitrator by this Court and not relegation to the appointment of the arbitrator by the designated authority. In this behalf, the learned counsel has referred to the Judgment in Deep Trading Company Vs. Indian Oil Corporation and Others, , to contend that where the arbitrator is not appointed as per the terms of the arbitration clause, the appointing authority loses his right to appoint the arbitrator and in such a case, the power vests under Section 11(6) to the Court to appoint the arbitrator. The appointment of arbitrator during the pendency of the proceedings under Section 11(6) of the said Act has been held to be of no consequence and would not disentitle seeking an appointment of arbitrator under Section 11(6) of the said Act. It may also be added the Honourable Supreme Court also took note of the fact that there was no qualification for the arbitrator prescribed in the agreement and the respondent Corporation therein had lost the right to appoint an arbitrator, leaving it to the court to appoint the arbitrator who is an independent and impartial one.

11. The learned counsel for the petitioner also brought to the attention of the Court, a recent Judgment in North Eastern Railway Vs. Tripple Engineering Works, , dealing with the same clause as in the present case which has been extracted in paragraph-4 of the Judgment. While referring to the earlier judicial pronouncements, it has been held that appointment of a retired Judge contrary to the agreement requiring appointment of specified officers has been held to be valid. Insofar as the same clause is concerned, the observation are under:

5. The "classical notion" that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short ''the Act'') must appoint the arbitrator as per the contract between the parties saw a significant

erosion in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, , wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd., , wherein following a three Judges Bench decision in Punj Lloyd Ltd. Vs. Petronet MHB Ltd., (2006) 2 SCC 638), it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in ACE Pipeline (supra) and Bharat Battery Manufacturing Co. (P) Ltd. (supra) was reconciled by a three Judges Bench of this Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., , where the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression "to take the necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read alongwith the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., . Paragraph 48 of the report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing sub-paragraphs (vi) and (vii) herein below. "(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."

6. The above discussion will not be complete without reference to the view of this Court expressed in Union of India (UOI) Vs. Singh Builders Syndicate, , wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in paragraph 25 of the report in Singh Builders Syndicate (supra) this Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

7. A pronouncement of late in Deep Trading Company Vs. Indian Oil Corporation and Others, . , followed the legal position laid down in Punj Lloyd Ltd. (supra) which in turn had followed a two Judges Bench decision in Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, . The theory of forfeiture of the rights of a party under the

agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Company (supra) subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Administration (supra) not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.

8. In the present case Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be railway officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In Singh Builders Syndicate (supra) pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of the contract No. CAO/CON/722 is yet to be passed. Though the appellant-Railway has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said Contract has been finalized, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged in the light of the several decisions noticed by us. We are, therefore, of the view that no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference. We, therefore, unhesitatingly dismiss this appeal filed by the appellant- railways. However, in the facts of the case we do not deem it appropriate to burden the appellant with any costs.

24. The result of the aforesaid is that this Court has to appoint an arbitrator. Accordingly, I appoint Thiru Justice G.M.Akbar Ali, a retired Judge of this Court, as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally.

25. The original petition is, accordingly, allowed, leaving the parties to bear their own costs.