JESMAJO Industrial Fabrications - Karnataka Pvt. Ltd. Vs Indian Oil Corporation Limited

Court: Bombay High Court

Date of Decision: Feb. 10, 2003

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11, 11(4), 11(5), 11(6), 11(6)(3)

Citation: (2003) 4 ALLMR 162 : (2003) 3 ARBLR 289 : (2003) 5 BomCR 676 : (2003) 3 MhLj 786

Hon'ble Judges: F.I. Rebello, J

Bench: Single Bench

Advocate: P.K. Samdani and Anil Agarwal, i./b., Mustafa Motiwala, for the Appellant; C.S. Balsara, i./b., Negandhi Shah and Himayatullah, for the Respondent

Judgement

F.I. Rebello, J.
The applicants have moved u/s 11 of the Arbitration & Conciliation Act, 1996. It is their case that there is an arbitral

clause in the contract between the parties. The applicants invoked the arbitral clause by their letter dated 16th March, 2001. The Respondents

failed to nominate the arbitrator. As the respondents had failed to nominate their arbitrator, the present application was filed invoking the provisions

u/s 11(6) of the Act. u/s 11(6) it is contended that it would not be the named arbitrator in the contract who is to be appointed as arbitrator but it is

open to the designated authority or to the chief Justice to nominate an impartial person to decide the disputes including the claims and counter

claims of the parties. This power can be spelt out from the language of Section 11 and can be resorted to in the event a person or authority

referred to under the arbitral clause chooses to abdicate its duty or responsibilities to nominate the arbitrator. In support thereof, reliance has been

placed on various authorities which will be adverted to in the course of the order. This therefore, is the question that has to be answered.

On the other hand, on behalf of the Respondents, their learned counsel contends that the letter dated 16.3.2001 is not an invocation of the arbitral

clause. The Petitioners having not invoked the arbitral clause, the question of nominating an arbitrator by the designated authority designated under

the Act does not arise. It is further contended that once that be the case, Section 11 Could not have been invoked by Petitioners herein.

Alternatively, it is contended that assuming that section can be invoked, it is only the authority named who can be directed to nominate the

arbitrator as that is the procedure agreed between the parties. Section 11 does not confer power on the learned Chief Justice or his designate to

supplant the terms of the contract between the parties. All that it provides is that the authority has to issue a direction to direct nomination or

appointment of the arbitrator by the said authority. Reliance has again been placed on various judicial pronouncements etc. Such a nomination, it is

contended, is a nomination by the designate but in terms of the contractual terms between the parties. Only if the contract does not provide for a

named person to be nominated or the contract does not provide a term for the procedure for appointment, will the designate u/s 11 make a

nomination. Otherwise, even on failure by the named authority under the contract, what the designate will do is to nominate or direct nomination in

terms of the contractual terms so as to specifically constitute the Arbitral Tribunal at the earliest.

2. With the above, we may now consider the issue that has arisen considering the powers conferred on the Chief Justice or his designate u/s 11 of

the Act of 1996. The nature of the power is no longer res integra having been decided by the Apex Court in Konkan Railway Corporation Ltd.

and Another Vs. Rani Construction Pvt. Ltd., . While considering the nature of the power conferred u/s 11, the Apex Court has observed that the

order of the Chief justice or his designate u/s 11 nominating an arbitrator is not an adjudicatory order as the Chief Justice or his designate is not a

tribunal. The issue referred to the Constitution Bench was for the purpose of deciding the controversy as to the real nature of the power conferred

u/s 11. The Apex Court has held and considering its earlier judgements that the power is administrative in character. Bearing this in mind, the issue

will have to be answered. Section 11(6) may now be reproduced :

11(6). Where under an appointment procedure agreed upon by the parties ;

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

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

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the

appointment procedure provides other means for securing the appointment.

The contention urged on behalf of the Petitioners, is that in any of the situations covered by the Clause (a), (b) and (c) of Sub-section (6) of

Section 11 on the failure to appoint arbitrator, it is the Chief Justice or the person or institute designated who will take necessary measure for

appointment, unless the agreement for the appointment of arbitrator provides other means for securing the appointment. On the reading of the very

section Respondent contention is that once there is an arbitral clause, if the authority authorised under the arbitral clause, does not refer the parties

to arbitration in respect of arbitrable claims, what Section 11(6)(c) provides is that the learned Chief Justice or the designate would secure

appointment by directing the authority named in the contract to nominate, when there has been failure on the part of the authority to nominate the

Arbitrator. This would be the necessary measure.

3. That will require determination firstly whether Petitioners have invoked the arbitral clause and there has been refusal by the named authority. The

several situations contemplated would be to enquire if for example no arbitrator is named to act as sole arbitrator then to fill in the gap by

nominating arbitrator considering that the parties have failed to appoint one. Similarly in the case of more than one arbitrator, where two arbitrators

appointed cannot agree to the name of third then to secure appointment of the third arbitrator in the like cases. The third situation, as in our case,

when the person including an institution fails to perform any function entrusted under that procedure.

What happens in the third situation if the person or institution named, does not take steps to nominate. Does that result in the learned Chief Justice

or his designate securing the appointment other than in terms of the contract. Is that the necessary measure contemplated. If the answer is yes, that

would mean that the contract between the parties can be displaced by an authority exercising administrative powers. It is well settled proposition of

law that the contract between the parties has to be given effect to. It is only a court under powers conferred which can rewrite the contract to the

extent possible between the parties for the purpose of effectively deciding the disputes and controversies and for making an effective order or

decree. The other situation is when the statute itself clearly so provides. In all other cases, the contract has to be performed in the manner it has to

be performed.

4. Considering the nature of the controversy, that has arisen and as several matters of this nature have arisen specially in Governmental and semi

Government contracts, counsel have been heard at length on the above contentions. In so far as Governmental or semi Governmental contract, it

must be borne in mind that Government officers in service normally are appointed, firstly because they are conversant with the nature of the dispute

and secondly to control expenditures and further as there is a disciplinary control in case of proven mala fides.

5. For the purpose of considering the controversy, it may be necessary to find out as to what was the position prevailing under the Act of 1940

when the courts did appoint arbitrators when the parties to the agreement failed to nominate the arbitrator and thereby abdicated its function. it is

no doubt true that the Apex Court has observed in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., that the provisions of the Act of 1940

cannot be referred to for interpreting the provisions of the Act of 1996. In Konkan Railway (Supra) it has been further observed that the settled

law and judgements and literature on the Model Law thereof cannot be taken to be guide to interpretation of the Arbitration & Conciliation Act

1996 in particular Section 11 thereof. The purpose of reference to the Act of 1940 is to understand the source of power to nominate the arbitrator

in the event there was abdication by the named authority in nominating the arbitrator. One of the two relevant provisions is Section 8 and more

specifically Section 8(2) which reads as under :

If the appointment is not made within 15 clear days after service of the notice, the court may, on an application of the party, to give notice and

after giving other parties opportunity of being heard, appoint arbitrator or arbitrators or Umpire as the case may be who shall have like power to

act in the reference and to make the award as if he or they had been appointed by consent of the parties.

It is therefore, clear that by a statutory fiction of law, the arbitrator appointed by the court is deemed to be arbitrator appointed by consent of the

parties.

The other relevant provision is Section 20 Sub-section (4) which reads as under:

Where no sufficient case is shown, the court shall order agreement to be filed and shall give order of reference to the arbitrator appointed by the

parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

This power u/s (4) can only be invoked on an application being made to the court for reference to arbitration wherein the agreement contains a

clause for arbitration. The power under Sub-section (4) is given to the court to make an order of reference firstly to the arbitrator appointed by the

parties whether in the agreement or otherwise, and only in the event the parties cannot agree then to appoint an arbitrator. Power has been

statutorily conferred. The power therefore, is statutory.

These sections therefore, specifically provide that the court has powers to appoint a person as arbitrator only on failure as set out therein. The

failure is when they can not agree.

6. With that let us consider some of the judgments referred to by the learned counsel to find out whether the controversy can be resolved based on

decided authority. In Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , the issue was as to when the Chief Justice or designate could

invoke the power u/s 11 to appoint an arbitrator. It was contended that once notice is given for appointment and once arbitral clause is invoked,

and the party or person named fails to make appointment, then appointment could be made u/s 11. While considering this aspect of the matter, the

Apex Court noted that for cases falling u/s 11(6) no time limit has been prescribed under the Act, whereas a period of 30 days has been

prescribed u/s 11(4) and Section 11(5) of the Act. For invocation of Section 11(6), if one party demands of the opposite party to appoint an

arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically

forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has

moved the court u/s 11, that would be sufficient. The court observed that in the cases arising u/s 11(6), if the opposite party has not made

appointment within 30 days of the demand, right to make appointment is not forfeited but continues but an appointment has to be made before the

former files an application u/s 11 seeking appointment of an arbitrator. Only then does the right of the opposite party cease. Therefore, what is

clear from that judgment is that the Chief Justice or his designate can step in if the party who has to nominate does not do so before the application

is made. Once the application is made the power to nominate is of the Chief Justice or his designate. Whether in exercise of that power the Chief

Justice or his designate could nominate an outsider was not directly in issue. What was in issue was when the Chief Justice or his designate could

step in to constitute of the Arbitral Tribunal on failure by the parties. The issue before us therefore, was not really in issue in Datar Switchgears

(supra). Learned counsel seeks to point out that this would indicate that the right of the party to nominate would cease and right to appoint

arbitrator u/s 11 would be that of the Chief Justice or designate.

7. The question will still then remain whether appointment has to be made de hors the contract on failure by the named authority or institution. The

entire object of Section 11 is to secure constitution of the Arbitral Tribunal expeditiously. The findings in Datar Switchgear have been relied upon

by learned counsel for the Petitioners to contend that it is the designated authority alone who can make appointment of arbitrator as respondents

have forfeited their right. Reliance is also placed in the judgment in Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, . That really was a

case u/s 8 of the Act of 1940. As already noted Section 8(2) specifically provided that the Arbitrator appointed by the court would deemed to be

the arbitrator appointed by consent of the parties. In other words, the clause providing for appointment would be replaced by the deeming

provisions of Section 8(2) as if the parties had agreed to the appointment. I do not propose to further consider this judgment for two reasons,

firstly, because u/s 8 power is conferred on the court unlike Section 11 and secondly by virtue of Section 8(2) the arbitrator appointed by the court

is deemed to be appointed by consent of the parties.

Next reliance was placed on the judgment in Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., . We have already

adverted to the judgment earlier. However, reproduction of certain observations thereto will be essential for the purpose of settling the controversy

that has arisen in this petition. What was in issue therein must also be borne in mind. The issue was the nature of exercise of power u/s 11 whether

it is administrative or adjudicatory. In para 17 of the judgment, the Apex Court observed as under:

Where an appointment procedure has been agreed upon by the parties but a party fails to act as required by that procedure or the parties, or the

two arbitrators appointed by them, fail to reach the agreement expected of them under that procedure or a person or institution fails to perform the

function entrusted to designate to nominate an arbitrator, unless the appointment procedure provides other means in this behalf. The decision of the

Chief Justice or his designate is final.

The following observations in Paragraph 18 of the judgment are also relevant and which read as under:

There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response

from that 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.

Finally the observations in Paragraph 19 which reads as under:

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 office of his designate, who would take due care to see that a competent,

independent and impartial arbitrator is nominated.

8. To my mind, these observations would disclose the true nature or import of Section 11. The entire purpose of Section 11 is to fill the lacuna

occasioned by the failure of the parties to the arbitration agreement or by the two arbitrators appointed by the parties, with the object of

expeditiously constituting the tribunal and allowing the arbitration proceedings to commence. What the Chief Justice or designate will do is to

secure the appointment where the parties have not done even without notice to the Respondent and thereby take the necessary measures, unless

the agreement on the appointment procedure provides other means for securing appointment. It can also be said from those observations that an

arbitrator can be appointed by the Chief Justice or his designate on failure by the authority or the institution.

9. What is the import of the expression ""necessary measures to secure appointment"". Would this be a power in the learned Chief Justice or his

designate to override the arbitral agreement. We may understand the issue in this case by reproducing the arbitral clause as it would be necessary

for deciding the controversy. The arbitral clause as contained in Clause 22 (a) reads as under:

Any disputes and/or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties hereto

arising out of or in relation to this agreement shall be referred to the sole arbitration of Director (Marketing) of the Corporation, or of some officer

of the Corporation who may be nominated by the Director (Marketing). It is known to the parties to the agreement that the arbitrator so nominated

is an employee of the Corporation and may be a shareholder of the Corporation. 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 or vacation of office or inability to act may designate another officer of the corporation 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 agreement that no person other that 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 Arbitrator and Conciliation Act, 1996 or any statutory modification of or re-enactment thereof and the

rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this Clause.

10. It is also necessary to advert to Sub-clause 22(e) as my attention has been invited to certain observations made in disposing of an application

u/s 11(6). The clause contains a provision that if for any reasons the authority is unable to nominate arbitrator then the matter shall not be referred

to arbitration at all. My attention was invited to an order which has held that such clause would be void considering Section 11(6) of the Act of

1996, in Shri P. Kumaran v. Executive Engineer, Works Division and Ors., 1998 (3) ARBLR 98 (BOM). That order was firstly rendered before

the Judgment of the Apex Court in Konkan Railway (supra) which finally took a view that power u/s 11(6) is administrative in character. That

decision was rendered in an application u/s 11. Once that be the case, the decision is not by a court but by an Administrative Authority holding

high office. However, the order at any rate cannot be construed as a binding precedent as it is not a Judgment of a Co-ordinate Bench. Secondly

the issue whether an arbitral clause or clause of the agreement is void, as per the law now settled can only be decided by the Arbitral tribunal u/s

16 of the Act of 1996. This cannot be decided in an Application u/s 11(6). See Konkan Railway (supra). Considering that whether the clause is

void or not need not be gone into and can be left for consideration by the arbitral tribunal which would be constituted if the issue does arise. In the

judgment in Konkan Railway v. Mehul Construction Company, the question before the Apex Court was as to what should be the correct

approach of the Chief Justice or his nominee in relation to the matter of appointment of Arbitrator u/s 11(6) of the Act and what is the true nature

of the said order and some other questions. I need not advert to it in view of the subsequent judgment in Rani Construction (supra). My attention

however, was invited to certain observations in Paragraph 5 of the judgment. It was noted by the Apex court that power under Sub-section (6)

seeks to remove obstacles arising in the absence of agreement for appointing the arbitrator. Obstacles were identified at Clause (a), (b) and (c) of

Sub-section 6. What Sub-section (6) provides is a cure to these problems by permitting the aggrieved party to request the Chief Justice or any

person or institution designated by him to take the necessary measure i.e. to make the appointment, unless the agreement on the appointment

procedure provides other means for securing the appointment. The apex Court further noted that while discharging function under Sub-section (6),

the Chief Justice or his nominee will be acting in his administrative capacity and that such a construction would subserve the very object of the new

Arbitration Law. The agreement to refer dispute to arbitration is voluntary. Parties can agree that if certain situation, do not arise or conditions are

not satisfied, then they will not proceed to arbitration but will get their disputes removed through courts. Such an agreement can never be void. An

agreement to resolve disputes by arbitration is not an agreement ousting jurisdiction of the civil court, but if such agreement exists, civil court will

give effect to it unless the parties themselves give a go-bye to the agreement.

11. Under the Arbitration Act 1940, in Bhupinder Singh Bindra Vs. Union of India and another, , the power to appoint arbitrator was noted and

the Apex Court observed as under:

There is no general power for the court to appoint an arbitrator unless the case falls within the relevant provisions of the Act nor will the court will

the court make an appointment where the arbitration agreement provides a method by which appointment is to be made.

A similar clause as contained in the present arbitral agreement had come up for construction under the Act of 1940 before this court. A Division

Bench of this court in Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others, firstly noted difference between Section 8 and 20 of

the Act of 1940. u/s 8 the Court is only called upon to supply the Arbitrator and the moment it names the Arbitrator, the Court becomes functus

officio. u/s 20, the proceedings conducted by the Arbitrator appointed under this section are controlled by the provisions of the Act and the Court

can give directions to the Arbitrator from time to time. In the case before the court under Clause 17, contract provided that the only authority

mentioned in the tender document had power to appoint sole arbitrator. The court noted the circumstances under which the party ought to

approach the court u/s 20. It held that the court while making order u/s 20 has to direct the competent authority to appoint sole arbitrator and that

under those provisions the court could have itself appointed the arbitrator. u/s 8(1), the court could have only directed the competent authority to

appoint arbitrator. Summing up various judgments in so far as the similar issue before us is concerned, the court held that the conspectus of the

decisions cited lays down a proposition that if under a clause of arbitration such as ours where the arbitrator is to be appointed by a named

authority and not by consent of the parties, the provisions of Section 8 cannot be invoked for appointment of an arbitrator. It is only the provision

of Section 20(4) that can be availed of in such circumstances, and even in that case the only direction that the Court can given, in the first instance,

is to the appointing authority to name the arbitrator.

In M/s. Harbans Singh Tuli and Sons Builders Pvt. Ltd. Vs. Union of India, a clause was being considered which was similar to the clause in the

present contract where the clause provided that the authority had to appoint the sole arbitrator. While considering the power u/s 8(1)(a) and in the

case where arbitrator was named the Apex Court observed as under:

Where, therefore, they are named, this section will have no application. Similarly, the arbitrator or arbitrators are required to be appointed by all

parties to the reference with consent. On the contrary, if there is some other mode of appointment, for example, Section 4, where the parties to the

agreement agree that the arbitrator has to be appointed by a person designated in the agreement either by name or hold, for the time being in

office, certainly, this section will not apply. It has also been held by this court in Chander Bhan Harbhajan Lal Vs. State of Punjab, that even in

cases where by agreement between the parties, one of them alone is given power to make the appointment without consulting others, this sub

section would apply.

My attention was also invited on behalf of the Respondent by their learned counsel to the judgment of learned Single Judge of Punjab and Haryana

High Court in V.K. Construction Works (P) Ltd. Vs. Food Corporation of India, Chandigarh and Another, where considering Section 20 the

court held that in the first instance the court shall ask person designated to appoint arbitrator. In Food Corporation of India Vs. Ghanashyamdas

Agarwal, , a learned Single Judge of the Orissa High Court relying on the earlier judgment held that the terms of the agreement would have to be

considered while considering the case for appointment of the arbitrator u/s 8 and where power is conferred on the designated authority directions

should be given to said designated authority to do nominate.

For the purpose of construction of the clause in the agreement which had voluntarily been entered into on behalf of the Petitioners, learned counsel

relies on the judgment in Central Bank of India Ltd. Vs. Hartford Fire Insurance Co. Ltd., . It is no doubt true that the counsel for the Petitioners

had drawn my attention to the judgment in Nandyal (supra) to contend that once nominated person chooses not to nominate the arbitrator, it will

be open to the court to do so. There is no difficulty in considering that and more so considering the express language of Section 8(2) of the Act of

1940. However, what is important to note is that in that case, there was no clause to appoint arbitrator by a named Authority for referring the

disputes and difference that had been raised. The Apex Court noted that the claimant twice gave notice requesting the appellant before it to

nominate arbitrator within 15 days time, but no action has been taken. it was held after the expiry of the said period, that the administrative head

denuded its power under Clause 65 of the Contract to appoint arbitrator. Respondent had invoked jurisdiction of the trial court which was

competent to deal with the matter and had given an opportunity to the appellant to contest the claim. it then held that no arbitrator has been

appointed within 15 days from the date of the notice, the Administrative head of the appellant had abdicated himself of the power to appoint

arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a) of the Act.

12. In the instant case, as we have noted earlier, the power to secure appointment is of the Chief Justice of his designate. The Chief Justice or the

designate does not decide the right of the parties but only secures an appointment. There is no power u/s 11 of the Act of 1996, as or example u/s

8(b) of the Arbitration Act 1940. The power u/s 11 is a measure to secure appointment of the arbitrator in the course of exercising administrative

powers. That can only be to give effect to the contract or in the event the contract cannot be given effect to then to give effect to arbitral clause by

nominating arbitrator so as to enable the parties to go to the forum of their choice. To my mind, there is nothing to indicate that the Chief Justice or

his designate where the clause provides for arbitral procedure for nominating arbitrator even in case of failure to make nomination can completely

give a go bye to the arbitral clause and appoint another person as arbitrator even when the person or authority named is available. In the first

instance, it would be to give effect to he agreement between the parties. An administrative authority does not displace the terms of the contract

unless power is conferred by statute and it is expressly required to be dealt. Otherwise, the administrative authority can only give effect to the

provisions of the contract, by directing the parties to arbitration in the manner provided. The manner provided normally should be by securing the

appointment in terms of the contract between the parties. Where the terms of the agreement do not provide for securing the nomination as per

explanation u/s 11(6)(3) and 11(6), then to secure the nomination u/s 11(6)(c), to secure nomination by normally directing the named authority to

secure the appointment within a time frame failing which to make the appointment.

Thus on a close look at the provisions of Section 8 and 20 of the Act of 1940, that there are specific provisions for appointment by consent of the

parties or otherwise by the court. Such power u/s 11(6) of the Act of 1996 is conferred on the Chief Justice or his designate who will act

administratively. Under the Act of 1996, what the Chief justice or a designate would do is to secure the constitution of the Tribunal by proper

measure such as to direct the authority to nominate arbitrator in those cases like Section 11(6)(c), where the contract so provides otherwise to

constitute the Tribunal by nominating an arbitrator like in case of Section 11(6)(c) and (b). There is no other power in the administrative authority

whether in the Chief Justice or his designate.

13. To sum up the following propositions emerge:

1. The Chief Justice or his designate even if the authority or institution named does not nominate the Arbitrator which is required to be done or to

constitute the Arbitral Tribunal, will ordinarily direct the authority or institution to nominate the Arbitrator and effectively constitute the Arbitral

Tribunal. This is more so in the case of public bodies and Corporation, where failure on the part of an official holding howsoever a high post, shall

not result in that body being saddled with an arbitral Tribunal not in terms of the contract it entered into or was entered on its behalf.

2. It is only in the event, for some good reason that the Arbitrator cannot be named or, the Tribunal constituted in terms of the contract, shall the

Chief Justice or designate nominate the Arbitrator or constitute the Arbitral Tribunal beyond the terms of the Contract.

14. Considering the clause and nature of the controversy, involved it is not possible in exercising jurisdiction u/s 11 to decide whether there is an

arbitrable dispute or claims which are arbitrable. However, considering provisions of the Act of 1996, the learned counsel for the Respondents

was asked whether the respondents have any object to refer the claims of the Petitioners to arbitration. The learned counsel points out that if the

Petitioners within twelve weeks from today seek reference of the claims which they want to get adjudicated by the arbitrator and by the procedure

for nomination provided in the contract, they have no objection for referring those claims to arbitration in terms of the procedure for appointing an

arbitrator under the contract.

15. In my opinion, therefore, it will not be possible to grant relief of appointing an outside arbitrator as is sought by the applicants. However, as

there is arbitral clause and as there is arbitral dispute and as the respondents have no objection for getting the matter referred to arbitration, if the

applicant serves on the Respondent a copy of the arbitral claims referred to the authority named in Clause 22, is directed within six weeks from

receipt of the application as directed to direct the parties to arbitration either of the Director of marketing of the Corporation or some other officer

of the Corporation nominated by the Director of Marketing. All issues including whether the claims are barred by limitation or not are left open for

considering before the arbitrator so named including the claims of the applicant and the counter claims of the Respondents, if any.

Application disposed of.