Appointment of Arbitrator by the Chief Justice under the Indian Arbitration Law

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I. Introduction:

The increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of alternative dispute resolution system more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commissions on International Trade law way back in 1985 adopted the UNCITRAL[2] Model Law of International Commercial Arbitration and since then number of countries have given recognition to that Model in their respective legal system. With the said UNCITRAL Model in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on arbitration in the country that had been enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to international commercial arbitration too. The Arbitration and Conciliation Act, 1996 would unequivocally indicate that the Act limits intervention of the Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a court of law. But the irony is that the Indian Judiciary has taken an expansionary stance in respect of its power of judicial intervention and has put the Arbitration Law at haul. This article analyses this expansionary outlook of the Indian Judiciary in the context of the appointment of arbitrator by the Chief Justice of the High Court and the Supreme Court of India.

II. Legislative Scheme of the Appointment of the Arbitrator by the Chief Justice of the High Court/Supreme Court:

Section 11 of the Arbitration and Conciliation Act, 1996 (the Act) deals with the appointment procedure for the arbitrator. This provision is on the line of Article 11 of the UNCITRAL Model Law on International

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[2] http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

Commercial Arbitration, 1985(the Model Law) and does not restrict the choice of the arbitrators to a certain nationality.[3] The section offers the parties greatest freedom in agreeing on an appointing procedure (sub section 2 of S.11), followed by the default provisions in case there is no such procedural agreement (sub. sections 3, 4 and5). Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (i) a party fails to act as required under the agreed procedure or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators. When the parties do not agree on any such procure of the appointment of the arbitrator as contemplated in sub section (2), sub-sections 3, 4 and 5 come into play as laying down default procedure. The default procedure laid down in those three above mentioned sub-sections does deal with two situations. Firstly, sub-section (3) provides that failing any agreement referred to in sub-section (2), one arbitrator can be appointed by each party and the two arbitrators appointed shall appoint the third arbitrator who shall act as the presiding arbitrator. In this first situation which talks about the appointment of three arbitrators in case parties default in laying down the procedure for the appointment, Chief Justice of the High Court or the Supreme Court[4] or any other person /institution designated there under shall have the authority to appoint arbitrator in case a party fails to make an appointment within 30 days from the date of the receipt of the request to do so from the other party, or the two appointed arbitrators fail to nominate the presiding arbitrator within thirty days from the date of their appointment. The second situation which is dealt under the default procedure is the situation which warrants the appointment of a sole arbitrator. In this case if the parties fail to agree on an arbitrator within thirty days from the date of a request by one party from the other party, the appointment of the sole arbitrator shall be made, upon a request of

[3] S.11 (1) of the Act: A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

[4] Sub-section (12) of Section 11: Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to Chief Justice in those sub-sections shall be construed as a reference to the Chief Justice of India and in cases where the matter refers to any other arbitration, the reference to Chief Justice shall be construed as a reference to the Chief Justice of High Court.

a party, by the Chief Justice or any person or institution designated by him. The decision of the Chief Justice in regard to the appointment of the arbitrator is final and binding[5] and the Chief Justice while making an appointment under section (11) of the Act shall have due regard to qualifications and other considerations which are likely to secure the appointment of an independent and impartial arbitrator.[6]

III. The Issues in Relation to the Appointment of the Arbitrator--- The Indian Experience:

III. I. Failure to Make Appointment within a Period of Thirty Days

When the parties have agreed the procedure for the appointment of an arbitrator and there are disputes later on in relation to the appointment of the arbitrator, sub-section (6) of section 11 comes into picture. While in case no such procedure is agreed upon by the parties and there are disputes in relation to the appointment of arbitrator(s), sub-sections 3, 4 and 5 of section 11 come into picture. It is worthy to note that while sub sections 4 & 5 envisage a period of 30 days limitation, subsection (6) does not prescribe any such period. Therefore when in an agreed procedure, one party does not make an appointment within a period of 30 days from the date of a request from the other party, the right to make such an appointment does not get forfeited automatically by the party. The party so requested can still make an appointment before the other party moves to the Chief Justice under section 11 of the Act and such an appointment shall be valid even though it is made after the expiry of thirty days of request by the other party. This thirty days limitation cannot be invoked in case an appointment procedure is agreed by the parties.[7] In these situations when due to the departmental lethargy the arbitrator is not getting appointed even after the request of such appointment by the other party and a reasonable period of time has expired, the Chief Justice can issue the writ of mandamus in exercise of the power under sub-section (6) of section 11.[8] But in large number of cases if it is found that it would not be conducive in the interest of parties or for any other reasons to be recorded in writing, choice can go beyond the designated persons or institutions in appropriate cases. But it should normally be adhered to the terms of arbitration clause and appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name.

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[5] See sub-section (7) of section 11

[6] See sub-section (8) of section 11

[7] *Datar Switchgears Ltd. v. Tata Finance Ltd.,* (2000) 8 SCC 151

[8] *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.,* AIR 2007 SC 1764

III.II. Securing the Appointment of an Independent and Impartial Arbitrator

The provisions relating to independence and impartiality are more explicit in the new arbitration Act.[9] A bare reading of the scheme of section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or giving effect as closely as possible. But the appointment of an arbitrator or arbitrators named in the arbitration agreement is not a must and while making such appointment the twin requirements of sub-section (8) of section 11, i.e. the qualifications and the independence and impartiality of the person likely to be appointed as arbitrator have to be kept in view. If that is not considered, the appointment becomes vulnerable.[10] Therefore, if the Chief Justice does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement and other conditions necessary to secure the appointment of an independent and impartial arbitrator, the appointment is liable to be set aside.[11]

III. III. Nature of the Function of the Chief Justice or His Designates

The question as to the nature of function of the Chief Justice or any person designated there under has come before the Court time and again. The debate in the instant matter revolves around interpretation of section 11. Though the 7 Judge Bench of the Apex Court in the case of S.B.P. & Company v. Patel Engineering Ltd. and another has laid down the law which is now the law of the land, but the journey of the Court has always been a matter of concern and the present proposition of law still needs a dexterous consideration. The matter came for consideration before the three Judge Bench of Supreme Court in the Case of Konkan Railway Corpn. Ltd. v. M/s.

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[9] Section 11 (8) of the Act requires the Chief Justice or his designate, in appointing an arbitrator, to have due regard to "(a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent or impartial arbitrator". Section 12(1) requires an Arbitrator, when approached in connection with his possible appointment, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Sub-section 12(3) enables the Arbitrator being challenged if (i) the circumstances give rise to justifiable doubts as to his independence or impartiality, or (ii) he does not possess the qualifications agreed to by the parties. Section 18 requires the Arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case.

[10] *Northern Railway Administration, Ministry of Railway, N. Delhi v. P.E.C. Ltd.,* AIR 2009 SC (Supp) 839

[11] *Bharat Sanchar Nigam Ltd. v. Dhanurdhar Champatiray,* AIR 2010 SC (supp) 330, Ace Pipeline Contracts Private Limited v. Bharat Petroleum Corporation Ltd., AIR 2007 SC 1764

Mehul Construction Co.[12] in the year 2000. The Court found when the matter of appointment is placed before the Chief Justice it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the arbitrator itself. The Court was of this view that at that stage it would not be appropriate for the Chief Justice or his nominee to entertain any such contentious issues. The Court summarized the following reasoning in order to justify that the legislature never intended to confer any judicial power on the Chief Justice or his designate while appointing an arbitrator on the request of any party.

Firstly, the Statement of objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimize the supervisory role of the Courts in the arbitral process.

Secondly, If a comparison is made between the language of section 11 of the Act and Article 11 of the UNCITRAL Model Law it would be apparent that the Act has designated the Chief Justice of a High Court in case of a domestic arbitration and the Chief Justice of India in case of international commercial arbitration to be the authority to perform the function of the appointment whereas under the Model law the said power has been vested with the court. This substantiates the legislative intention of not conferring any judicial power on the Chief Justice while performing its function under section 11.

Thirdly, a bare reading of sections 13, 14, 15 & 16 of the Act makes it crystal clear that any question as to the independence, impartiality and more over in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same. Conferment of such powers on the arbitrator under the 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the chief justice to appoint an arbitrator without wasting any time and without deciding any contentious issues.

On the basis of the above observations the Court concluded that bearing in mind the purpose of legislation, the language used in section 11(6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the powers of the court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceeding, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing arbitrator by the Chief Justice or his nominee under section 11(6) had to be decided upon. If it was held that an

[12] *Konkan Railway Corpn. Ltd. v. M/s. Mehul Construction Co.*, AIR 2000 SC 2821

order under section 11(6) was a judicial or quasi judicial order then the said order would be amenable for judicial intervention and any reluctant party could frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a court of law even against an order of appointment of arbitrator. On the other hand if the said order was considered to be administrative in nature, and then in such an event in a case where the learned Chief Justice or his nominee refused erroneously to make an appointment then an intervention could be possible in the same way as an intervention was possible against an administrative order of the executive. The court found mandamus as an appropriate remedy in such a case. The Court was persuaded to accept the second alternative in as much as in such an event there would not be inordinate delay in setting the arbitral process in motion. The Court, therefore, held that the nature of the function performed by the Chief Justice under section 11 was administrative. On this note, it must be referred that even before Konkan Railway Corpn. Ltv. V. Mehul Construction Co, this Court in another case of Sundaram Finance Ltd v. NEPC India ltd.,[13] while deciding an issue on section 9 of the Act (interim measures by the court) made an observation to the effect "under the Act, appointment of arbitrator is made as per the provisions of section 11 which does not require the Court to pass a judicial order appointing arbitrator". Reference may also be had to the decision of this court in the case of Ador Samia Private Ltd. v. Peekay Holdings Ltd.[14] which also got decided before the Konkan Railway Corpn. Ltd. M/s. Mehul Construction Co came up. The Court in Ador samia concluded that the Chief Justice of the High Court or his designate under section 11(6) of the Act, acts in administrative capacity, and such an order of the Chief Justice is not passed by any Court exercising any judicial function nor is it a tribunal having the trappings of a judicial authority. Notwithstanding the aforesaid decision the matter in relation to the nature of the function of the Chief Justice under section 11(6) was put before the Court for reconsideration and this Court reaffirmed its earlier position. This position continued for a long time and in the year 2002, the Supreme Court in the case of Konkan Rly. Corpn. Ltd., v. M/s. Rani Construction P Ltd.[15] once again reiterated the view. The Court in this case also held that the Model Law and judgment and literature thereon are not a guide to the interpretation of the Act, especially, of section 11 thereof.

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[13] *Sundaram Finance Ltd. v. NEPC India Ltd.,* AIR 1999 SC 565

[14] *Ador Samia Private Ltd. v. Peekay Holdings Ltd.,* AIR 1999 SC 3246

[15] *Konkan Rly. Corpn. Ltd. v. M/s. Rani Construction P Ltd.,* AIR 2002 SC 778

IV. S.B.P. and Co. v. M/s. Patel Engineering Ltd.[16] – A Faux Measure by the Supreme Court of India:

Majority Opinion --- Delivered by P.K. Balasubramanyam,J.

The changing stand of the Apex Court in relation to the question of the nature of the function performed by the Chief Justice under section 11 of the Arbitration Act, 1996 is represented through a decision of this court in the case of S.B.P & Co. v. Patel engineering Ltd. The Court found that adjudication was being involved in the constitution of the arbitral tribunal by the Chief Justice while acting under section 11 of the 1996 Act and therefore it cannot be held as an administrative order. According to the Court the Chief Justice performs a judicial function while appointing an arbitrator under the scheme of the Indian arbitration law. The Court came to this conclusion on the basis of the following reasons:

Firstly, normally any tribunal/authority which is conferred with a power to act under a statute has also the right to decide whether conditions for the exercise of that power existed. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts is not generally final, unless it is made so by the Act constituting the tribunal or the authority. In sub section 7 of section 11, finality has been conferred on the decision taken by the Chief Justice under section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on the matters to be decided by it, normally that decision cannot be said to be a purely administrative decision.

Secondly, the Court discussed the complementary nature of section 8 and section 11 of the Act. Under section 8 of the Act which deals with the power of the Court to refer the parties for arbitration in case one of the parties files a suit before the Court and the other party makes an objection in relation to the maintainability of the suit on the basis of the existence of an arbitration agreement between the parties. Under that provision the Court, on being satisfied that a valid arbitration agreement is existing in between the parties, shall refer the parties for arbitration. Thus a judicial authority as referred in section 8 of the Act is entitled to, has to and is bound to decide the jurisdictional issue[17] which is raised before it before making a decision for the reference of the parties for arbitration. Section 11 just covers another situation. Where one party initiates for arbitration and asks the pother party to take part in the appointment of the arbitrator and if the party so requested has refused to act, the other party under section 11 of the Act may move to

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[16] *S.B.P. and Co. v. M/s. Patel Engineering Ltd.*, (2005)8SCC 618

[17] The term jurisdictional issue refers a challenge to the jurisdiction of the arbitrator. This challenge can be made on the basis of existence or validity of the arbitration agreement or the scope of the arbitration agreement.

the Chief Justice for the appointment of arbitrator. Now, the party so reluctant to appoint the arbitrator if raises objection as to the existence or the validity of the arbitration agreement or the objection is to the effect that the said existing dispute does not fall within the purview of the agreement, it would be incongruous to hold that the Chief Justice cannot decide all these preliminary objections when in a parallel situation, the judicial authority can do so under section 8 of the Act.

Thirdly, the use of the expression "Chief Justice or any person or institution designated by him" is a conscious deviation from the Model law, article 11. The meaning of the Court is defined in section 2(e) of the Act which includes the principal civil court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The principal civil court of original jurisdiction is normally the District Court. The High Courts, in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the concerned Court would be the District Court. The Parliament while not using the term 'court' in section 11 and using the expression 'Chief Justice or any person or institution designated by him' instead, certainly did not want to confer such an important function on the District Court and certainly the apparent intention was to confer the power on the highest judicial authority in the State and in the Country, i.e. the Chief Justice of High Court and the Chief Justice of India. The conferment of such power on the highest judicial authority certainly involves adjudication in its connotation.

Finally the Court analyzed the long route which was likely to be adopted and the cost which was likely to be incurred in case the function of the Chief Justice was to be considered administrative. According to the Court if the Chief Justice does not perform any adjudicatory function at this stage and thereby simply refers the matter for the arbitration, all these preliminary questions of jurisdictional issue shall remain left to be raised before the arbitrator. Now under section 16 of the Act, the tribunal can decide all these jurisdictional questions like existence, validity of the arbitration agreement, scope of the agreement etc. If such jurisdictional objection is not upheld, the tribunal shall continue the arbitral proceedings with no immediate appeal against the decision of the tribunal. The only remedy which shall be available to the aggrieved party is under section 34 of the Act for challenging the order on the basis of the jurisdictional objection which was raised before the tribunal. Now though this may avoid the intervention of the court until the arbitral award is pronounced by the arbitrator/arbitral tribunal, it involves considerable expenditure and time spent by the party before the arbitral tribunal during the whole phases of the arbitration proceedings. On the other hand if the Chief Justice decides all these jurisdictional objections at this preliminary stage, that will put an end to a host of disputes between the parties, leaving the party aggrieved with a

remedy of approaching the Supreme Court under Article 136 of the Indian Constitution. Once the Court declines to interfere with the adjudication of the Chief Justice, the decision of the Chief Justice on the said issue becomes final and this reasoning can be supported by sub-sec. (7) of S.11. This will leave the arbitral tribunal to decide the dispute on merits unhampered by preliminary and technical objections.

On the basis of the aforesaid observations, the Court held that the power of the Chief Justice or his designate under S. 11 (6) of the Act is not administrative but it is judicial.

IV. I. Post S.B.P. Development

Before coming to the discussion whether the Constitution Bench of the Apex Court was right in its approach and whether the said adopted approach is in consonance with the aims and objectives of the Act and thereby conducive in international trade and business, we shall have a look at the development which has taken place to post S.B.P. decision.

The Apex Court in the case of National Insurance Co. Ltd. V. M/s Boghara Polyfab Pvt. Ltd.[18] has identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; (iii) issues which he should leave the Arbitral Tribunal to decide. The issues which fall into the first category which the CJ / his Designate shall have to decide are:

(a) Whether the party making the application has approached the appropriate High Court
(b) Whether there is an arbitration agreement and whether the party who has approached the High Court is a party to such an agreement.

The issues (second category) which the CJ/his Designate may choose to decide are:

(a) Whether the claim is a dead claim (long barred) or a live claim.
(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

The issues (third category) which the Chief Justice/his Designate should leave exclusively to the arbitral tribunal are:

(a) Whether a claim made falls within the arbitration clause
(b) Merits or any claim involved in the arbitration.

[18] *National Insurance Co. Ltd. v. M/s Boghara Polyfab Pvt. Ltd.*, AIR 2009 SC 170

In relation to the scope of examination of the existence of the arbitration agreement by the Chief Justice or his Designate u/s 11 of the Act, the Court in the case of Indowind Energy Ltd. v. Wescare (I) Ltd.[19] has held that the examination is necessarily restricted to the question whether there is an agreement between the parties and can not extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. Any such wider examination in such a summary proceeding is not warranted. However the CJ is required to decide the issue finally and it is not permissible to go for any prima facie finding.

V. Concluding Remarks:

Though the Apex Court has laid down the law way back in the year 2005 and is still the law of the land but a close look at the situation shall inevitably hold the view that the majority opinion in S.B.P. case suffers from an inherent lack of understanding the true spirit of commercial arbitration. The author is of this view that the minority opinion which is delivered by C.K. Thakker, J is much more convincing if we look at the aims and objectives of the Act. This seems absolutely absurd as also rightly pointed by the minority opinion that mere finality attached to the decision of the Chief Justice cannot make the decision judicial. Also it is logical to believe that the use of the word Chief Justice instead of Court[20] clearly shows the intention of the legislature of not making the decision under this provision as an outcome of prolonged judicial process. No matter whichever country it is, every country has given due recognition to the power of the arbitral tribunal to rule its own jurisdiction which is called '*competence competence*'. The basic purpose of resorting to arbitration is to avoid the long battle of the court room litigation and henceforth any kind of in roads in the full play of the principle of *competence competence* shall inevitably undermine the basic conscience of the commercial arbitration. The Supreme Court's view of holding the decision of the Chief Justice as judicial has just created a hostile environment of international commercial arbitration in India. A party from any other country would remain scared of the long route litigation at this very initial stage of arbitration. Even if the Chief Justice decides in favour of a foreign party who wishes to initiate arbitration and therefore applies under section 11 of the Act because the Indian party did not co-operate in the appointment of the arbitrator, the said non-cooperation shall continue and the Indian party shall prolong the appointment of the arbitrator by filing appeal and further appeal. This was never the intention of the legislature especially when the Act itself aims the least judicial intervention in the arbitral process.

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[19] *Indowind Energy Ltd. v. Wescare (I) Ltd.,* AIR 2010 SC 1793

[20] The word 'Court' is used in Article 11 of the UNCITRAL Model Law, 1985 which India has followed in the enactment of the 1996 Act.

The decision in SBP is also seen as a setback to the growth of institutional arbitration in India as the decision holds the view that the role of an institution under section 11 of the Act is limited to the nomination of an arbitrator and not the appointment. After the BALCO[21] decision of the Supreme Court which reflects a positive attitude of the judiciary towards arbitration, we are hopeful that the Supreme Court shall deal upon this area of appointment of the arbitrator by the Chief Justice with a more sincere and positive mind set and will help in removing the clouds which are remaining over India's arbitration scene.

[21] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552