IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : ARBITRATION AND CONCILIATION ACT, 1996

Judgment reserved on: 25.05.2011

Judgment delivered on: 04.07.2011

O.M.P. 358/2010

ARIBA INDIA PRIVATE LTD ..... Petitioner

Through: Mr. Mukul Talwar and Mr. S. Mohapatra, Advocates

versus

M/S ISPAT INDUSTRIES LTD ..... Respondent

Through: Mr. Gaurav Mitra and Mr. Sachin Midha, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. This petition has been filed under Section 14 of the Arbitration and Conciliation Act, 1996 to seek a declaration that the mandate of the arbitral tribunal stands terminated on the ground that the arbitral tribunal has failed to act without undue delay. A further direction is sought for reconstitution of the arbitral tribunal with a direction that the reconstituted tribunal continues the arbitration proceedings from the point where the existing arbitral tribunal had reached, and that it should conclude the proceeding within the next six months.

2. Upon issuance of notice, the respondent has filed its reply raising a preliminary objection to the territorial jurisdiction of this Court to entertain the present petition. However, no reply on merits has been filed by the respondent.

3. The submission of the respondent is that under their agreement called the Access & Services Agreement dated 01.05.2003, Clause 9.11, which deals with the aspect of jurisdiction, provides that "all disputes arising out of or relating to this contract shall be subject to sole jurisdiction of the Courts at Mumbai only". It is argued that the petitioner has preferred this petition at Delhi only because the petitioner is located at Delhi. Otherwise, no part of cause of action has arisen at Delhi. It is further argued that, in any event, even if a part of cause of action has arisen at Delhi, that by itself is not sufficient to clothe this Court with jurisdiction, as the Courts at Mumbai also have jurisdiction. It is claimed that a part of the cause of action has arisen in Mumbai and the respondent has its principal place of business in Mumbai. It is argued that the parties can choose and restrict the Courts jurisdiction at a particular place while ousting the jurisdiction of all other Courts, if Courts at more than one place have jurisdiction to entertain the lis between the parties. The respondent submits that even though its registered office is at Kolkata, its principal office is located at Nariman Point, Mumbai and its steel plant is located at Dolvi, District Raigad, Maharashtra. The respondent had tendered, during the course of arguments in Court, an affidavit filed by its vice-president (Legal) dated 13.05.2011 to substantiate its plea that the respondent's headquarter of business is situated in Mumbai and its corporate office is situated in Mumbai. It is further stated that its central marketing office is situated in Navi Mumbai. Various senior officers of the respondent such as the Vice-Chairman and Managing Director, Executive Director (finance), Director (corporate finance) etc. have their offices at Nariman Point, Mumbai. Various departments such as the marketing department, risk management department, export department, customer

relationship management department etc. are also situated at Navi Mumbai. Approximately 350 people are working in the central marketing office and 150 people are working in corporate office in Mumbai/Navi Mumbai. Learned counsel for the respondent in support of his submissions places reliance on the following decisions:-

a. Geo Miller & Co. Ltd. v. United Bank of India, (1997) 2 Arb LR 50 (Delhi)

b. Hakkam Singh v. M/s Gammon (India) Ltd., (1971) 1 SCC 286

c. Cholamandalam Investment & Finance Co. Pvt. Ltd. v. Radhika Synthetics & Anr., (1996)2SCC109

d. Rajasthan State Electricity Board v. Universal Petro

Chemicals Ltd., (2009) 3 SCC 107

e. ABC Laminart Pvt. Ltd. & Anr. v. AP Agencies, Salem,

(1989) 2 SCC 163

f. Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., (2004) 4 SCC 671

4. To counter the aforesaid preliminary objection of the respondent, counsel for the petitioner submits that no part of cause of action has arisen within the jurisdiction of the Courts at Mumbai. He submits that the agreement in question was executed between the parties at Dolvi, District Raigad, Maharashtra. The payments under the contact were to be made at Delhi. In this regard reliance is placed on Clause 3 read with schedule to the agreement. Clause 3 of the agreement, inter alia, provides that the respondent shall pay all invoices/debit notes within thirty (30) days from acceptance. In Clause 3.1 the respondent had agreed to pay to the petitioner the fees and expenses set forth in the applicable schedule. Schedule 2 to this agreement, inter alia, provides that:

“CHEQUE SHOULD BE MADE AS PER DETAILS BELOW

BANK: HDFC BANK

BRANCH: New Delhi Branch, India

BENEFICIARY: FreeMarkets Services Private Limited

ACCOUINT NUMBER: 0030310001278”

(emphasis supplied)

5. Mr Talwar, learned counsel for the petitioner places reliance on the explanation to Section 20 CPC which states that “a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it also has a subordinate office, at such place” (emphasis supplied). He submits that cause of action has arisen in Delhi, as the consideration under the agreement was payable by the respondent to the petitioner at Delhi. The place where the payment has to be made under the contract has been recognized by the Supreme Court to be a place where a part of cause of action arises. In this regard he places reliance on the Supreme Court decision in ABC Laminart Pvt. Ltd. (supra). The Supreme Court in Para 15 observed “part of cause of action arises where money is expressly or impliedly payable under a contract”. He submits that the respondent undisputedly has its subordinate office at Delhi. Therefore, the respondent by virtue of the aforesaid explanation to Section 20 is deemed to carry on business, in relation to the cause of action which has arisen at Delhi, in Delhi. Consequently, this Court has the territorial jurisdiction to entertain the present petition as the respondent carries on its business in Delhi. Mr. Talwar places reliance on the following decisions:-

1. Patel Roadways Limited, Bombay v. Prasad Trading Company, (1991) 4 SCC 270

2. New Moga Transport Co. v. United India Insurance Co. Ltd., (2004) 4 SCC 677

6. Before I proceed further to record and deal with the submissions of the parties on merits, I think it appropriate to deal with the aforesaid preliminary objection of the respondent.

7. The Access and Services Agreement has been entered into between the parties at Dolvi, District Raigad, Maharashtra. Under this agreement, the petitioner agreed to provide e-sourcing software and services to the respondent on the terms and conditions mentioned in the agreement. The respondent is engaged in the business of manufacture of steel. This entails substantial procurement of raw materials, consumables and fuels at Dolvi, District Raigad, Maharashtra. The respondent has its registered office at Kolkata.

8. From the affidavit tendered by the respondent in Court during the course of hearing of this petition, it appears that the respondent may have its principal office in Mumbai.

9. However, is that sufficient to clothe the Courts in Mumbai with exclusive jurisdiction in relation to disputes arising out of the contract in question? In my view, the answer is in the negative. A perusal of the explanation to Section 20 CPC leaves no manner of doubt that in respect of any cause of action arising at any place, where the corporation also has a subordinate office, such place shall be deemed to be the place where the corporation carries on its business. The claim of the petitioner is for recovery of its dues which were payable at Delhi. Therefore, the alleged failure of the respondent to pay the dues of the petitioner has taken place at Delhi, and the cause of action, in respect whereof the petitioner has initiated arbitration has arisen at Delhi.

10. In Patel Roadways Ltd. (supra), the Supreme Court considered the explanation to section 20 CPC. The appellant before the Supreme Court-Patel Roadways Ltd. was carrying on business as a carrier and transporter of goods on hire. It had its principal office in Bombay. The agreement between the appellant, Patel Roadways Ltd. and its customers provided that the jurisdiction to decide any dispute between the appellant/transporter and the customer would be only with the Courts at Bombay. In the two appeals before the Supreme Court, the customers had instituted suits at the Courts in Madras, as the goods had been entrusted by the two respondents for transportation to the appellant, within the jurisdiction of the Courts at Madras. The appellant, Patel Roadways Ltd. had its subordinate office within the jurisdiction of the Courts at Madras. The appellant took the plea in its defence that, contractually, the parties had agreed that jurisdiction to decide any dispute with the customers would be only with the Courts at Bombay, and consequently

the Courts at Madras had no jurisdiction. The plea of the appellant was rejected by the Trial Court as also by the Madras High Court.

11. Before the Supreme Court, the plea of the appellant was that apart from the courts within whose territorial jurisdiction the goods were delivered to the appellant for transportation, the Courts at Bombay also had jurisdiction to entertain the suit arising out of the contract between the parties, inasmuch as, the principal office of the appellant was situated in Bombay. As two places had jurisdiction, contractually, the jurisdiction of the Courts at Madras was ousted and only the Courts at Bombay had jurisdiction.

12. The Supreme Court, after considering the decision in Hakkam Singh (supra), and other decisions cited before it, rejected the plea of the appellant. The Supreme Court held that if it could be held that the Courts at Bombay also had jurisdiction to entertain the two suits in question, the judgments appealed against will have to be set aside on the basis of the decision in Hakkam Singh (supra) and Globe Transport Corporation v. Triveni Engineering Works, (1983) 4 SCC 707.

13. The Supreme Court then posed a question, whether in respect of any of the two suits before it, the Courts at Bombay also had jurisdiction, in addition to the Courts within whose jurisdiction the goods were entrusted to the appellant for purposes of transport. The Supreme Court held that the Courts at Bombay, in the two cases before it, did not at all have jurisdiction, and consequently the agreements between the parties conferring exclusive jurisdiction on Courts at Bombay were of no avail. The Supreme Court also considered and rejected the plea of the appellant that the Courts at Bombay alone had jurisdiction, as its principal office was situated at Bombay.

14. I may refer to the following extract from paras 9, 12 and 13 of the judgment of the Supreme Court, wherein the Supreme Court considered the said plea by analyzing the Explanation to section 20 CPC:

"9. … … … What has been urged with the aid of the Explanation to Section 20 of the Code is that since the appellant has its principal office in Bombay it shall be deemed to carry on business at Bombay and consequently the courts at Bombay will also have jurisdiction. On a plain reading of the Explanation to Section 20 of the Code we find an apparent fallacy in the aforesaid argument. The Explanation is

in two parts, one before the word "or" occurring between the words "office in India" and the words "in respect of" and the other thereafter. The Explanation applies to a defendant which is a corporation which term, as seen above, would include even a company such as the appellant in the instant case. The first part of the Explanation applies only to such a corporation which has its sole or principal office at a particular place. In that event the courts within whose jurisdiction the sole or principal office of the defendant is situate will also have jurisdiction inasmuch as even if the defendant may not be actually carrying on business at that place, it will "be deemed to carry on business" at that place because of the fiction created by the Explanation. The latter part of the Explanation takes care of a case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate office at another place. The words "at such place" occurring at the end of the Explanation and the word "or" referred to above which is disjunctive clearly suggest that if the case falls within the latter part of the Explanation it is not the Court within whose jurisdiction the principal office of the defendant is situate but the court within whose jurisdiction it has a subordinate office which alone shall have jurisdiction "in respect of any cause of action arising at any place where it has also a subordinate office".

12. We would also like to add that the interpretation sought to be placed by the appellant on the provision in question renders the explanation totally redundant. If the intention of the legislature was, as is said on their behalf, that a suit against a corporation could be instituted either at the place of its sole or principal office (whether or not the corporation carries on business at that place) or at any other place where the cause of action arises, the provisions of Clauses (a), (b) and (c) together with the first part of the explanation would have completely achieved the purpose. Indeed the effect would have been wider. The suit could have been instituted at the place of the principal office because of the situation of such office (whether or not any actual business was carried on there). Alternatively, a suit could have been instituted at the place where the cause of action arose under Clause (c) (irrespective of whether the corporation had a subordinate office in such place or not). This was, therefore, not the purpose of the explanation. The explanation is really an explanation to Clause (a). It is in the nature of a clarification on the scope of Clause (a) viz. as to where the corporation can be said to carry on business. This, it is clarified, will be the place where the principal office

is situated (whether or not any business actually is carried on there) or the place where a business is carried on giving rise to a cause of action (even though the principal office of the corporation is not located there) so long as there is a subordinate office of the corporation situated at such place. The linking together of the place where the cause of action arises with the place where a subordinate office is located clearly shows that the intention of the legislature was that, in the case of a corporation, for the purposes of Clause (a), the location of the subordinate office, within the local limits of which a cause of action arises, is to be the relevant place for the filing of a suit and not the principal place of business. If the intention was that the location of the sole or principal office as well as the location of the subordinate office (within the limits of which a cause of action arises) are to be deemed to be places where the corporation is deemed to be carrying on business, the disjunctive "or" will not be there. Instead, the second part of the explanation, would have read ' and, in respect of any cause of action arising at any place where it has a subordinate office, also at such place".

13. As far as we can see the interpretation which we have placed on this section does not create any practical or undue difficulties or disadvantage either to the plaintiff or a defendant corporation. It is true that, normally, under Clauses (a) to (c), the plaintiff has a choice of forum and cannot be compelled to go to the place of residence or business of the corporation and can file a suit at a place where the cause of action arises. If a corporation desires to be protected from being dragged into litigation at some place merely because a cause of action arises there it can save itself from such a situation by an exclusion clause as has been done in the present case. The clear intendment of the Explanation, however, is that, where the corporation has a subordinate office in the place where the cause of action arises, it cannot be heard to say that it cannot be sued there because it does not carry on business at that place. It would be a great hardship if, in spite of the corporation having a subordinate office at the place where the cause of action arises (with which in all probability the plaintiff has had dealings), such plaintiff is to be compelled to travel to the place where the corporation has its principal place. That place should be convenient to the plaintiff; and since the corporation has an office at such place, it will also be under no disadvantage. Thus the Explanation provides an alternative locus for the corporation's place of business, not an additional one." (emphasis supplied)

15. In New Moga Transport Co.(supra), the Supreme Court by relying upon its earlier decision in Patel Roadways Ltd. (supra) reiterated the same legal position. In paras 9 and 10, the Supreme Court held as follows:

“9. Normally, under clauses (a) to (c) plaintiff had a choice of forum and cannot be compelled to go to the place of residence or business of the defendant and can file a suit at a place where the cause of action arises. If the defendant desires to be protected from being dragged into a litigation at some place merely because the cause of action arises there it can save itself from such a situation by an exclusion clause. The clear intendment of the Explanation, however, is that where the Corporation has a subordinate office in the place where the cause of action arises it cannot be heard to say that it cannot be sued there because it does not carry on business at that place. Clauses (a) and (b) of Section 20 inter alia refer to a Court within local limits of whose jurisdiction the defendant inter alia "carries on business". Clause (c) on the other hand refers to a Court within local limits of whose jurisdiction the cause of action wholly or in part arises.

10. On a plain reading of the Explanation to Section 20 CPC it is clear that Explanation consists of two parts, (i) before the word "or" appearing between the words "office in India" and the word "in respect of" and the other thereafter. The Explanation applies to a defendant which is a Corporation which term would include even a company. The first part of the Explanation applies only to such Corporation which has its sole or principal office at a particular place. In that event, the Court within whose jurisdiction the sole or principal office of the company is situate will also have jurisdiction inasmuch as even if the defendant may not actually be carrying on business at that place, it will be deemed to carry on business at that place because of the fiction created by the Explanation. The latter part of the Explanation takes care of a case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate office at another place. The expression "at such place" appearing in the Explanation and the word "or" which is disjunctive clearly suggest that if the case falls within the latter part of the Explanation it is not the Court within whose jurisdiction the principal office of the defendant is situate but the Court within whose jurisdiction it has a subordinate office which alone have the jurisdiction "in respect of any cause

of action arising at any place where it has also a subordinate office." (emphasis supplied)

16. The aforesaid two decisions in Patel Roadways Ltd. (supra) and New Moga Transport Co. (supra) squarely apply in the facts of this case.

17. There can be no doubt that if any part of cause of action has arisen within the jurisdiction of the Courts at Mumbai, by force of Clause 9.11 of the agreement, the Courts at Mumbai shall have exclusive jurisdiction. But the question to be asked is, whether any part of cause of action has arisen in Mumbai?

18. Learned counsel for the respondent has placed reliance on sub-clause (d) of Clause 6.6 contained in Schedule I to the agreement between the parties to submit that the performance of the contract had to take place in Mumbai. It is argued that "historic price" has been defined to mean the price of imported goods or services last paid by the respondent CIF or CIP price at Mumbai. On this basis, it is argued that the services under the contract in question were to be availed of/rendered at Mumbai.

19. I do not agree with this submission of learned counsel for the respondent. Merely because, as a reference point, the "historic price" has been defined to mean, in relation to the price of imported goods or services, last paid CIF or CIP price at Mumbai, it does not follow that the services under the current agreement between the parties had to be rendered in Mumbai. The purpose of defining the "historic price" is only to fix a point of reference, so as to be able to compute the savings/return on investment of the respondent by the use of the e-sourcing software and services solution provided by the petitioner. As the steel plant of the respondent is located in Dolvi, District Raigad, Maharashtra, the procurement of goods and services would be for the said plant at Dolvi, District Raigad, Maharashtra, and not for the corporate office of the respondent at Mumbai.

20. It is also contended by learned counsel for the respondent that under the agreement in question, the parties had agreed that the respondent shall pay the invoices via payees account cheques in Indian rupees drawn at Mumbai.

Therefore, the payment had to be made from Mumbai. He submits that the said fact also constituted a part of cause of action.

21. I cannot agree with this submission of learned counsel for the respondent. The mere drawing of the cheques at Mumbai does not constitute any part of cause of action. "Cause of action" means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It is not even necessary for the plaintiff to plead, much less to prove, that the respondent has failed to draw the cheques at Mumbai. All that the petitioner needs to plead and prove is that the petitioner has not received the payment due under the agreement at Delhi, where it was so payable. The Supreme Court in Union of India v. Adani Exports Limited, (2002) 1 SCC 567, while considering the issue of territorial jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution of India, relied upon its earlier decision in ONGC v. Utpal Kumar Basu, (1994) 4 SCC 711, and while referring to it, held that "… … … It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned."

22. It is wholly irrelevant and not necessary, in the facts of the present case, for the petitioner to even plead that the cheques had to be drawn on a bank at Mumbai. Even if such a pleading were to be made, that by itself would not confer jurisdiction on the Courts at Mumbai.

23. In Mosaraf Hossain Khan v. Bhagheeratha Engineering Ltd. & Others, (2006) 3 SCC 658, the Supreme Court was considering the issue of territorial jurisdiction of the Kerala High Court, where a petition under Article 226 of the Constitution of India had been preferred to challenge proceedings initiated by the appellant under section 138 of the Negotiable Instruments Act in the Court of the CJM Birbhum, Suri, West Bengal. The respondent/accused, who was the petitioner in the writ petition before the Kerala High Court, was located at Ernakulam in Kerala, from where the cheques had been issued. The Supreme Court, after considering

numerous decisions including the decision in Adani Exports (supra), in para 32 observed "Sending of cheques from Ernakulam or the respondents having an office at that place did not form an integral part of "cause of action" for which the complaint petition was filed by the appellant and cognizance of the offence under section 138 of the Negotiable Instruments Act, 1881 was taken by the Chief Judicial Magistrate, Suri."

24. I may only observe that for determining the territorial jurisdiction of the High Court within whose jurisdiction a writ petition under Article 226 may be preferred, Article 226(2) is relevant, which expressly, inter alia, states that the power to issue writs may be exercised by any High Court exercising jurisdiction in relation to the territories "within which the cause of action, wholly or in part, arises … …". The expression "cause of action" used in Article 226(2) of the Constitution is understood and interpreted in the same manner as in section 20 CPC. (See Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254)

25. Pertinently, the respondent has not been able to bring forth even a single decision of any Court in support of his aforesaid submission. The respondent has not been able to place any other relevant or material fact before this Court which could be said to give rise to a part of cause of action at Mumbai. The petitioner is a company working out of Gurgaon, as its corporate office is situated in Gurgaon. The petitioner's registered office is located in Delhi. The performance of the contract was to take place either in Delhi, or in Gurgaon, or in Dolvi, District Raigad, Maharashtra where the respondent's steel plant is located. No part of the performance of the contract was agreed to take place at Mumbai. The agreement between the parties contained in clause 9.11, which vests exclusive jurisdiction in the Courts at Mumbai cannot, therefore, be enforced against the petitioner.

26. The decisions relied upon by the respondent in support of its submissions do not advance the respondents case.

27. In Hakkam Singh (supra), the parties agreed that the contract shall be deemed to have been entered into between them in the city of Bombay. The appellant had invoked the jurisdiction of the court of the Subordinate Judge at Varanasi by filing a petition under section 20 of the Indian Arbitration Act, 1940. The respondent contended that Civil Courts at Bombay alone had jurisdiction to entertain the

petition. Though the said objection was rejected by the Subordinate Judge at Varanasi, the Allahabad High Court, in its revisional jurisdiction, held that the Courts at Bombay had exclusive jurisdiction to entertain the petition.

28. From a perusal of the judgment in Hakkam Singh (supra), it appears that the Supreme Court proceeded on the basis that as the contract was deemed to have been executed at Bombay, a part of cause of action had arisen at Bombay. This decision, in my view, has no application in the facts of this case, as the contract between the parties before me has not been executed at Mumbai, and no part of cause of action has arisen at Mumbai. Hakkam Singh (supra) was not a case dealing with that part of the Explanation to Section 20, which reads "… … …. or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place." Moreover, the Supreme Court has in its later decisions in Patel Roadways Ltd (supra) and New Moga Transport Co. (supra) considered the judgment in Hakkam Singh and rejected an identical argument, as raised by the respondent before me. Reliance placed on Hakkam Singh (supra) is, therefore, misplaced.

29. In Rajasthan State Electricity Board (supra), the agreement between the parties vested exclusive jurisdiction in the Courts at Jaipur. The proceedings were initiated by the respondent at Kolkata. The Supreme Court set aside the judgment of the Division Bench of the Calcutta High Court, which held that the Calcutta High Court had jurisdiction by placing reliance on Hakkam Singh (supra) and ABC Laminart (supra), by observing that where more than one Courts had jurisdiction, the parties could, by their agreement, restrict the jurisdiction to one Court. Pertinently, it appears that it was not even pleaded before the Supreme Court that no part of cause of action had arisen within the jurisdiction of the Courts at Jaipur. Consequently, this decision is also of no avail to the petitioner.

30. Geo Miller (supra) was a case where the agreement provided that all disputes or differences in the matter of the contract were subject to jurisdiction of appropriate courts at Lucknow. By following ABC Laminart (supra), this Court held that "it is clear that where the parties to a contract agree to submit the disputes arising from it to a particular jurisdiction which would otherwise also be an appropriate jurisdiction under the law that agreement to the extent that they agree

not to submit to other jurisdictions cannot be said to be void as being against public policy." (emphasis supplied)

31. The Court found, as a matter of fact, that the agreement dated 05.11.1988 had been entered into for construction, design and commissioning of a sewage treatment plant at Kankal, Haridwar, and therefore, the Civil Court at Lucknow had jurisdiction to try and decide the dispute. It was in this factual background that this Court held that the Courts at Lucknow had exclusive jurisdiction in the matter. Geo Miller (supra) has, therefore, no application in the facts of this case.

32. On facts, Cholamandalam Investment (supra) has no application in the present case, as the Court found that a part of cause of action had arisen within the jurisdiction of the Courts at Madras, which was the court vested with exclusive jurisdiction under the agreement of the parties.

33. In ABC Laminart (supra), the Supreme Court, followed Hakkam Singh (supra) and held that if under the law several courts would have jurisdiction, and the parties have agreed to submit to one of these jurisdictions, and not to other or others of them, it cannot be said that there is total ouster of jurisdiction. It was held: "In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy." (emphasis supplied)

34. Therefore, to vest exclusive jurisdiction in the Courts at Mumbai, it is imperative for the respondent to show that the Courts at Mumbai have jurisdiction otherwise under the law. Unfortunately for the respondent, the respondent has not been able to establish that any part of cause of action has arisen at Mumbai.

35. Hanil Era Textiles Ltd. (supra), has no application to the facts of this case. In this case, clause 17 of the agreement provides that all legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai. The Court found, as a matter of fact, that practically the entire cause of action had arisen at Mumbai. Even though, the aforesaid clause did not use words like "alone", "only",

"exclusive", the Court invoked the maxim 'expressio unius est exclusio alterius', and held that the Courts at Mumbai had exclusive jurisdiction.

36. The common thread that runs through all the decisions relied upon by the respondent is that the Court which had been invested with exclusive/non-exclusive jurisdiction by agreement of parties, was also the Court within whose jurisdiction a part of the cause of action arose. That is the distinguishing feature in the present case, as no part of cause of action has arisen within the jurisdiction of the Courts at Mumbai. Consequently, the preliminary objection of the respondent, that this Court does not have the territorial jurisdiction to entertain this petition is rejected. I hold that this Court has the territorial jurisdiction to entertain this petition.

37. I now proceed to consider the petition on its merits. At the outset, I may note that I had rendered a decision in Alcove Industries Limited v. Oriental Structural Engineers Limited and Anr. 2008 (1) Arb. L.R. 393 (Delhi), holding that a petition under section 14 of the Act to seek termination of mandate of an arbitral tribunal on the ground of bias of an arbitrator is maintainable. A Division Bench of this Court has recently overruled my aforesaid view in Progressive Career Academy Pvt. Ltd. v. Fit Jee Limited, OMP No.297/2006; Oriental Structural Engineers v. Alcove Industries Limited, FAO (OS) No.128/2008; and Oriental Structural Engineers v. Alcove Industries Limited, FAO (OS) No.129/2008, and a couple of other appeals decided on 16.05.2011. However, this Division Bench decision does not deal with the jurisdiction of the Court to entertain a petition under section 14 of the Act on the ground that the arbitral tribunal has lost its mandate on account of its failure to act without undue delay. In the present petition, the petitioner has not made any allegation of bias against any of the arbitrators, and the only averment of the petitioner is that the arbitral tribunal has lost its mandate on account of its failure to act without undue delay. This being the position, the aforesaid judgment of the Division Bench does not come in my way in examining the submissions of parties on merits.

38. The arbitral tribunal in question constituted of three learned arbitrators, namely, Hon'ble Mr. Justice A.M. Ahmadi, retired Chief Justice of India, who acted as the presiding arbitrator; Hon'ble Mr. Justice Ajit Kumar Sengupta, former Judge, Calcutta High Court nominated by the respondent and Hon'ble Mr. Justice P.K. Bahri, former Judge, Delhi High Court nominated by the petitioner.

39. I may note that Hon'ble Mr. Justice A.M. Ahmadi (retired), the presiding arbitrator has tendered his resignation.

40. The case of the petitioner is that the first hearing before the arbitral tribunal took place on 03.12.2005. Thereafter, in over four and half years, the learned arbitral tribunal has been able to examine only one witness of the petitioner/claimant. The grievance of the petitioner is that the hearings before the arbitral tribunal have been fixed after very large gaps of time. The petitioner has tabulated the hearings fixed before the arbitral tribunal from time to time, and indicated the time gaps between the hearings, as under:

1.

December 2005 till November 2006

Eleven months

2.

November 2006 till January 2007

Two months

3.

January 2007 till February 2008

One year and one month

4.

February 2008 till March 2008

One month

5.

March 2008 till February 2009

Eleven months

6.

February 2009 till December 2009

Ten months

7.

December 2009 till April 2010

Four months

41. According to the petitioner, the said delay has occurred primarily due to repeated defaults of the respondent in complying with the time schedule fixed by the tribunal; the repeated adjournments sought by the respondent and granted by the tribunal; the failure of the tribunal to reign in the respondent and the over indulgent attitude of the tribunal towards the respondent; the non availability and non accessibility of, particularly, one member of the tribunal, viz. Mr. Justice Sengupta (retd.), and; the adjournment of the proceedings at the behest of Mr. Justice Sengupta (retd.). I shall be dealing with these submissions a little later.

42. The per sitting fee of each arbitrator was fixed at Rs.50,000/-. The secretarial cost of the arbitral tribunal to be deposited by each party was fixed at Rs.5,000/- with the presiding arbitrator. Learned counsel for the petitioner submits, without challenge by the respondent, that a sitting was defined as a two hour sitting. Consequently, for a sitting in the pre-lunch and post-lunch session on the same day, two sets of fees/costs were payable by the parties to the arbitral tribunal.

43. The submission of Mr. Talwar, learned counsel for the petitioner, is that the manner and pace in which the arbitral proceedings have progressed over the years, and the costs which the parties have had to bear till date, has left much to be desired and the whole purpose of taking the petitioner's claim to arbitration stands defeated. He submits that parties entered into arbitration agreement in the hope that there disputes would be resolved expeditiously in a fair and reasonable manner with reasonable and limited expenditure and costs. If these objectives are not achieved, the whole purpose of agreeing to resolution of disputes by arbitration gets defeated and the proceedings become a mockery. He points out that the hearings were spread out over a very large period and the Tribunal failed to control

and reign in the respondent who was, time and again, on one pretext or the other seeking adjournments. Mr. Talwar submits that this is a fit case for terminating the mandate of the learned Arbitral Tribunal as the Tribunal has failed to act without undue delay in concluding the proceedings and only the sole witness of the petitioner had been examined in a span of over four years from the time the Tribunal was constituted. He further submits that as is evident from the petitioner's communication dated 25.05.2010 addressed to the Arbitral Tribunal, as also the response of the learned Presiding Arbitrator dated 26.05.2010, the learned Tribunal left it for the petitioner to fix the dates of hearing after consulting the respondent and the members of the Tribunal and did not take it upon itself to fix further dates of hearing. He submits, by relying upon the earlier conduct of the respondent, that the respondent was least interested in cooperating with the petitioner and the Tribunal in early conclusion of the arbitral proceedings and the thrusting of the said responsibility by the tribunal (i.e. to communicate the possible future dates for hearing on the petitioner after finding dates convenient to all concerned), did not help the cause of early conclusion of the arbitral proceedings.

44. Mr. Talwar submits that the present is a fit case for termination of the mandate of the Tribunal on the ground that it has failed to act without undue delay.

45. The Respondent has not filed any reply to contest this petition on merits. Learned counsel for the respondents has also not contested the aforesaid submissions of the Petitioner that the mandate of the Arbitral Tribunal stands terminated on account of the tribunal failing to act without undue delay.

46. Merely because the Act does not fix a time limit within which the arbitral tribunal should render its award, it does not mean that the tribunal can display a casual or non-serious approach in the matter of conduct of the arbitral proceedings. It is the tribunal which has to control the proceedings by laying down definite times lines and by enforcing strict adherence to them. Of course, there may be occasional and genuine exceptional situations, when those times lines may be relaxed in the interest of justice and fair play, but by and large, those time lines should be strictly enforced even handedly and consistently by the tribunal.

47. The reason why the act does not lay down a fixed time within which the tribunal should render the award from the time of its entering upon the reference is

not to set the arbitral proceedings at large and give an unlimited time to the tribunal to conclude the proceedings and render the award. Under the Arbitration Act, 1940, section 28 empowered the Court to extend the time of the arbitrator for making the award in case the award was not made within the period of four months, which was the statutorily fixed time for making of the award, or within the mutually extended time period. It was felt that the procedure for extension of time, which required one of the parties to approach the Court for extension of time, was proving to be self-defeating and counter-productive, inasmuch, as, the petition under section 28 remained pending in the court for a very long duration before being disposed of. To ensure that the arbitration proceedings are not obstructed by one or the other party, merely by denying its consent to the extension of time for making of the award, the Act did away with the time limit of four months for making of the award from the date of the arbitrator entering upon the reference. This, however, did not mean that the arbitral tribunal was given a carte blanch, and could act casually in the matter of conduct of the arbitration. The legislative intent is that the tribunal should act without undue delay. Lest, the parties can determine the mandate of the Tribunal, and if any dispute in this regard remains, the Court can declare that the mandate of the Tribunal stands terminated.

48. For the institution of the arbitration to succeed, it is essential that the arbitrators take up the reference with all seriousness and exhibit a sense of urgency and professionalism. It is absolutely essential that the tribunal functions efficiently, not only in terms of time, but also in terms of costs to the litigating parties, else the litigating public would not feel attracted to accept this mode of alternate dispute resolution - an alternate to the conventional dispute resolution mechanism through the process of the courts.

49. It appears that the arbitral tribunal in the present case set out in the right earnest by fixing a time schedule which would have pleased the parties or, at least, the petitioner during its first sitting held on 03.12.2005. As per the said schedule, within a space of about three months from the date of the first meeting of the tribunal, the parties were expected to complete their pleadings, admission/denial of documents and also undertake the process of discovery and inspection of documents. They were also expected to exchange the draft issues before the next date of hearing which was fixed for 13.03.2006.

50. Even though the petitioner complied with the time schedule inasmuch, as, the statement of claim was filed within the time granted by the tribunal, the respondent sought repeated extension of time for filing its defence statement/counter claim. The first request was made on 08.02.2006 to seek four additional weeks, and the second was made on 09.03.2006 to seek two additional weeks to file its reply/counter claim. The respondent also sought the deferment of hearing fixed on 13.03.2006 at New Delhi. It appears that the petitioner agreed to the said deferment, though reluctantly, as the ground of adjournment was stated to be the illness of one of the respondents counsel and of the illness of the mother of the other counsel. The respondent succeeded in deferment of the hearing fixed on 13.03.2006. Thereafter, on 20.03.2006, the respondent sought further time for filing its defence statement/counter claim on the ground that the petitioner has submitted ten volumes of 175 pages. This request was opposed by the petitioners counsel vide email dated 21.03.2006. However, the learned presiding arbitrator vide his email dated 28.03.2006, agreed to grant extension of time for filing reply/counter claim as prayed by the respondent, without any consequences.

51. The tribunal failed to fix any hearing after 11.03.2006 on its own. As the respondent did not file its defence statement/counter claim, the tribunal ought to have kept the respondent on a tight leash. Mr. Justice Sengupta (retd.), one of the arbitrators, in the meantime, vide his communication dated 24.08.2006, expressed his unavailability till the end of October 2006 on account of his travelling abroad.

52. Only when the petitioner raised its grievance with regard to its interrogatories not being answered, and documents not being produced/discovered, vide email dated 19.08.2006, the tribunal fixed the hearing from 20th to 22nd November, 2006 (five sessions) at Delhi, i.e. after eleven months of the first hearing.

53. Vide email dated 13.11.2006, i.e. one week before the scheduled date of hearing, the respondent again sought curtailment of the hearing to only one day i.e., 20th November, 2006. The petitioner protested against this request made by the respondent vide counsels email dated 14.11.2006. The petitioner conveyed that it had already made all the arrangements and incurred expenses for the meetings slated for 21st and 22nd November, 2006.

54. On the same day, Mr. Justice Sengupta (retd.), one of the learned arbitrators, also sent a communication to the presiding arbitrator expressing his inability to attend the arbitration hearings on 21st and 22nd November, 2006 on account of other prior commitments on those dates. He requested that the meeting be held only on 20.11.2006 only.

55. The last minute expression of his inability to hold the hearing on 21st and 22nd November, 2006 by the Learned Arbitrator, on the ground of other prior commitments on those dates, in these circumstances, conveys lack of commitment to the cause entrusted to the said learned Arbitrator as a member of the Tribunal. Consequently, the scope of the hearing fixed on 20th November, 2006 was limited to the consideration of the petitioner's application for production and discovery of documents, and for orders for answer of interrogatories by the respondent. The respondent, however, succeeded in curtailment of the hearing only to 20.11.2006 in the aforesaid circumstance.

56. In the hearing held on 20.11.2006, the petitioner raised a protest against the respondents failure to answer the petitioners interrogatories. The respondent undertook to answer the same within four weeks. The tribunal directed the parties to complete admission/denial of documents and circulate draft issues, and indicate if they would like to lead oral evidence. The next sitting was fixed by the tribunal on 22nd and 23rd January, 2007 at Delhi.

57. In the hearings held on 22nd and 23rd January, 2007, the issues were framed by the tribunal. Additional interrogatories were directed to be answered by the opposite party within two weeks. The respondent was granted time to move an application to amend the statement of defence/counter claim within two weeks. The next sitting was fixed on 15th, 16th and 17th March, 2007.

58. However, once again the respondent defaulted and did not move the application to seek amendment within the specified time. On 10.03.2007, the respondent accused the petitioner of not submitting its list of witnesses; the affidavits of witnesses, or; answering the interrogatories served on the petitioner on 23.01.2007. The petitioner responded through its counsel on 12.03.2007 by pointing out that the respondent had taken time to move an application for amendment within two weeks of the last hearing, but not filed the same till 08.03.2007. This left hardly

any time to file reply to the application, which the petitioner wished to oppose. The petitioner sought time to file its reply till 19.03.2007 and, in the circumstances, suggested cancellation of the dates fixed, i.e. 15th to 17th March, 2007. The respondent, did not deny its own default in not filing the application to seek amendment of reply/counter claim in time, but sought to put the blame on the petitioner for not answering the respondents interrogatories. The respondent also joined the request for adjournment of the hearings fixed on 15th to 17th March, 2007. On 14.03.2007, i.e. one day before the scheduled hearing fixed on 15th to 17th March, 2007, the respondent moved an application to seek condonation of delay in filing the application to seek amendment of the statement of defence/counter claim.

59. All these lapses on the part of the respondent were simply swallowed by the tribunal without any consequences to the respondent despite consistent protest by the Petitioner. No hearing was fixed by the tribunal. In the meantime, one of the learned arbitrators viz. Mr. S.K. Misra was elevated as a Judge of this Court on 04.07.2007. The petitioner then nominated Mr. Justice P.K. Bahri (retd.) as an arbitrator. The hearing was fixed for 06.02.2008 vide notice dated 07.01.2008.

60. On 06.02.2008, the respondents application for permission to amend its statement of defence/counter claim was allowed and the amended statement of defence/counter claim was taken on record. Two weeks time was granted to the petitioner to file its reply to the amended reply/counter claim. The parties were directed to circulate the revised/recast issues and interrogatories, if any.

61. On 06.02.2008, the petitioner made a strong submission that the respondent may subjected to costs. The tribunal declined the said request of the petitioner and adjourned the hearing to 31.03.2008.

62. On 31.03.2008, the respondent sought and was granted four weeks time to file its rejoinder to the reply of the petitioner to the respondents counter claim. The petitioner was granted time to file affidavits of its witnesses. Thereafter, the respondent was required to file affidavits of its witnesses. The next sitting was fixed on 28th, 29th and 30th August, 2008, i.e. after a gap of nearly five months for cross examination of petitioners witnesses. For cross examination of respondents

witnesses, 11th, 12th and 13th September 2008 were fixed. The tribunal also framed additional issues on this date.

63. The set of hearings which were fixed on and from 28.08.2008 were adjourned due to indisposition of Justice Sengupta (retd.) and the hearing was thereafter fixed for 14th and 15th November, 2008 vide notice dated 29.08.2008. The parties moved a joint application to seek adjournment of the hearings fixed on 14th and 15th November, 2008. Accordingly, vide notice dated 05.12.2008, the next set of sittings were fixed on 2nd and 3rd February, 2009.

64. On 02.02.2009, the respondent expressed its inability to cross examine the petitioners witnesses because the affidavit dated 23.01.2009 of the petitioners witness was received on 29.01.2009 (hard copy). Moreover, the petitioner had not answered the interrogatories of the respondent, raised in 2007. The petitioner was directed to answer the interrogatories in two weeks and the respondent was granted four weeks thereafter to file its affidavits by way of evidence. The hearing was adjourned to 4th to 6th May, 2009. These dates were cancelled due to non availability of the presiding arbitrator, to 20th and 21st July, 2009. The hearing did not take place on 20th and 21st July, 2009 on account of the demise of the father of one of the counsels for the respondent.

65. It appears, the tribunal left the task of fixing the dates after ascertaining the availability of the members of the tribunal and the parties, upon the petitioner. From the manner in which the proceedings proceeded before the tribunal, it is evident that the respondent was in no mood to conclude the proceedings early. The submission of the petitioner that the respondent was not cooperating in the matter of fixation of dates, in these circumstances, appears to be correct.

66. The arbitral tribunal fixed the next date of hearing on 18.12.2009 vide notice dated 13.11.2009. On 19.11.2009, the petitioner sought a direction to the respondent to file the affidavits by way of evidence of its witnesses, before the start of the cross examination of the petitioners witnesses. The learned presiding arbitrator vide email dated 20.11.2009 communicated that the respondent would take the consequences of not complying with the tribunals directions. Once again the respondent's counsel sought an adjournment of the hearing fixed on 18.02.2009 on the ground of his personal indisposition vide email dated 16.12.2009. Though

the learned presiding arbitrator declined his request, however, when the arbitral tribunal met on 18.12.2009, this request was acceded to and the hearing was adjourned to 8th to 10th and 12th April, 2010 to be held at Kolkata.

67. On 02.03.2010, the respondent's counsel sent an e-mail communication to the three learned Arbitrators informing that the respondent cannot arrange for holding the scheduled sittings at Kolkata and the sittings be held at New Delhi itself on the dates fixed.

68. On 05.03.2010, the Presiding Arbitrator sent an e-mail communication to the respondent's counsel stating that the meeting in Kolkata was finalized on 18.12.2009. It was informed that there would be no change in it and if any party defaults in appearance, the matter would proceed ex-parte.

69. The proceedings were conducted on 8th to 10th April, 2010 as scheduled, when the petitioners witness Mr. Nandan Narwekar (CW-1) was cross examined. The tribunal then fixed 20th to 24th May, 2010 at Delhi for cross examination of the respondents two witnesses, Mr. Mr. S.K. Varma & Mr. P. Subramanian. The respondent filed affidavits of two witnesses, namely Mr. S.K. Varma & Mr. P. Subramanian. The respondent's counsel stated that the hard copies of notarized affidavits would be sent within a week's time. The Tribunal fixed the next meeting from 20th to 24th May, 2010 at Delhi. The Tribunal also directed that "the respondent will ensure presence of both the witnesses at Delhi for cross-examination by the claimant's counsel". It appears that one of the learned Arbitrators, viz. Mr. Justice Sengupta (retd.), vide his e-mail dated 12.04.2010 expressed his difficulty in meeting on 23.05.2010 and 24.05.2010. Vide an e-mail communication dated 13.04.2010 the Presiding Arbitrator curtailed the dates of hearing to 20.05.2010 to 22.05.2010.

70. Though the respondent was required to file the affidavits of its witnesses by 17.04.2010, soft copies of the same were sent to the petitioner only on 01.05.2010, i.e. with the delay of nearly two weeks. As usual, the respondent at the last minute on 14th May, 2010 sought an adjournment of the hearing fixed on 20th to 22nd May, 2010 on the ground that Mr. S.K. Varma, the first witness was not well. It was informed that Mr. Varma had been advised complete bed rest till the end of May 2010.

71. Pertinently, till this stage, the tribunal did not exhibit any sense of urgency or seriousness with regard to adherence to its earlier orders fixing time schedules within which the parties were required to act. In this scenario, what was the message conveyed to the parties? In my view, the only message conveyed was that the parties could take the orders of the tribunal easy, and the impression given was that the tribunal was not reluctant about grant of adjournments as it had been doing in the past, practically on every request of the respondent.

72. It appears that in the light of the aforesaid request of the respondent to seek adjournment of the hearing, a telephonic conversation took place between the petitioner's counsel and the learned Presiding Officer. The petitioner's counsel, in view of the adjournment request made by the respondent's counsel, agreed to postponement of the hearing. It appears that the learned Presiding Arbitrator was of the view that even if Mr. Varma was not available for cross-examination, the second witness Mr. P. Subramanian could be made available for cross-examination and the cancellation of the tranche of dates, i.e. 20.05.2010 to 22.05.2010 (two sittings per day) was unnecessary. To this, Mr. Talwar, learned counsel for the petitioner, responded by stating that he was not ready for cross-examination of Mr. Subramanian.

73. The presiding arbitrator did not find the ground for postponement put forward by the petitioner's counsel as sustainable. The presiding arbitrator vide his email dated 18.05.2010, inter alia, directed as follows:

"In view of the above the hearing fixed from 20th to 24th May 2010 has to be postponed. It is high time that the parties realize the value of time of arbitrators; they do not fill their diaries in vain. The parties will, therefore, be liable to pay the fees of the arbitrators for the postponed tranche from 20th to 24th May, 2010 (2 sittings per day). The fees have not been paid fully by both the claimant and the respondent. They are therefore directed to pay the outstanding fees and fees upto 24th May, 2010 within 2 weeks and are further directed to convey the mutually agreed dates after consulting both my co-arbitrators and myself for cross-examination of both the witnesses."

74. The petitioner's counsel responded to the aforesaid direction made by the learned Presiding Arbitrator for payment of fee of the Tribunal for all the sittings between 20.05.2010 to 24.05.2010, even though the said sittings were not held, vide an e-mail communication dated 20.05.2010. The petitioner's counsel pointed out that the respondent served the amended affidavits of the two witnesses belatedly (soft copies on 01.05.2010 and the hard copies a few days thereafter), even though they were required to be filed on or before 17.04.2010. On 13.04.2010, the hearing fixed for 24.05.2010 had been cancelled as Mr. Justice Sengupta (retd.) was not available. He stated that at the most five sessions could possibly have been held during the tranche of sittings fixed in May. The cross-examination of the first witness Mr. S.K. Varma would have taken at least five sittings. On 14.05.2010, the counsel for the respondent informed about the unavailability of the first witness, namely, Mr. S.K. Varma on the dates fixed by the Tribunal. On the dates fixed, petitioner would have been able to complete the cross-examination of only first witness. On 16.05.2010, when the Presiding Arbitrator asked whether he would be able to cross-examine the second witness instead of Mr. Varma, the petitioner had expressed his inability to do so since only three days were available before the first sitting on 21.05.2010, and the personnel of the claimant who are briefing the counsel are stationed in Pune/Mumbai. The petitioner's counsel stated that the petitioner had committed to cross-examine both the witnesses on the dates fixed on the assumption that they would have the copies of the affidavits with the respondent's witnesses latest by 17.04.2010. It was further stated that when the affidavits of the respondent's witnesses were received on 01.05.2010, they did not lodge a protest since, by then, the hearing of 23.05.2010 had already been cancelled and it was expected that 5 sessions would be taken up in cross-examination of the first witness itself.

75. The petitioner's counsel also stated that the proceedings had been pending before the Tribunal since the year 2006. A majority of the adjournments and delays had been on account of personal difficulty of the respondent's personnel and their counsel. Some adjournments were also occasioned due to personal difficulty of the Arbitrators. The inability of the counsel for the claimant to cross-examine the second witness, which was stated to be an expert witness and the consequent adjournment was probably the only occasion when an adjournment could be attributed to the petitioner and that too because of delay by the respondent in

providing copies of the affidavits. The petitioner, therefore, appealed that it would be highly unfair to foist the extra cost of adjournment upon the claimant. The petitioner requested the Tribunal to review the direction to the claimant to pay half of the Arbitrators' fees for hearing fixed for the purpose of cross-examination of the respondent's witness, which hearings were not to be held.

76. The presiding arbitrator responded to the aforesaid communication of the petitioner's counsel vide an e-mail communication dated 21.05.2010. The presiding arbitrator observed that the tendency of shooting out letter of adjournment just a few days before the dates fixed for the proceedings cannot be appreciated. If Mr. S.K. Varma could not be present, the other witness could have been asked to be present for cross-examination. The entire tranche of three days was lost as counsel for Ariba expressed his inability to cross-examine the other witness. The presiding arbitrator ordered that the cost/fees would not include the sittings fixed on 24.05.2010. However, no order to modify the remaining costs was passed.

77. On 25.05.2010, the petitioner's counsel sent an e-mail communication to the Arbitral Tribunal in response to the Presiding Arbitrator's communication dated 21.05.2010. The petitioner stated that "We expect that the decision of the learned Presiding Arbitrator will be placed before the entire Tribunal for ratification when it meets next, and we shall be allowed to make oral submissions in the matter. After all, a sum of Rs.4,40,000/- (the share of just the Claimant for six sessions) is not a small sum."

78. The petitioner further requested the Tribunal to fix fresh dates for hearing in June 2010. The petitioner stated that in July 2009, when the matter was adjourned, the counsel for the claimant was asked to get in touch with all concerned and suggest a set of dates that would be convenient to all. It was stated that the petitioner's counsel did not receive any cooperation from any of the concerned persons and went around in circles trying to arrive at a set of dates convenient to all. The petitioner also complained that despite many requests made to counsel for the respondent, the minutes of the last set of hearing, the soft copies of which were recorded in the laptop of the respondent, had not been circulated.

79. The said e-mail of the petitioner's counsel evoked an angry response from the Presiding Arbitrator. On 26.05.2010, the Presiding Arbitrator responded by posing a question as to whether it was fair to expect the Tribunal to bear wasting days without imposing condition to compensate for the same. He also observed that the petitioner "Wanting my decision to be ratified by the tribunal hoping to draw a wedge between the members of the Tribunal by seeking ratification, is to say the least is not just". He further stated that "I am afraid the course of ratification suggested by you is not in keeping with the dignity of the Tribunal and in particular of the Presiding Arbitrator and is unacceptable. The impunity of postponement at the sweet will of parties' counsel cannot be a healthy practice since it delays the progress of the proceedings for which fault is laid at the doors of the Tribunal". The learned Presiding Arbitrator further stated:

"Let me end that if the notion is that the Tribunal must be prepared to bear the wasted days for no fault of its own and if the decision taken by the Presiding Arbitrator is to be subject to ratification, I would think that the more honourable way would be for me to quit. I am willing to take that course. Besides, as you yourself admit how difficult it is to fix the next dates for the hearing, I do not think that while the counsel agree to an adjournment, the Presiding Arbitrator should go through the ordeal of getting parties and colleagues to agree to a set of dates as the diaries of counsel and arbitrators are fairly tight; speaking for myself I do not think I can find a five day slot in June-July and only with difficulty in August unless I cancel dates already given to make room, and why without a guarantee that neither side will seek postponement and why should either party do so if adjournment comes free?"

80. The petitioner's counsel sent an e-mail dated 29.05.2010 to the learned Arbitrators stating that the petitioner had sought a hearing on the issue of payment of costs as certain relevant aspects had not been considered by the Presiding Arbitrator while making the order on costs. The petitioner also conveyed his no objection if the Presiding Arbitrator sits singly to hear and decide on the aspect of costs. The petitioner renewed its request for fixing the next date of hearing in June 2010 while pointing out that there had been undue delay in the mater and special efforts should be made to regain some of the lost time.

81. The learned presiding arbitrator sent his response to the aforesaid e-mail of the petitioner's counsel on 01.06.2010. The Presiding Arbitrator stated that he was agonized and did not see any reason to continue with his agony. He further stated that there was no valid reason to the petitioner's request to cross-examine the second witness. He stated that he did not find any reason to continue on such correspondence which is not consistent with dignity. He offered his resignation.

82. The present petition was thereafter filed by the petitioner on 04.06.2010.

83. From the aforesaid it appears that after the postponement of the hearing which was fixed on 20th to 22nd May, 2010, the Ld. Presiding Officer refused to fix any further hearing on its own. He observed that the presiding arbitrator should not be made to go through the ordeal of getting parties and colleagues to agree to a set of dates as the diaries of counsel and arbitrators are fairly tight. He also observed that he would not be able to find a five day slot in June/July and even in August, he could make room only by cancelling the dates already given.

84. In my view, the aforesaid facts clearly reveal the following:

i) The respondent was not at all interested in letting the arbitration proceedings progress and conclude. On majority of dates the respondent sought adjournment on one ground or the other.

ii) The respondent hardly ever stuck to the schedule fixed by the tribunal.

iii) The tribunal repeatedly accommodated the respondent without any costs or consequence.

iv) On majority of occasions the petitioner adhered to the schedule fixed by the tribunal, and despite protests and demand for costs due to the delay and defaults caused by the respondent, the tribunal turned a deaf ear to all such requests.

v) Contrary to the attitude displayed by the tribunal in the past, the presiding arbitrator, in relation to the hearing fixed between 20th to 22nd May, 2010, saddle both the parties with exemplary costs of Rs.4,40,000/- each to be paid to the arbitral tribunal towards its fee for the hearings which were not to be held.

85. It is patently clear that the arbitral tribunal has failed to act without undue delay in disposing of the reference made to it. The hearings have been fixed by the

Tribunal after extremely long gaps of time, and on various dates, little progress had been made. From the facts narrated by the Petitioner, which are supported by correspondence/order sheets placed on record and also not denied by the respondent, it is evident that the tribunal has proceeded rather casually in the matter. These proceedings display a lack of will on the part of the tribunal in reigning in the respondent, and in enforcing discipline on the part of the parties. On one pretext or the other, the respondent repeatedly sought adjournments and larger time for compliance by it of the tribunals directions. On each occasion the tribunal let the respondent have its way without any penal consequences. Obviously, the respondent took the tribunal and the petitioner for granted. This was the result of over indulgence shown by the tribunal to the respondent. There was no sense of urgency displayed by the tribunal in the matter of fixing the dates of hearing or in enforcing compliance of the schedule fixed by the parties, particularly in the earlier part of its proceedings. The arbitral tribunal has not shown the commitment expected of it in expeditiously taking up the reference and concluding the same. The tribunal has to take control of the proceedings and to dictate terms to the parties and enforce their compliance with only rare and deserving exceptions. At the same time, the tribunal has to be consistent in its approach and even handed in its treatment. It appears, the tribunal in the initial years was rather laid back in its approach, and all of a sudden, became intolerant to petitioners request for adjournment.

86. In NBCC Ltd. v. J.J. Engineering Pvt. Ltd., (2010) 2 SCC 385, the Supreme Court observed that arbitration is an efficacious and alternative dispute resolution between the parties. The method of arbitration has evolved over a period of time to help the parties to speedily resolve their disputes through this process. The Act recognizes this aspect and has elaborate provision to cater to the need of speedy disposal of disputes. In the case before the Supreme Court, the arbitration proceedings had lingered on for 9 years. The Supreme Court held that the said delay defeated the notion of the whole process of resolving the disputes through arbitration. The decision of the High Court in fixing a time schedule within which the arbitration should be concluded (six months in this case) was upheld by the Supreme Court.

87. In the present case, over a span of 4½ years, only one witness of the claimant had been examined. The cross examination of the respondents witnesses has not

yet begun. By no standard or yardstick can it be said that the arbitral tribunal has proceeded in this case diligently and efficiently. Even if the one off mutual adjournment sought by the parties is accounted for, the progress of the proceedings before the tribunal has been unacceptably slow. Moreover, I fail to appreciate, how the tribunal could have refused to, or showed its reluctance to fix the dates in future, even if the tribunal was upset about the fact that the proceedings fixed on 20th to 22nd May, 2010 had been got unjustifiably adjourned. The communication dated 26.05.2010 of the Ld. Presiding arbitrator conveys the impression that he was reluctant to proceed in the matter. I am, therefore, of the clear view that the mandate of the arbitral tribunal stands terminated.

88. The issue which now arises is as to what is the course of action that the Court should now adopt in the facts of the present case. The submission of Mr. Talwar is that looking to the conduct of the respondent, and the modus operandi adopted by it; the fact that the parties have entered into an arbitration agreement to have early and cost effective resolution of the arbitrable disputes; the costs and time already incurred and spent by the parties, the arbitral reference should be made to a sole arbitrator appointed by this Court. He further submits that the respondent while exercising its right to appoint an arbitrator, deliberately appointed an arbitrator who was either too busy, or not entirely committed to the cause of arbitration, as is evident from the aforesaid narration.

89. Mr. Talwar submits that though the petitioner is not in a position to make, and is not making any allegations of personal bias against the arbitrator nominated by the respondent, namely Mr. Justice Sengupta (retd.), a perusal of the arbitration record would reveal that Mr. Justice Sengupta (retd.) lacked commitment to the cause of early disposal of the arbitral reference in this particular case.

90. Mr. Talwar submits that the Court is not bound to follow the rules that were applicable to the appointment of an arbitrator upon termination of mandate of the tribunal. He relies on Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd., (2008) 10 SCC 240, wherein the Supreme Court held that while exercising its power under section 11 of the Act, “it is not mandatory for the Chief Justice of any person or institution designated by him to appoint a named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other

considerations." Mr. Talwar submits that the appointment of Mr. Justice Sengupta (retd.) in the present case tantamounted to a failure of the designated authority/appointing authority to appoint an independent, impartial, able and efficient arbitrator. Consequently, the respondent cannot be trusted to appoint another arbitrator upon termination of mandate of the Tribunal.

91. He places strong reliance on the decision of the Supreme Court in Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523, wherein the Supreme Court upheld the decision of this Court appointing a retired Judge of the High Court as the sole arbitrator, even though the arbitration clause in the agreement between the parties, contained in clause 64 of the General Terms and Conditions of the Contract, required two serving gazette officers of equal status to be appointed as arbitrators: one by the contractor from a panel to be proposed by the Railways, the other by the Northern Railways, and the two arbitrators so appointed in turn had to appoint the presiding arbitrator.

92. Mr. Mitra, learned counsel for the respondent submits that in a situation like the present, the fresh Tribunal would need to be constituted by applying Section 15(2) of the Act which provides that "where the mandate of an Arbitrator terminates, a substituted Arbitrator shall be appointed according to the rules that were applicable to the appointment of the Arbitrator being replaced". He submits that both the parties should, therefore, nominate one Arbitrator each and the two Arbitrators should appoint the Presiding Arbitrator, as done in the earlier round, and the Arbitral Tribunal so constituted should proceed with the reference from the stage left by the earlier Tribunal. Mr. Mitra submits that the right of the parties to nominate one Arbitrator each cannot be taken away by the court merely because the mandate of the earlier constituted Tribunal stands terminated on account of its failure to act without undue delay.

93. In support of his submissions Mr. Mitra has placed reliance on the following decisions:

(i) Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. & Another, (2006) 6 SCC 204;

(ii) You One Engineering & Construction Co. Ltd. & Another Vs. National Highways Authority of India (NHAI), (2006) 4 SCC 372; and

(iii) National Highways Authority of India & Another Vs. Bumihiway DDB Ltd. (JV) & Others, (2006) 10 SCC 763.

94. Section 11(8)(b) of the Act, inter alia, states that an Arbitrator to be appointed should be independent and impartial. These are the qualities that are expressly recognized in the Act itself, which an Arbitrator necessarily must possess. Apart from possessing these qualities, an Arbitrator should also be able – in body and mind, competent (i.e., should possess requisite knowledge and qualifications, if any, prescribed in the arbitration agreement or considered necessary for the resolution of the dispute), and should also have the will and commitment to proceed with the arbitration without undue delay. An Arbitrator, who may otherwise fulfill all the requirements of being independent, impartial, qualified and able, would be of no use, if he does not proceed efficiently and expeditiously with the arbitral reference made to him, and would lose his mandate if he fails to act without undue delay.

95. The parties are free to agree to the termination of the mandate of an Arbitrator, and upon their so agreeing, his mandate stands terminated by virtue of Section 14(1)(b) of the Act. Therefore, even if an Arbitrator is appointed by resort to the appointment procedure agreed upon by the parties, if they find that the Arbitrator is not proceedings without undue delay with the arbitral reference, they can mutually agree to this termination of his mandate.

96. A perusal of the arbitral record shows that firstly, Mr. Justice Sengupta (retd.), in the midst of the arbitration proceedings went away to USA. This fact would not have been of much significance if, otherwise, the tribunal would have been holding its hearings on short intervals and would have been making tangible progress in the case. Secondly, even though the arbitration proceedings had been fixed on 20th to 22nd November 2006, presumably with the prior consultation and consent of the said arbitrator, at the last minute, he expressed his inability to proceed with the arbitration and sought curtailment of the hearing fixed on the ground of his other engagement, as late as on 13.11.2006. This shows lack of commitment on the part of the said arbitrator to proceed with the arbitral reference in this case. Thirdly, Mr. Justice Sengupta (retd.) was not available either on email or on telephone for

many months, after the proceedings fixed on 21st and 22nd November, 2006 had been adjourned. The learned arbitrator did not either leave his contact details with the parties, or did not respond to the various attempts made by the petitioner for fixation of fresh dates of arbitration. Mr. Justice Sengupta (retd.) again sought curtailment of the hearing fixed between 20th to 24th May, 2010 (which presumably had been fixed in consultation with him) vide his email dated 12.04.2010.

97. All the aforesaid facts and circumstance suggest that Mr. Justice Sengupta (retd.), who had been nominated by the respondent, was not serious about, and not committed to the arbitration proceedings being conducted expeditiously and efficiently.

98. Despite the aforesaid position continuing, the respondent who had nominated Mr. Justice Sengupta (retd.) did not register any protest against the aforesaid conduct of the learned Arbitrator. As the respondent had nominated Mr. Justice Sengupta (retd.),the respondent could have, with the consent of the petitioner, terminated the mandate of Mr. Justice Sengupta (retd.) for his exhibiting lack of commitment and interest in the progress of the arbitral reference. However, no step was taken by the respondent. In fact, the slackness displayed by Mr. Justice Sengupta (retd.) in proceeding with the arbitral reference appears to be in consonance with the conduct of the respondent in seeking adjournments on practically every hearing fixed before the Tribunal.

99. From the facts of this case it appears that the possibility of the respondent deliberately having nominated an arbitrator, who would not be able to take up the reference expeditiously (for whatever reasons), to scuttle the arbitration proceedings cannot be ruled out. Even if it were to be assumed that at the time of nomination of Mr. Justice Sengupta (retd.) the respondent was not aware of the manner in which the said Arbitrator would conduct himself, the failure of the respondent to take corrective measures by replacing Mr. Justice Sengupta (retd.) demonstrates the intent of the respondent in not letting the arbitration proceedings progress expeditiously.

100. The respondent cannot misuse and exploit its power to appoint an arbitrator, so as to appoint an arbitrator who is not interested in early resolution of the

disputes. The power to appoint an arbitrator is coupled with the duty to appoint an independent and impartial arbitrator, who would conduct the arbitral proceedings efficiently and diligently to achieve the desired result of early conclusion of the arbitral proceedings within reasonable costs and expenses. The power to appoint an arbitrator conferred on a party is to be exercised with caution. That power cannot be exercised with a view to defeat arbitration, and thereby the rights of one or the other party to seek early, efficient and just conclusion of the arbitration proceedings. The appointing authority, even if he is one of the parties to the lis in relation to which he appoints/nominates the arbitrator, while making the appointment, acts, and is expected to act, in an independent and fiduciary capacity to ensure appointment of an independent, impartial competent, able and efficient arbitrator.

101. I may refer to the judgment of this Court in Interstate Constructions v. NPCC Limited, 114 (2004) DLT 746, wherein this Court held "the appointing authority should be always mindful that he discharges the fiduciary duty towards the adversaries, and while nominating an arbitrator the effort should be to facilitate and not frustrate the adjudication." I may note that Interstate Constructions (supra) is one of the decisions overruled by the Division Bench in Progressive Career Academy Pvt. Ltd. (supra). However, the overruling does not pertain to the aforesaid aspect dealt with in the said judgment. In Interstate Constructions (supra) as well, the mandate of the arbitrator was terminated on the ground of bias, and it was for this reason that the said judgment was overruled in Progressive Career Academy Pvt. Ltd. (supra).

102. If the appointing authority breaches the faith reposed in it by the parties, or one of the parties, to appoint an independent, impartial, able and efficient arbitrator, it's said authority/power can be forfeited by the Chief Justice or his designate, as it is the duty of the Court to ensure that the cause of arbitration is not allowed to be defeated by adopting such tactics.

103. In Alcove Industries Limited (supra) this Court had inter alia held as under:-

"Merely because one of the parties to an arbitration agreement may be entrusted with the duty of nominating an Arbitrator, it does not mean that the nominee can be a person who is in such a position in relation to one or the other party, or is

possessed of such knowledge or attributes, as may give rise to justifiable doubts as to his independence and impartiality. The obligation to nominate an Arbitrator is a solemn fiduciary obligation to nominate an unbiased and fair Arbitrator. This obligation cannot be turned into an opportunity by the party making the nomination, to nominate an Arbitrator who acts with partiality in favor of one or the other party. In the present case, the nominating authority, in appointing the second respondent failed to discharge what has been referred to in Interstate Constructions v. NPCC Limited 2004 (VII) AD (Del) 499 as, his fiduciary duty towards the adversaries. In Interstate (supra) the learned single Judge of this Court was faced with a situation where the Appointing Authority as well as the Arbitrator appointed by him acted unreasonably. The learned judge held that the conduct and dealing of the Appointing Authority compelled it to overlook strict procedural objections which are calculated to defeat the ends of justice. The learned single Judge thereafter proceeded to appoint an Arbitrator after "overlooking" the power of the Appointing Authority to appoint an Arbitrator."

I may note that the aforesaid aspect in Alcove Industries Limited (supra) has not been commented upon by the Division Bench and hence cannot be said to have been overruled.

104. The question that arises for consideration is whether, in the facts of this case, the respondent should be trusted to discharge its obligation to nominate an independent and impartial arbitrator who would act diligently and efficiently to proceed with the arbitral reference in an expeditious manner? Looking to the past experience as discussed above, my answer is in negative.

105. Failure to appoint an independent and impartial arbitrator who is able and competent, and who would act efficiently to dispose of the arbitral reference with a sense of commitment to the cause of arbitration is, in my view, a failure of the appointing authority to act as required under the procedure to appoint an Arbitrator.

106. This Court in M/s. Singh Builders Syndicate v. Union of India, ILR (2006) I Delhi 501, held that the mandate of the arbitral tribunal constituted in terms of clause 64 of the General Terms and Conditions stood terminated on account of the failure of the tribunal to act without undue delay. The arbitral tribunal consisted of three arbitrators. The arbitrators were railway employees. The proceedings did not

proceed for several years on account of the frequent transfers of the successively appointed arbitrators. The Court proceeded to consider the plea of the petitioner that an independent arbitrator be appointed, as the respondent had lost its right to suggest names of arbitrators. The plea of the petitioner was that under certain circumstances, notwithstanding the procedure contained in the arbitration agreement, the Court had the power to appoint an arbitrator.

107. The learned Single Judge proceeded to take note of a few decisions, including BWL Limited v. MTNL, 2000 (2) ALR 190 (Del). In this decision, the Court, inter alia, observed "it has now become common place for persons who have retained this power of appointment of an Arbitrator, not to act at all or to act with such obduracy as to render an Arbitration Clause totally meaningless." It was held in this decision that even after notice of appointment of arbitrator, if the appointing authority had allowed thirty days time to lapse without taking action, the aggrieved party could approach the Court for appointment of an arbitrator and the persona designata forfeits its right to appoint the arbitrator. The Court, in such circumstances, can step in and take charge of the proceedings and appoint the arbitrator.

108. The learned Single Judge then took note of the decision in Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr., 2000 (3) Arb.LR 447 (SC), wherein the aforesaid dicta was approved with the modification that merely on expiry of thirty days time, the right of appointment which vested in the persona designata did not forfeit. The appointment could be made even after the expiry of thirty days period, but before the application for appointment of an arbitrator is filed before the Court.

109. The Court then took note of the decision in Interstate Constructions (supra), wherein a learned Single Judge of this Court while terminating the mandate of the arbitrator on the ground of bias, held:

"It is this type of conduct and dealing which sometimes compels a Court to override clauses in an agreement which waive objection as to impartiality of the Arbitration on the grounds that he is an officer of one of the parties to the dispute."

I may, once again, note that the overruling of Interstate Constructions (supra) does not impinge on the aforesaid aspect of the matter.

110. The learned Single Judge also took note of the decision in Sushil Kumar Raut v. Hotel Marina & Ors., 2005 (81) DRJ 533, decided by a Division Bench of this Court, wherein the Division Bench proceeded to appoint an arbitrator in the peculiar circumstances of the case, which is not covered by the provisions of the Act. The Division Bench held as follows:

"We are conscious of the position that arbitration admits of least judicial intervention and the manner in which an arbitrator is to be appointed. But we are faced with an impasse which is neither covered by the provisions of the Arbitration Act, nor any precedent. This, if left unattended would have the natural consequence of leaving the disputes between the parties unresolved which would be contrary to the spirit and intent of the Arbitration Act. It would, Therefore, require to be broken which can be only done by the appointment of an impartial arbitrator. This may not be technically or strictly in tune with the provisions of the Act which do not provide for such like eventualities but it is surely dictated by the interests of justice. Therefore to promote and secure the interests of justice, it would be appropriate to set aside the impugned order and appoint an independent arbitrator."

111. Deriving strength from the aforesaid three decisions, the learned Single Judge in Singh Builders Syndicate (supra) expressed his opinion that "in the present case also time is ripe for constituting an independent arbitral tribunal by this Court." The Court, after discussing the facts of that particular case, held:

"…. … … Because of dilly dally practice adopted by the respondent at every stage and repeatedly, the arbitration proceedings are stuck up at the initial stage though seven years have passed since the dispute arose. Therefore, it would be a fit case to appoint a sole arbitrator by this court superseding the procedure prescribed in the arbitration clause. That is the only choice left in view of the aforesaid conduct of the respondent."

112. This decision was challenged before the Supreme Court, which is reported as Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523. The Supreme Court, in para 3 of its decision, observed as follows:

"3. It is true that the Arbitral Tribunal should be constituted in the manner laid down in the Arbitration agreement. Provisions for arbitration in contracts entered by governments, statutory authorities, and government companies, invariably require that the Arbitrators should be their own serving officers. Such a provision has to be given effect, subject to requirements of independence and impartiality. But there can be exceptions and this case which has a chequered history, falls under such exceptions." (emphasis supplied)

113. The Supreme Court posed the question which arose before it, i.e. "Whether the appointment of a retired Judge of the High Court as the sole arbitrator should be set aside and the arbitral tribunal should again be constituted in the manner provided in terms of clause 64 ?" The Supreme Court rejected the reliance placed by Union of India on Union of India v. M.P. Gupta, (2004) 10 SCC 504, (a decision under the Arbitration Act, 1940) wherein it had been held that the appointment of a retired Judge as the sole arbitrator contrary to clause 64 (which requires serving gazetted railway officers to be appointed) was impermissible, on the ground that the position under the new Act is different. The Supreme Court placed reliance on Northern Railway Administration (supra), wherein it had been held "that the appointment of arbitrator(s) named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered to and/or given effect as closely as possible." Para 14 of this decision read as follows:

"It was further held in Northern Railway case that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of Sub-section (8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the Arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the Arbitrator/s appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary

to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration." (emphasis supplied)

The ratio of the decision in Union of India v. Singh Builders Syndicate (supra), in my view, squarely applies in the facts of the present case.

114. No doubt, on facts, the position before the Supreme Court in the case of Singh Builders Syndicate (supra) was different, inasmuch, as, the tribunal in that case had been constituted on more than one occasion by adhering to clause 64 of the General Terms and Conditions of the Contract, whereas in the present case, the tribunal has been constituted only once, in terms of the arbitration agreement between the parties. However, that to my mind, does not make much difference. What has to be seen is the conduct of the concerned party in appointing an arbitrator; the conduct of the arbitrator so appointed; and the resultant situation which has arisen in the case. I have already discussed all these aspects herein above. The result of the respondent making the appointment of one of the arbitrators has been that the proceedings have got stretched over a period of 4 ½ years with hardly any progress, and the costs incurred by each of the party in the conduct of the proceedings, till date, is to the tune of Rs.12.75 lacs. This situation is wholly unacceptable and makes a mockery of the institution of arbitration.

115. Pertinently, under clause 64 of the General Terms and Conditions of the Contract, the arbitrators had necessarily to be serving railway officers. In para 2 of its decision, the Supreme Court paraphrased the requirement of clause 64 as follows:

"2. The appellant contends the appointment of arbitrators should be only in accordance with Clause 64 of the general terms and conditions contract which requires two serving Gazetted Railway officers of equal status being appointed as Arbitrators, one by the contractor from a panel made available by the General Manager of Northern Railways and the other by the Northern Railways, and the two arbitrators so appointed, in turn appointing an Umpire."

116. Despite that being the position, the Supreme Court upheld the order of this Court directing appointment of a sole independent arbitrator, i.e. a retired Judge of this Court. In the present case, as per the arbitration agreement, no specific qualification has been laid down that the arbitrator need possess.

117. In Indian Oil Corporation Ltd. & Others v. Raja Transport Pvt. Ltd., (2009) 8 SCC 520, in para 45, the Supreme Court observed that if the arbitration agreement provides for arbitration by a named arbitrator, the Court should normally give effect to the provisions of the arbitration agreement. By placing reliance upon Northern Railway Administration (supra), it was held that:

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

118. In my view, the present is an exceptional situation which calls for departure from the manner of constitution of the arbitral tribunal, for the reasons already indicated herein above.

119. Reliance placed by counsel for the respondent on Yashwith Constructions (supra), in the facts of this case, is of no avail. There can be no quarrel with the proposition that in normal circumstances, upon termination of the mandate of an arbitrator, the same rules and procedure for appointment of an arbitrator would be applicable as was applicable for the initial constitution of the tribunal. However, as held by the Supreme Court in Northern Railway Administration (supra), Singh Builders Syndicate (supra) and Raja Transport (supra), in exceptional cases, for reasons to be recorded, the Court may deviate from the appointment procedure

prescribed in the agreement, and appoint an independent arbitrator on its own so as to achieve the ultimate aim of a fair, swift and cost effective resolution of the disputes between the parties.

120. Similarly, reliance placed on You One Engineering & Construction (supra) is of no avail to the respondent. In this decision, the Supreme Court held that a request could be made to the Chief Justice or his nominee under section 11(6) of the Act, if a party fails to act as required under the procedure agreed between the parties, or the two appointed arbitrators fail to reach an agreement expected of them, or that the person, including the institution, fails to perform any function entrusted to him or it under the procedure. The Supreme Court held that the institution in question, namely, Indian Road Congress had not failed to act and had, in fact, nominated the third arbitrator, when the two arbitrators appointed by the two parties failed to agree upon the third arbitrator. The Supreme Court, in this background, held that an application to the Chief Justice was not maintainable. I have already observed that failure to appoint an independent, impartial, competent, able and efficient arbitrator tantamounted to failure to act by the respondent, and in exceptional circumstances, this Court is not powerless to step in and appoint an independent arbitrator.

121. Mr. Mitra lastly has placed reliance on Bumihiway DDB Ltd (supra). At the outset, I may note that Bumihiway DDB Ltd. (supra) is an earlier decision of two Hon'ble Judges, whereas Northern Railway Administration (supra) is a decision of three Hon'ble Judges of the Supreme Court. In this case, the High Court had proceeded under Section 11(6) of the Act on the basis that the Indian Road Congress having been approached to appoint the presiding arbitrator, had failed to do so. However, the Supreme Court found that the Indian Road Congress, which was authorized to nominate the presiding arbitrator, had not been called upon to nominate the presiding arbitrator.

122. In Bumihiway DDB Ltd. (supra), the Supreme Court did not address itself to the question whether the appointment procedure under the agreement of the parties could be deviated from, or not, even in exceptional circumstances. That was an issue which was squarely considered by the Supreme Court in Northern Railway Administration (supra), Singh Builders Syndicate (supra) and Raja Transport (supra). The Supreme Court while dealing with Bumihiway DDB Ltd. (supra) was

not confronted with a situation like the present, wherein the appointing authority of one of the arbitrators, namely the respondent in this case, had lost the confidence of the Court that it would appoint an independent, impartial, competent, able and efficient arbitrator, who could become a part of the tribunal to ensure expeditious conclusion of the arbitral proceedings.

123. For all the aforesaid reasons, the decision in the case of Bumihiway DDB Ltd. (supra) has no application in the facts of the present case.

124. I am, therefore, of the view that in the peculiar facts of this case, with a view to advance the cause of justice and to achieve expeditious and cost effective disposal of the arbitral reference, this Court is justified in not resorting to the manner of constitution of the arbitral tribunal as agreed between the parties in clause 9.10 of their agreement and instead, this is a fit case where the Court should appoint an independent and impartial sole arbitrator to adjudicate the arbitral reference.

125. The next question that arises for consideration is with regard to the order passed by the learned presiding arbitrator on 18.05.2010 directing imposition of costs on both the parties, which translates to Rs.4,40,000/- per party.

126. Firstly, from the correspondence exchanged between the petitioner's counsel and the learned presiding arbitrator it appears that the decision to impose the aforesaid costs vide order dated 18.05.2010 was made by the learned presiding arbitrator singly, and it was not an order passed by the tribunal, i.e. three learned arbitrators jointly, and after consultation with each other. This becomes clear from the communication of the learned presiding arbitrator sent in response to the petitioners request that the issue of payment of costs be placed before the tribunal in a sitting that may be convened. The learned presiding arbitrator accused the petitioner of trying to draw a wedge between the learned arbitrators by making such a request. This is a clear indication that the decision to levy costs, (which translates to Rs.4,40,000/- per party) vide order dated 18.05.2010, was a unilateral decision taken by the learned presiding arbitrator, and not by the three member tribunal as a whole. I fail to appreciate how the learned presiding arbitrator could have taken such a drastic decision, which had significant monetary consequences

for the parties, entirely on his own and without the concurrence of the other two learned arbitrators.

127. Secondly, even if one were to assume that such an order imposing costs could have been passed by the ld. Presiding arbitrator on his own, without the concurrence of the other two arbitrators, I find that while imposing the said costs, the learned presiding arbitrator did not even give an option to the parties to either proceed with the arbitration, or pay the said costs. If the learned presiding arbitrator was not convinced that the petitioner was justified in seeking an adjournment of the hearings fixed from 20th to 22nd May, 2010, he could have insisted on the hearing on these dates proceeding. The tribunal could, in the sittings, have passed consequential orders to close the right of the petitioner to cross examine the respondents witnesses, if the petitioner failed to cross examine the respondents witness(es). The threat of imposing costs could have been used as a stick by the learned presiding arbitrator to ensure that the proceedings went on as per schedule between 20th to 22nd May, 2010. From this, it appears that the real emphasis of the ld. Presiding arbitrator was not on holding the hearings on 20th to 22nd May, 2010, but the focus was on realization of the exemplary costs/fees.

128. Thirdly, from the entire correspondence addressed by the learned presiding arbitrator to the counsel for the petitioner, it appears that the learned presiding arbitrator has brushed aside the relevant and pertinent issues raised by the petitioners counsel, namely:

i) The delay on the part of the respondent in filing the affidavits of its two witnesses. Though the said affidavits were required to be filed by 17.04.2010, the same were forwarded only on 01.05.2010, i.e. with the delay of about two weeks.

ii) The failure of the respondent to produce its first witness Mr. Varma at the last minute on the ground of his being unwell.

It was the case of the petitioner that the cross examination of Mr. Varma itself would have taken up the curtailed hearing fixed between 20th to 22nd May, 2010. According to the learned presiding arbitrator, there was no reason to assume that such a long time would be required for cross examination of the said witness. I have not gone into the merits of the controversy and, therefore, I am in no position to comment on the said assessment made by the learned presiding

arbitrator. However, I may only note that the cross examination of the petitioners sole witness had taken about five to six sessions between 8th to 10th April, 2010. Therefore, the estimation of the learned counsel for the petitioner, that the petitioner would take all the sessions between 20th to 22nd May, 2010 for cross examination of the respondents first and prime witness, may have been justified.

iii) The petitioners submission that the second witness of the respondent Mr. Subramanian was an expert witness and for preparation of his cross examination, the petitioner required instructions from his client's officers based in Pune/Mumbai, for which there was not sufficient time left, as the respondents communication expressing difficulty in producing the first witness came only on 14.05.2010.

129. Fourthly, the reaction of the learned presiding arbitrator in issuing the communication dated 18.05.2010 goes contrary to the yardstick (in the matter of accommodating parties) adopted by the tribunal in the earlier hearings. On various occasions, the hearings were adjourned at the request of the respondents counsel, without any penal consequences, as already discussed above. In that sense, the order dated 18.05.2010 stands out as being rather unusual and odd.

130. Fifthly, even otherwise the explanation furnished by the petitioner for expressing the inability of the petitioner to cross examine the second witness on the said dates fixed, i.e. 20th to 22nd May, 2010 appears to be genuine and bona fide, and it cannot be said that the petitioner was avoiding to proceed with the cross examination of the respondent witnesses. This was one of the rare occasions when the petitioner sought an adjournment which itself was triggered by, firstly, the delayed filing of the affidavit by way of evidence by the respondent, secondly, by the curtailment of the hearing fixed on 24th May, 2010, and, thirdly, by the delayed communication of the respondent that the first witness Mr. Varma shall not be available for cross examination on the dates fixed. All earlier adjournments had either been sought by the respondent or were occasioned due to the conduct of the respondent in delaying or defaulting in making compliance, with the exception of one adjournment occasioned due to failure of the petitioner in answering the respondents interrogatories.

131. From a perusal of the record, it appears that the fee payable by each of the parties to the tribunal for the hearings actually held was to the tune of Rs.12,75,000/- apart from secretarial expenses of Rs.40,000/- per party. The parties would naturally have borne the expenses for arranging the venue for the conduct of the arbitration as well. In relation to sittings held in Kolkata, the parties would have had to bear the travelling, lodging and boarding expenses as well for the learned arbitrators.

132. The issue that arises is, whether such heavy fee and costs can be justified, looking to the time consumed and the progress made in the arbitral proceedings? With utmost respect to the members of the tribunal, in my view, the fees and expenses already incurred/payable by each of the parties is excessive and cannot be justified in the facts of this case. It cannot be said that the parties have got their monies worth. The institution of arbitration, just like the courts, are created with the litigant, i.e. consumer of justice being the central figure. It is to provide judicial service to the litigating public, so as to preserve law and order in the society, that the courts have been established and all other alternate dispute resolution modes, including arbitration, have been evolved. Just like the courts have not been created for the benefit of the Judges and the support staff, similarly, the arbitrations are not conducted to advance the cause of the learned arbitrators. No doubt, the arbitrators, specially retired judges, are rated very highly on account of their established reputation of honesty, integrity, legal knowledge and acumen, and they must be adequately compensated for devoting their time and effort to help resolving disputes between the parties. However, that does not mean that arbitration should be allowed to become prohibitively expensive for the arbitrating parties, such that it defeats the very purpose of sending parties to arbitration.

133. The claim of the petitioner before the tribunal is to the tune of Rs 2,27,62,02. The arbitral fee and expenses, already incurred by the petitioner amounting to Rs 12.75 lac translates to 5.6 percent of the claim. I am not even taking into account the legal fee that the claimant would have incurred in pursuing its claim till now. The arbitral fee and expenses already incurred, in my view, is rather high, considering that the respondents witnesses have not yet been cross examined and the parties are yet to address their arguments. Unfortunately, the petitioner in this case, has neither saved costs, nor time by going to arbitration instead of going to a

civil court to pursue its claim. The present certainly cannot be said to be a case which can be showcased to promote the institution of arbitration.

134. In these circumstances, in my view, the order dated 18.05.2010 passed by the learned presiding arbitrator cannot be enforced, and even otherwise does not deserve to be enforced, as the costs imposed by the said order were in respect of hearings which the learned presiding arbitrator chose to adjourn without even giving an option to the parties to proceed with the hearing or face costs. The said order having been passed by the learned presiding arbitrator entirely on his own, without the consent or concurrence of the other arbitrators, in my view, cannot be said to be a binding order of the tribunal. The parties should, however, pay up their respective share of fee and expenses of the members of the tribunal whose mandate stands terminated, if not already paid, within four weeks.

135. In the light of the aforesaid discussion, I allow this petition and declare that the mandate of the arbitral tribunal stands terminated. I appoint Mr. Justice A.P. Shah, retired Chief Justice of Delhi High Court as the sole arbitrator to adjudicate the claims of the petitioner and the counter claims of the respondent. The learned arbitrator shall proceed from the stage at which proceedings have been left by the erstwhile tribunal. Considering the fact that the parties were paying a fee of Rs.50,000/- per arbitrator, the fee of the newly appointed arbitrator is also fixed at Rs.50,000/- per sitting, apart from all other expenses that the learned arbitrator may communicate to the parties.

136. As the disputes between the parties have been pending for a considerably long period of time, it is hoped that the learned arbitrator shall conclude the proceedings and render the award within the next six months.

137. The petitioner shall be entitled to costs quantified at Rs.3 lacs. Petition stands disposed of in the above terms.

Sd/-

VIPIN SANGHI, J