IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 89 OF 2006
WITH
ARBITRATION APPLICATION NO. 90 OF 2006

Voltas Limited,]
a Public Limited Company, incorporated]
under the provisions of the Indian]
Companies Act, 1913 and having its]
registered office at Voltas House “A”]
Dr.Babasaheb Ambedkar Road,]
Chinchpokli, Mumbai 400 033] ... Applicant

Versus

Rolta India Limited,]
a Company incorporated under]
provisions of the Companies Act, 1956]
and having its office at Rolta Bhavan,]
Rolta Technology Park, MIDC-Marol,]
Andheri (East), Mumbai 400 093] ... Respondent

.....

Mr. D.J. Khambatta, Addl. Solicitor General of India, senior counsel with Mr. G.R.Joshi, Mr. B.H. Antia, Mr. Avinash Joshi and Mr. Vipul Bilve i/b M/s. Mulla & Mulla and Cragie Blunt & Caroe for the Applicant.

Mr. Janak Dwarkadas, senior counsel with Mr. P.K.Samdani, senior counsel, Mr. P.R. Diwan, Mr. Sharan Jagtiani, Ms. Gunjan Shah and Mr. Arvind Rathod i/by M/s. Arvind Rathod & Company for the Respondent.

CORAM : S.J. VAZIFDAR, J.

DATED : 19TH NOVEMBER , 2010.

ORAL JUDGMENT :

1. This is an application under section 11(6) of the Arbitration & Conciliation Act, 1996 for the appointment of a sole arbitrator to adjudicate the disputes and differences that have arisen between the parties relating to an agreement dated 8th January 2003.

2. According to the Applicant, the Respondent had failed to act as required and its Chairman and Managing Director (CMD) had failed to perform the function entrusted to him, under the procedure agreed upon between the parties. The failure was to appoint an arbitrator as per the procedure prescribed by the arbitration agreement between the parties. According to the Applicant, the Respondent and its CMD had failed to appoint an arbitrator within 30 days of the Applicant's requesting them to do so and prior to the above application being filed. It was contended that the Respondent had, therefore, forfeited its right to appoint an arbitrator.

On behalf of the Respondent, correspondence was relied upon to establish that it had appointed one Dr. P.S. Chauhan, a retired

District and Sessions Judge, Bhopal, Madhya Pradesh as a sole arbitrator, within 30 days of the receipt of the Applicant's letter and in any event prior to the above application being filed. This correspondence was disputed by the Applicant in every respect. The Applicant also contended that even assuming that the correspondence was proved, it did not constitute an appointment of an arbitrator.

As the correspondence was disputed, by an order dated 22nd September, 2006, evidence was ordered to be recorded on commission. The learned Commissioner after recording the evidence, filed the report along with the notes of evidence, which was taken on record by an order dated 5th October 2007.

I have come to the conclusion that the correspondence was not proved by the Respondent.

FACTS :

3. For the purpose of this application, it is necessary only to refer to the facts pertaining to the alleged appointment of the arbitrator by the Respondent.

4. The parties had entered into an agreement dated 8th January 2003 whereby, the Applicant had agreed to supply, erect,

commission, test and handover air cooled screw chillers and BMS for the Respondent's office. Article 17B thereof contains an arbitration agreement which reads as under :

> **"Article 17B :** Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim right matter or thing whatsoever in any way arising out of or relating to the contract design, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works of the execution or failure to execute the same whether existing during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the CMD/Rolta India Ltd. (Respondent) incharge of the work at the time of dispute. Subject to prevailing Indian Arbitration Act." (emphasis supplied)

5. Disputes and differences arose between the parties. The Applicant, by its various letters, demanded payment of the balance consideration under the agreement. The Applicant ultimately by a letter dated 29th March 2006 addressed to the Respondent and marked to the attention of the Respondent's CMD invoked the arbitration agreement and called upon the Respondent to appoint an arbitrator within 30 days from the receipt of the notice. The Applicant stated

that if the Respondent failed to do so, it would make an application under section 11 of the Arbitration and Conciliation Act, 1996.

6. The Respondent by its Advocate's letter dated 21st April 2006 stated that its CMD was out of India on a business tour and had returned to India only on 19th April 2006. It was further stated that the Respondent's CMD had been extremely busy. It is important to note that the letter stated that the Respondent would appoint an arbitrator within 30 days from the date of his return to India.

7. According to the Applicant, the Respondent/its CMD, however, failed to appoint an arbitrator within 30 days of the receipt of the said letter dated 29th March 2006. It also failed to appoint an arbitrator prior to the filing of this application. The application was filed on 3rd May 2006.

The Respondent, however, contend that it had appointed the said arbitrator prior to the filing of the above application. In this regard, the Respondent relied upon the following correspondence which is denied by the Applicant in every aspect:-

(A). The Respondent alleges having addressed a letter dated 24th April 2006 to the said arbitrator. The letter refers to a telephonic conversation between the Respondent's CMD and the arbitrator on 21st April 2006, the disputes between the parties, enclosed the correspondence between the parties and stated that the Respondent appointed the said arbitrator as a sole arbitrator in respect of the disputes and differences between the parties and that the proceedings would be held at Mumbai.

(B). The Respondent alleges having received a reply dated 2nd May 2006 from the arbitrator accepting his appointment and stipulating the terms and conditions for his acting as the arbitrator.

(C). The Respondent's CMD alleges having addressed a letter dated 8th May 2006 to the arbitrator *inter-alia* referring to the above application, stating that the Respondent would be filing an affidavit-in-reply thereto and that the arbitrator would be informed the outcome thereof.

(D). The Respondent alleges having received a letter dated 11th May

2006 from the arbitrator in response to the alleged letter dated 8th May 2006. The arbitrator requested the Respondent to inform him the order passed in the above application in order to enable him to proceed further in the matter.

8. The Respondent, by another Advocate's letter dated 17th May 2006, in reply to the Applicant's letter dated 9th May, 2006, for the first time stated that Respondent had appointed an arbitrator. The details, including as to the name of the arbitrator were not furnished. It was stated that instructions were awaited from the Respondent for filing an affidavit-in-reply.

9. The affidavit in reply was filed on 9th June 2006 in which for the first time, the alleged correspondence was referred to and the name of the arbitrator was furnished.

10. The Applicant examined its Chairman and Managing Director one K.K. Singh. The Applicant also examined witnesses. However, for the purpose of the present application, everything turns on the disputed letters. Counsel accordingly also addressed me in respect of

the CMD's evidence regarding these letters which were tendered in evidence on behalf of the Respondent. The Commissioner recorded the Applicant's objections to the same being taken on record which I will deal with in the course of this judgment.

11. Mr. Khambatta, the learned Additional Solicitor General of India appearing on behalf of the Applicant submitted that the Respondent had forfeited its rights under the arbitration agreement to appoint an arbitrator on the following grounds :-

I. Even assuming that the disputed letters are proved, the Respondent cannot be said to have appointed an arbitrator before the application was filed.

II. The Respondent had failed to prove the letters. The Respondent had, therefore, failed to act as required under the appointment procedure prescribed by the arbitration agreement and the Respondent's CMD had failed to perform the function entrusted to him under the said procedure of appointing an arbitrator.

III. The Respondent and its CMD having failed to appoint an arbitrator within thirty days from the receipt of the Petitioner's letter dated 29th March 2006 invoking arbitration and before the above application was filed, had forfeited its right to appoint an arbitrator.

Re. I :- Even assuming that the disputed letters are proved, the Respondent cannot be said to have appointed an arbitrator before the application was filed.

12. Mr. Khambatta submitted that a valid appointment of an arbitrator can be said to be made and completed only when the following conditions are fulfilled :-

(i) The communication by the appointor (in this case the Respondent) to the arbitrator authorizing him to act as a arbitrator;

(ii) Receipt by the appointor of the arbitrators acceptance of the appointment;

(iii) Communication of the acceptance of the appointment by the appointor to the other party.

I find the submission to be well founded only so far as the first condition is concerned.

13. Mr. Khambatta submitted that the third condition was admittedly complied with only in the affidavit in reply i.e. after the application was filed. Therefore, according to him, the Respondent had forfeited the right to appoint an arbitrator even assuming the disputed letters are proved.

In support of this submission, Mr. Khambatta relied upon the commentary in Russel on Arbitration, twenty-second edition, 4-056 and 4-057, and Mustill and Boyd, The Law and Practice of Commercial Arbitration in England, Second Edition, page 184. He also relied upon the judgments in the case of *Tew Vs. Harris, (1848) 11 QB 7* and *S.A. Tradax Exports Vs. A.V. Volkswagenwerk (1969) 2 QB 599.*

14. It is not necessary for me to consider these commentaries and judgments qua the second and third conditions in view of the judgments relied upon by Mr. Dwarkadas of a learned Single Judge of this Court in the case of *Keshavsingh Dwarkadas Vs. Indian*

Engineering Company, AIR 1969 Bombay 227, which was affirmed by the Supreme Court in *Keshavsingh Vs. Indian Engineering Company (1971) 2 SCC 706*, which conclusively answer the questions against Mr. Khambatta.

15. In *Keshavsingh Vs. Indian Engineering Company, AIR 1969 Bombay 227*, a learned Single Judge of this court dealt with a petition under section 33 of the Indian Arbitration Act, 1940 (for short 'the 1940 Act') for determining the existence and/or validity of the arbitration agreement. The Petitioner sought a declaration that there was no valid agreement to refer the disputes and that the decision of the appointment of an umpire by the arbitrators was void.

To the facts narrated by the learned Judge, I will add a few facts noted in the judgment of the Supreme Court while affirming the judgment which indicate the circumstances in which the umpire entered upon the reference. The disputes which arose between the parties in respect of an agreement dated 26th April 1967 were referred to the arbitration of two arbitrators. Clause 6 of the arbitration agreement required the arbitrators, before proceeding with the arbitration to appoint an umpire and in the event of any differences

arising between them, to refer the matter to the umpire for his decision and award.

The arbitrators at the first meeting made the appointment of an umpire. Neither of the judgments, however, mentions whether the arbitrators, had while appointing the umpire initially, communicated the same to the umpire. The time for making the award expired. The Respondent called upon the Petitioner to seek an extension of time but there was no reply. The Appellant did not comply with the Respondent's request to obtain an extension of time for making the award by the arbitrators and contended that one of the arbitrators would be biased in favour of the Respondents. The Respondents, therefore, called upon the arbitrators to refer the matter to the umpire and by a separate letter called upon the umpire to enter on the reference. Thereafter, the umpire held a meeting at which he gave certain directions. The Petitioner objected to the umpire's right to decide the dispute and filed the said petition.

It was contended, *inter-alia,* that the consent of the umpire not having been obtained to his appointment as such before proceeding with the arbitration, there was in effect no appointment of the umpire at all. The learned Single Judge rejecting this contention held as

under :

> “2. As far as the first ground mentioned above is concerned, Mr. Shah has contended that Section 8(1)(b) of the Arbitration Act, which provides the mode of filling a vacancy in the appointment of arbitrators or umpire, comes into play only if the arbitrator or umpire refuses to act after having accepted the appointment, but that if there is no acceptance by the arbitrator or the umpire as such, then there is no appointment at all and no question of resorting to the procedure under Section 8(1)(b) of the said act arises at all. I see no reason whatsoever to restrict the full import of the word "refuses" in the manner suggested by Mr. Shah. Mr. Shah's contention that there is no appointment unless there is acceptance of the appointment is not founded on anything contained in the Arbitration Act itself. That Act does not anywhere lay down that requirement as being necessary to constitute a valid appointment, either of an arbitrator or of an umpire. Mr. Shah's contention in that behalf is founded only on what, he submits, should be read into the connotation of the word 'appoint'. As far as that is concerned, it may, however, be mentioned that the plain meaning of the word 'appoint', in the sense in which it is being considered for the purpose of the present case, is , "to ordain or nominate to an office" (Murray's Oxford English Dictionary 1961). There is, therefore, no reason to import the idea of consent into the plain meaning of the word 'appoint'. It is not unusual to find a man refusing an appointment to a post or office which has already been made in his favour. Mr. Shah has placed reliance on a decision of the Allahabad High Court in the case of Fayazuddin v. Aminuddin, (1909) 1 Ind cas 354 (All) and on the statement that is to be found in Russel on Arbitration (17th edn.) pp. 160 and 214--215. It is stated in Russel that acceptance of the office by an arbitrator appears to be necessary to perfect his appointment, and the decision in the old English case of Ringland v. Lowndes (1863) 15 CB (NS) 173 is cited in support of that proposition. The same position is stated in Russel in

regard to an umpire also, in support of which another English case is cited therein. I am, however, bound by the view expressed by the Privy Council in another case, which happily coincides with the view which I have taken, apart from authority, on this point, and that is the case of Mirza Sadik Hussain v. Musammat Kaniz Zohra Begum (1889) 13 Bom LR 826 at p. 832-833 (PC). The facts of that case were that one Mizra Hasan Khan died leaving him surviving, as heirs, his widow the 1st respondent, his daughter the 2nd respondent and his son the appellant. Disputes having arisen between the appellant and the two respondents as to their shares, the respondents filed a suit in the Court of the Subordinate Judge in Lucknow claiming administration of the estate of the deceased, but after the written statement was filed in that suit, the parties arrived at a compromise which provided inter alia for a reference to the arbitrators named therein. One of those arbitrator, however, refused to accept office as such, or to act. The District Judge made order of reference to arbitration, whereupon the respondents applied to the court to withdraw the order of reference and to deal with the matter itself or to appoint a commissioner for the purpose. The appellant objected to that course and insisted that the respondents should nominate a new arbitrator. The respondent having declined to appoint another arbitrator the District Judge made an order that he would scrutinise the matter himself and, on his having done so he passed an Order allotting certain properties to the respondents. On appeal from that order to the Court of the Judicial Commissioner of Oudh, the decision of the District Judge was affirmed. The appellant thereupon appealed to the Privy Council. Reference was made in the judgment of the Privy Council to Section 510 of the Code of Civil Procedure 1882, which dealt with the same situation as Section 8 of the present Arbitration Act 1940 and also used the expression "refuses or neglects" in regard to the same. It was stated that courts in India had construed the said section as meaning that it could only apply to an arbitrator who refused, after having accepted office before refusing. It

was observed in the judgment of the Privy Council that what had actually happened in the said case was that, after the arbitrator had been appointed, he refused to accept office as such, or to act. The Privy Council took the view that the construction that had been placed upon Section 510 by the courts in India till then was not a proper construction of that Section, and that

"when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he had performed the first action of all, viz. to take up the office by signifying his assent to his appointment."

[Note: The word "had" underlined by me is an obvious typographical error in the judgment in AIR 1969 Bom. 227. The report in (1889) 13 BLR 826 at pg. 833 has in its place the words "has not".]

The Privy Council, therefore, adopted the view that the course adopted by the lower court was erroneous and the appeal was, therefore, allowed. It is clear from the decision of the Privy Council in the case which I am now considering, that this very question arose before them, though in another context, and that the Privy Council has taken the view that there is no distinction between "refusal to act" and "refusal to accept" his nomination for the purpose of Section 8 of the Arbitration Act. In fact, the observations of the Privy Council clearly show that the view taken in that judgment was that there was appointment, and that the subsequent refusal of the arbitrator to accept office was nothing else but a refusal to act after having been nominated and it is only on that basis that the Privy Council held that Section 510 of the Code of Civil Procedure, 1882 was applicable. I respectfully agree with the view taken by the Privy Council in the said case and I, therefore, hold that there has been a valid and proper appointment of Mr. Mehta as Umpire in the present case, notwithstanding the fact that his consent had not been obtained prior to his appointment as such." (emphasis supplied)

16. Mr. Dwarkadas then relied upon the judgment the Supreme Court upholding the judgment in appeal. The decision is reported in (*1971) 2 SCC 706.* The Supreme Court *inter alia* referred to the judgments of the English Court relied upon by Mr.Khambatta and noted the commentary in Russel on Arbitration, 17th Edition. Mr.Khambatta of course relied upon the 22nd edition. The Supreme Court specifically referred to and dealt with the cases of *Tew Vs. Harris (1847) 11 QB 7 and S.A. Tradax Exports Vs. A.V. Volkswagenwerk, 1969-2 QB 599.* The Supreme Court noted in paragraph 8 that the judgment in *Tradax Exports* had been affirmed by the Court of Appeal as reported in *(1970) I All E R 420 = (1970) 1 QB 537.*

The same contention was raised before the Supreme Court namely that the arbitrators before proceeding with the reference, did not obtained the consent of the umpire to his appointment and there was, therefore, no appointment of the umpire. Rejecting the contention, the Supreme Court held :-

> **"10.** It is important to notice the distinction between appointment and acceptance of office. The present appeals concern the appointment of an umpire. The questions of effectiveness or perfection of appointment are by the nature of things subsequent to appointment unless the agreement or

> the statute provides otherwise. Arbitrators and umpire too are often appointed by the parties. Sometimes an umpire is appointed by arbitrators. The constitution of the arbitral body and the manner in which the appointments are made are primarily dealt with in the arbitration agreement or else the Arbitration Act will apply. In some cases, the appointment of arbitrator may require special consideration. If, for instance, two arbitrators are required to be appointed one by each party an appointment of arbitrator by a party is not complete without communication thereof to the other party. The reason in the words of Lord Denman is this: "Neither party can be said to have chosen an arbitrator until he lets the other party know the object of his choice" (See *Thomas* v. *Fredricks*). Where each party was to appoint a valuer by May 31, 1847 and one of the parties nominated a referee late on May 31 and sent by that night's post a notice thereof to the defendant who received it on June 1, it was held that the plaintiff had not nominated a referee by May 31. (See *Taw* v. *Harris*)."

In paragraph 15, the Supreme Court observed that if an umpire declines the offer, the appointment is ineffectual which indicates again the difference between an appointment and the acceptance thereof. The doubt, if any, in this regard is removed by the observations in paragraphs 16 and 21 of the judgment, which read as under:

> **"16.** It is, therefore, apparent that appointment of umpire is something different from the acceptance of office by the umpire. The arbitrator or umpire assumes his office when he accepts the appointment. There is no authority for the proposition that consent of the appointee is required before an umpire is appointed by the arbitrators. The observations in *Russell on Arbitration*, 18th Edn. at p. 212 do not support that submission. The decision in *Ringland* v. *Lowndes* which is referred to in Russell had very special features. Under the Public Health Act, 1848, a disputed claim to compensation was to be settled by arbitration. Arbitrators were required to make an award within twenty-one days after the appointment or within extended time, if any. If arbitrators neglected or refused to ap-

> point an umpire for seven days after being requested so to do by any party the Court of quarter sessions would on the application of such party appoint an umpire. In that case arbitrators were appointed in January 1861. The arbitrators refused to appoint an umpire. The plaintiff applied at the Easter to sessions to appoint an umpire but failed in consequence of want of a notice of his intention to make such application. The plaintiff thereafter gave the required notice and the second application was made at the Midsummer sessions. One Johnson was named as umpire. But as his consent had not been obtained no formal appointment was made. A third application was made at the Michaelmas sessions and Johnson was on October 14 appointed umpire and accepted the appointment. The question for consideration was whether the appointment of the umpire was at the Midsummer sessions or at the Michaelmas sessions. Under the statute the award was to be made within three months from the umpire's appointment. The umpire made an award on December 30, 1861. If the appointment was in the Midsummer sessions the award would be bad.
>
> 21. The question of acceptance of appointment of umpire arises with reference to the stage when he is called upon to act. The Arbitration Act, 1940 does not say that appointment of umpire by arbitrators is to be made only after obtaining consent of the appointee. The arbitrators here appointed an umpire before entering on the reference. The appointment was not conditional upon the acceptance of appointment by the umpire. The scheme of arbitration proceedings indicates that the appointment of umpire and the acceptance of office are two separate matters arising at different stages in the proceedings. When the umpire is called upon to proceed in terms of the appointment he will either assent expressly or by conduct to act or he will decline to act." (emphasis supplied)

17. The judgments are not based only on the provisions of the 1940 Act. They also dealt with the ambit of the term appointment, which appeared in the arbitration agreement between the parties. The ratio of the judgments negates the submission that there cannot be said to be an appointment of an arbitrator unless it has been accepted by the

arbitrator. It follows therefore that for an appointment to be said to have been made it is not necessary that the appointor received the acceptance thereof from the arbitrator or that the appointor communicates the acceptance to the other side.

18. In *SBP & Co. vs. Patel Engineering Ltd. & Anr. (2009) 10 SCC 293*, the Supreme Court held :

> **"45.** Insofar as this case is concerned, we find that the arbitrator appointed by Respondent 1, namely, Shri S.N. Huddar declined to accept the appointment/arbitrate in the matter on the ground that in his capacity as Superintending Engineer and Chief Engineer, he was associated with Koyna Hydel Project implying thereby that he may not be able to objectively examine the claims of the parties or the other party may question his impartiality. To put it differently, Shri S.N. Huddar did not enter upon the arbitration. Therefore, there was no question of his withdrawing from the office of arbitrator so as to enable Respondent 1 to appoint a substitute arbitrator. In any case, in the absence of a clear stipulation to that effect in the agreements, Respondent 1 could not have appointed a substitute arbitrator and the learned Designated Judge gravely erred in appointing the third arbitrator by presuming that the appointment of Shri S.L. Jain was in accordance with law."

Although the Supreme Court did not specifically deal with the point, it is important to note that it drew a distinction between the

appointment of an arbitrator and the acceptance of the appointment by him.

19. Section 11(6) does not require the acceptance of the appointment by the arbitrator. Section 11(6)(a) refers to a situation where a party fails to act as required under an appointment procedure. Once a party appoints or nominates the arbitrator, it cannot be said that the party failed to act as required under the appointment procedure merely because the arbitrator takes time to respond to the appointment by accepting or refusing the same. Once a party, person or institution has appointed the arbitrator, the time taken by or the failure of the arbitrator to respond to the appointment cannot constitute a failure on their part, as regards the appointment of the arbitrator. Whether the appointment has been made as per the procedure prescribed in the agreement and in accordance with law is a question of fact or a mixed question of law and of fact to be determined in each case depending, *inter-alia,* on the nature of the arbitration agreement.

20. In the present case too, there is nothing either in the provisions

of the 1996 Act or the arbitration agreement between the parties which required the arbitrator to accept the appointment before it could be said that the Respondent had appointed an arbitrator. Nor do I find anything to suggest that the term 'appointment' in the present case required the appointment to have been received by the arbitrator or the same to have been communicated by the Respondent to the Petitioner.

Mr. Khambatta's submissions based on the second and third contentions are, therefore, rejected.

21. The judgments of the learned Single Judge of this Court and of the Supreme Court in *Keshavsingh's* case are authority for the proposition that for a valid and proper appointment of an arbitrator, the acceptance of the appointment by the arbitrator is not necessary. There remains, therefore, for consideration the first condition viz. whether for an appointment to be said to have been made, it is necessary that the appointor communicates the appointment to the other party and/or the appointee i.e. the arbitrator and/or any other concerned party. This, in turn, requires for consideration as to when an appointment of an arbitrator can be said to have been made.

22. Absent anything to the contrary in the appointment procedure, an appointment can be said to be made only when the appointor communicates the appointment to a concerned party such as the other side or an institution where the arbitration agreement refers to one or to the arbitrator. An appointment which remains only in the mind or even on the records of the appointor is no appointment. Till such time as the appointment is sought to be communicated, there is no appointment at all. It is then but an intention to appoint the arbitrator which intention can always be changed or revoked till it is communicated. It is axiomatic, therefore, that a valid appointment requires at least a transmission of the communication thereof to a concerned party. The communication must name the arbitrator failing which it would not constitute a communication of the appointment at all. In others words it is not sufficient for a party to merely state that it has appointed an arbitrator but will not disclose the name. The purpose of the communication is then not served.

23. Moreover, the communication must be to all the concerned parties such as the other side, the arbitrator or an institution where the

agreement requires for instance, the appointment to be made through or by the institution or routed through it. An appointment of an arbitrator concerns not merely the appointor, but others as well especially the other side and the arbitrator or an institution where the agreement so provides. An arbitration cannot commence if any of the concerned parties is not informed of the appointment. The reason for this is too obvious to state.

24. I, however, do not consider it necessary that the communication is addressed to all the concerned parties simultaneously. It is sufficient if it is communicated in the first instance to any of them and thereafter to the others. The purpose of such communication is only to establish that the appointment was made finally. The purpose of the communication being to make the appointment it is equally served by the communication thereof to any concerned party in the first instance and thereafter to the others if the circumstances so warrant. For instance, the other side can always be informed after the arbitration accepts the appointment. That all this must be done in a reasonable time is another matter and must be determined on the facts of the case.

25. A view to the contrary would enable a party to indefinitely delay the appointment of an arbitrator which militates against the purpose of the 1996 Act.

26. The term communicate, however, does not necessarily require the subject thereof to come to the knowledge of the person to whom it is made. The fact that the communication is not complete or ineffective qua the other until it comes to the knowledge of the person to whom it is made is another matter. Once it is transmitted, it is a communication of the message nevertheless. That this is so is also clear from section 4 of the Indian Contract Act, 1872, which provides that the communication of the acceptance is complete as against the proposer when it is put in a course of transmission to him so as to be out of the power of the acceptor. There is thus a distinction between the communication and the receipt thereof by the person to whom it is made. Section 4 of the Indian Contract Act reads as under :

> "**4. Communication when complete.-** The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> The communication of an acceptance is complete, -

> as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;
>
> as against the acceptor, when it comes to the knowledge of the proposer.
>
> The communication of a revocation is complete, -
>
> as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;
>
> as against the person to whom it is made, when it comes to his knowledge."

There is thus a difference between a communication and the receipt thereof by the person to whom it is made. For an appointment to be said to have been made, it is not necessary that the communication thereof reaches the appointee or the other side or any other concerned person. It is sufficient if it is put in a course of transmission to them.

27. In this view of the matter, it is not necessary to consider the judgment of the learned Acting Judicial Commissioner in the case of *A. Ramjibhai & Co. vs. Yusifali & Bros. AIR 1925 Sind 12*. A different aspect was considered in that judgment and it is in that context that

the observations relied upon by Mr. Khambatta were made to the effect that when one of the parties has communicated his nomination or appointment in clear and unequivocal language in writing to the other or when the third person has communicated it to the parties in the manner intended by the parties to the agreement, the nomination or appointment is completed. In that case, the nomination was made "without prejudice" which was held not to be valid.

28. Mr. Khambatta then relied upon the judgment of a learned single Judge of the Delhi High Court in the case of *M/s. R.S. Avatar Singh & Co. vs. Indian Tourism Development Corporation Limited, AIR 2003 Delhi 249*. The judgment was delivered considering facts which are entirely different from those before me. This was also a petition under section 11 of the said Act. On 20th August, 2001, the Petitioner issued a notice invoking the arbitration agreement. The Respondent initiated action for appointment of an arbitrator only internally. The Respondent's Chairman approved the appointment on 30th August, 2001. However, the letter appointing the arbitrator was issued only on 5th October, 2001. In the meanwhile, on 22nd September, 2001, the petition under section 11 had already been filed.

The learned Judge, relying upon the judgment of the Supreme Court in *Bachhittar Singh vs. State of Punjab, AIR 1963 SC 395 = 1962 Supp.(3) SCR 713* held as under :-

> "7. Learned counsel for the petitioner, Mr. Arvind Nigam relies on Bachhittar Singh v. State of Punjab, AIR 1963 SC 395 where the Constitution Bench of the Supreme Court while considering the requirement of communication of an order for it to become legally effective observed as under at page 398:-
>
> > "thus it is of essence that the order had to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character".
>
> In view of the aforesaid dictum, as laid down by the Constitution Bench of the Supreme Court, it is clear that the order of appointment of the Arbitrator would be taken to have been made when communicated and received by the Arbitrator and the concerned party i.e. by the order dated 5th October, 2001."

29. I have already held that so long as the appointment is not even sought to be communicated/put in a course of transmission to the

concerned parties, it cannot be said to have been made. I would therefore have come to the same conclusion viz. that the appointment was not made before the petition was filed in view of the fact that the communication of the appointment was not even sought to be made/put in a course of transmission.

I am, however, with respect, unable to agree that an appointment would be taken to have been made only when the communication is received by the arbitrator and the concerned party. The judgment of the Supreme Court was in an entirely different context. It is necessary to read the entire judgment of the Supreme Court and not merely the portion extracted. In that case, the Revenue Secretary of Pepsu Government, after an enquiry, dismissed the Appellant from service. In appeal, the Revenue Minister of Pepsu held the charges to have been proved and noted that they were serious. The Revenue Minister, however, opined that as the Appellant was a refugee and had a large family to support, his dismissal from service would be hard and that instead he ought to be reverted to his original post. It was found as a question of fact that the remarks of the Revenue Minister were never officially communicated to the Appellant. After the merger of Pepsu with the State of Punjab, the

Appellant's file was considered finally by the Chief Minister who ordered the Appellant's dismissal. One of the contentions of the Appellant was that the order of the Revenue Minister of Pepsu was not open to review. It is in this context that the Supreme Court observed that merely writing something on the file does not amount to an order and that before something amounts to an order, it has to be expressed in the name of the Governor under Article 166(1) and then it has to be communicated. On the finding that the order of the Revenue Minister of Pepsu was never communicated and remained only on the files, the Supreme Court held that the State Government was not bound by the same for the reason that as long as the matter rested with the Revenue Minister without the same being considered, he could well have scored out his remarks or minutes on the file and written fresh ones. The Supreme Court also referred to the rules of business and held that the same had not been followed and as a result thereof, the action of the Revenue Minister of Pepsu could not be considered to be an act of the State.

It is of vital importance, however, to note that in that case, the order was never even put in a course of transmission with a view to communicate the same to the Appellant. It was therefore, held that the

decision was not communicated to the officer. The Supreme Court, therefore, did not deal with the question whether a decision can be said to have been communicated once it is despatched. It was therefore, held that the Chief Minister of the State of Punjab was not precluded from taking a decision as regards the dismissal of the officer.

30. The judgment was approved by a Division Bench of the Delhi High Court in the case of *Delhi Development Authority vs. Bhagat Construction Company (P) and Anr. (2004) 3 Arbitration Law Reports, 548 (Delhi)*.

31. For the reasons stated above I am, with respect, unable to agree with this judgment either, on the point that an appointment of an arbitrator would be taken to have been made when the communication thereof is received by the arbitrator and the concerned party.

32. The judgment of the Supreme Court in *BSNL vs. Subash Chandra Kanchan, AIR 2006 SC 3335 = (2006) 8 SCC 279* is of no assistance to the Petitioner's submission either. In that case, the notice

invoking the arbitration clause was issued on 7th January, 2002. The letter appointing the arbitrator was alleged to have been drafted on 4th February, 2002. Admittedly, however, it was despatched only on 7th February, 2002. On the same day, the application under section 11 was also filed. The Supreme Court held as under :-

> "11. Evidently, the Managing Director of the Appellant was served with a notice on 7th January, 2002. The letter appointing the arbitrator was communicated to Respondent on 7th February, 2002. By that time, 30 days period contemplated under the Act lapsed. The Managing Director of the Appellant was required to communicate his decision in terms of Clause 25 of the contract. (emphasis supplied)
>
> 12. What would be the meaning of the term `communicate' came up for consideration before this Court in State of Punjab v. Amar Singh Harika [AIR 1966 SC 1313], wherein it was held:
>
> "It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order."

The judgment in State of Punjab vs. Amar Singh must also be read as a whole. The observations are quoted from paragraph 11 of

the report. It was contended on behalf of the Appellant that though the Respondent came to know about the order of his dismissal on 28th May, 1951, it must be deemed to have taken effect from 3rd June, 1949, when it was actually passed. The judgment refers to the detailed procedure that was adopted for enquiring into the Respondent's conduct. Ultimately, on 2nd/3rd May, 1949, the Respondent received a communication from the Government of Pepsu, Home Department, suggesting that in view of the finding of the Enquiry Committee holding him guilty of the charges levelled against him he may exercise the option to resign. It was clarified that it should not be taken to imply any commitment on the part of the Government to accept the same. The Respondent tendered his resignation on 6th May, 1949. Notwithstanding the same, the Appellant passed an order of dismissal against him on 3rd June, 1949. It is important to note that the Supreme Court, in paragraph 8, noted that though a copy of the order was forwarded to certain other persons, no copy of the same was sent to the Respondent himself. The observations of the Supreme Court quoted above were in this context viz. that the order was never communicated to the Respondent who was the concerned person. The Supreme Court did not consider whether if the order had been put in a

course of transmission with a view to communicate the same to the Respondent, it would not constitute a communication of the order till it reached the addressee i.e. the Respondent. Indeed, it was not necessary for the Supreme Court to deal with that question.

Cases such as those in State of Punjab vs. Amar Singh and Bachhittar Singh vs. State of Punjab also stand on a different footing altogether. The communication of orders in disciplinary proceedings raise a question as to the effectiveness of the order and not whether they are deemed to have been communicated once they are put in a course of transmission.

33. The judgment if anything is authority for the proposition that for a matter to be said to have been communicated, it is not necessary that it should reach the addressee. The letter dated 7th February 2002 was despatched on that day and the Supreme Court held in paragraph 7 : "The letter appointing the arbitrator was communicated to Respondent on 7th February, 2002." Thus the letter having been despatched, it was sufficient to say that it was communicated.

34. In the present case, the arbitration agreement does not specify the mode of appointment, including as to the communication thereof. Although admittedly the alleged appointment of the arbitrator was not communicated to the Applicant, it was alleged to have been communicated to the appointee i.e. arbitrator. Had the communication namely the letter dated 24th April 2006 been proved, the Respondent would have discharged its obligation of appointing an arbitrator as per the arbitration agreement for it subsequently albeit in the affidavit-in-reply communicate the appointment to the Petitioner. However, as the letter has not been proved, I must come to the conclusion that the Respondent had failed to appoint an arbitrator at all.

II. The Respondent had failed to prove the letters. The Respondent had, therefore, failed to act as required under the appointment procedure prescribed by the arbitration agreement and the Respondent's CMD had failed to perform the function entrusted to him under the said procedure of appointing an arbitrator.

35. The question then is whether the Respondent in fact addressed the alleged letter dated 24th April 2006 to the arbitrator.

36. I must at this stage consider whether the alleged letters have been proved by the Respondent. I have come to the conclusion that they have not been proved.

37. The alleged letters were sought to be proved by the evidence of the Respondent's CMD, who filed an affidavit-in-lieu of examination-in-chief dated 3rd May 2007. The witness produced the alleged letters dated 24th April 2006, 2nd May 2006, 8th May 2006 and 11th May 2006. The Applicant's counsel objected to the letters being taken on record on the ground that the original letters dated 24th April 2006 and 8th May 2006 had not been produced, no grounds for leading secondary evidence had been made out and notice to produce them had not been issued to the persons in whose custody the original letters would be and that there was also no proof of delivery of the letters dated 24th April 2006 and 8th May 2006.

The copies of the alleged letters were admittedly not forwarded to the Applicant.

As stated earlier, the above application was filed on 3rd May 2006.

On behalf of the Respondent, it was submitted that the original letters dated 24th April 2006 and 8th May 2006 would be in the custody of the addressee i.e. the arbitrator and the witness could therefore only produce copies thereof; the witness had deposed to the fact that he had addressed the letters dated 24th April 2006 and 8th May 2006 to the arbitrator and the question, therefore, of his producing the original letters cannot and does not arise. It was further submitted that there was no question of leading secondary evidence since the witness was producing all the letters addressed to the arbitrator. It was also submitted that the letters constituted a chain of correspondence commencing with the letter dated 24th April 2006.

The learned Commissioner recorded the objections and the submissions in response thereto and marked the documents X1 to X4 for identification.

38. It is important to note at the outset that there was a serious objection including as to the genuineness of the alleged letters. Serious allegations have been made against the Respondent in respect

of these letters. It was necessary, therefore, for the Respondent to have proved the same.

39. Only a copy of the letter dated 24th April 2006 was produced by the witness. There was not even an attempt to produce the original. Merely because the original letter was in the custody of the addressee thereof, the Respondent was not precluded from having the same produced. Nothing prevented the Respondent from taking out an appropriate application for having the original letter produced by the arbitrator. It was not the Respondent's contention that it was not possible for it to have the original letter produced.

Moreover, the witness has not even proved that the letter had been despatched by the Respondent. The witness has very fairly not even contended that he had any role to play in the letter being despatched.

40. The letter dated 24th April 2006 is, therefore, not proved. Nor has the Respondent proved that it was despatched to the addressee thereof. The objection is, therefore, upheld. The document, therefore, must remain marked as X1 only for identification.

41. The letter dated 2nd May 2006 was objected to on the ground that the witness had not identified or proved the signatures of the addressor i.e. arbitrator, proved the contents thereof or the receipt of the letter. The only response to this was that the letters had been received in the ordinary course and formed a chain of correspondence.

42. This objection too, must be sustained. The witness has admittedly not proved the signature of the person who allegedly addressed the letter. The witness does not even claim to be familiar with his signature. The witness has not proved the receipt of the letter by the Respondent or the circumstance in which the same was delivered to him.

43. The letter cannot be proved on the basis of a chain of correspondence in view of a fact that I have held earlier that the letter dated 24th April 2006 has itself not been proved.

44. The letter, therefore, must remain marked X3 only for identification.

45. For the same reasons, the objections to the letters dated 8th May 2006 and 11th May 2006 are upheld. The letters must remain marked X2 & X4 respectively for identification only.

46. Mr. Dwarkadas submitted that even if the contents of the letter had not been proved, the letters must be at least taken on record. I do not agree. Once it is held that the documents have not been proved, there is no question of taking them on record subject to the proof of the contents and the truth of the contents.

47. There is no other evidence to indicate that the Respondent or its CMD had appointed the said arbitrator. In the circumstances, it must be held that the Respondent had failed to comply with its obligations under the arbitration agreement of appointing an arbitrator in accordance with the arbitration agreement contained in clause 17B of the said agreement dated 8th January 2006.

48. However, as both the learned counsel without prejudice to their rights and contentions addressed me on the evidence as regards the

probability of the letters having been addressed and received, I will deal with the same.

49. To put the Applicant's case at its lowest, the Respondent has failed to prove the alleged letters and the cross-examination of the Respondent's witness establishes a high degree of probability that the letters were never in fact addressed or received by the Respondent as the case may be. I find it necessary to advert to only a few aspects of the oral evidence in this regard.

50. In his affidavit, by way of examination-in-chief, the Respondent's witness stated that he was out of India between 25th March 2006 and 19th April 2006. On 19th April 2006, itself, the Respondent's Senior Executive Director one T.V.Holay invited the witness's attention to the Applicant's advocate's letter dated 29th March 2006, invoking the arbitration agreement and calling upon the Respondent to appoint an arbitrator within 30 days. The letter dated 29th March 2006 was admittedly received on the same day. He stated that as there were several pressing matters for him to attend to and as the arbitration agreement did not mentioned a time limit of 30 days,

he asked the said T.V.Holay to instruct the Respondent's advocate to write to the Applicant's advocate that he would appoint an arbitrator within 30 days of his return.

Obviously, instructions to the above effect were furnished to the Respondent's advocate. This is clear from the fact that the Respondent's advocate addressed the letter dated 21st April 2006 informing the Applicant's advocate that the Respondent's CMD was extremely busy having returned to India on 19th April 2006 and would therefore, appoint an arbitrator within 30 days from the date his return to India.

51. Absent anything else this evidence would indicate that nothing else or to the contrary transpired between 19th April 2006 and 21st April 2006.

The Respondent has, however, come up with an entirely different case to establish the said correspondence, the improbability of which stand virtually established from the cross-examination.

52. The Respondent's witness stated in the said affidavit that the said T.V. Holay alongwith the Executive Vice President and Company

Secretary of the Respondent one Harjinder Singh met him on 20th April 2006 and informed him that they had given the necessary instructions to the Respondent's advocate, as instructed by the witness on 19th April 2006. However, he add\s in the affidavit that at the meeting on 20th April 2006, the said Harjinder Singh, who is a qualified lawyer, informed him that although clause 17(B) which contains the arbitration agreement does not provide a time limit of 30 days for appointing an arbitrator, since the letter dated 29th March 2006 stated that the Petitioner would approach the Bombay High Court with an application under section 11 of the Arbitration and Conciliation Act, 1996 if the appointment was not made within 30 days, he should appoint an arbitrator within that period. The affidavit then states that on the same day i.e. 20th April 2006, he contacted several persons including his family, friends, and acquaintances in order to ascertain the name of a suitable person like a retire Judge whom he could nominate as an arbitrator. I will not refer to the details of these attempts. Suffice it to state that the name of the said arbitrator was recommended by his sister's husband, who carries on business in Indore and Bhopal. It is important to note that the witness stated that on 21st April, 2006, he contacted the said arbitrator over the

phone; that the arbitrator agreed in principle to act as an arbitrator and asked the witness to send him a letter and necessary information. The contention that the telephonic conversation with the arbitrator took place on 21st April 2006 is of crucial importance for it belies the Respondent's entire case in this regard.

53. As noted above, the decision on 19th April 2006 was to instruct the Respondent's advocate to address a letter to the Applicant's advocate stating that the Respondent would appoint an arbitrator within 30 days of the return of the Respondent's witness to India. On 20th April 2006, the Respondent's Executive informed the witness that instructions to that effect were given to the advocates. The alleged decision on the same day i.e. 20th April 2006 to appoint an arbitrator immediately was contrary to the decision of 19th April 2006 and the instructions furnished to the Respondent's advocate.

54. To a question in cross-examination as to why the Respondent did not instruct its advocate not to write a letter as per the previous instructions and/or to write a letter confirming that the Respondent would be appointing an arbitrator by 20th April 2006, the only answer

was that if the Respondent was able to appoint an arbitrator within the time framed stipulated in the Applicant's letter, the Respondent wanted to instruct its advocate about the outcome as soon as it happened and that there was no need to change the earlier instructions unless the new action could be executed. (Answer to Question 51).

55. This explanation is contrary to the normal course of conduct and contrary to the Respondent's actual conduct.

The advocate's letter was written only on 21st April 2006, i.e. after the revised decision of 20th April 2006. The normal course of conduct would have been for the Respondent to inform its advocate to address a letter in accordance with the final decision and not as per the earlier decision which was abandoned.

Moreover, the above explanation is also not convincing for even according to the witness the arbitrator agreed to the appointment on 21st April, 2006. The Respondent, however, did not communicate the same till 9th June, 2006 and that too in the affidavit-in-reply.

56. The above explanation is in fact contrary in a material aspect to the witness's answers to questions 196 and 197. The cross-

examination from Questions 196 to 201 is important in this regard. Mr. K.R. Modi referred to is a senior partner of the Respondent's Solicitor firm, M/s. Kanga & Co.

> "Q.196 : Please see your answers to question Nos. 49 to 52 on pages 61, 62 and 64 of the Notes of Evidence. In answer to question No.52, you have stated that you took a decision to appoint an arbitrator immediately after your conversation with Mr. Harjinder Singh. In answer to the previous question, you are now stating that the decision to appoint an arbitrator was taken after your conversation with Mr. K.R.Mode. Which answer is correct ?
>
> A.: Both the answers are correct. Immediately after my conversation with Mr. Harjinder Singh, I made the call to Mr. K.R.Modi, I discussed various issues with him in general consultation and apprised him of my decision to appoint the arbitrator and also sought advise from him for any particular name if he had for the possible arbitrator. Since this call was made immediately after my above referred conversation with Mr. Harjinder Singh, it will not be wrong to say that my decision to appoint the arbitrator immediately, stemmed out of this conversation with Mr. K.R.Modi also.
>
> Q.197 : According to you, Mr. K.R.Modi was therefore, aware on 20th April 2006, that you were proceeding to appoint an arbitrator within a period of 30 days from the date of receipt of the notice from the Applicants ?
> A. : I am sure that Mr. K.R.Modi was aware, that I was making due efforts in this regard.
>
> Q.198 : Please see the letter dated 21st April 2006

addressed by M/s. Kanga & Co., to M/s. Mulla & Mulla & Cragie Blunt & Caroe (Serial No.5 of Common Compilation of Documents). Who has signed this letter ?

A. : Mr. K.R.Modi.

Q.199 : As you suggesting that despite Mr. K.R.Modi being aware on 20th April 2006 of your alleged decision to appoint an arbitrator within 30 days of the date of receipt of the notice from the Applicants, Mr. K.R.Modi chose not to inform the Applicants' Advocates of the aforesaid decision and chose to state that you would appoint an arbitrator within 30 days of your return to India ?

A.: Although I have already answered to this question, let me again repeat and clarify that on 19th April 2006, we gave instructions to our Solicitors, M/s. Kanga & Co., to inform the other party that I would exercise my right to appoint the arbitrator within 30 days of my return to India. Mr. Modi conveyed these instructions recording them in the letter of 21st April 2006 addressed to M/s. Mulla & Mulla & Cragie Blunt & Caroe. My conversation with him on 20th April 2006, only informed him of my efforts to appoint the arbitrator at an early date and I did tell Mr. K.R.Modi that I would revert back to him if I am able to appoint the arbitrator and then necessary intimation can be sent to the other party. Therefore, I see nothing wrong in Kanga & Co., writing the letter of 21st April 2006 as those were the instructions standing at that time. Mr. Modi was informally informed about the appointment only on 24th April 2006, as I have referred to in my answer to question No.59.

Q.200 : Please tell me clearly whether on 20th April 2006, you had informed Mr. Modi of your decision to appoint an arbitrator within 30 days from

the receipt of the notice from the Applicants ? Please answer in “yes” or “no”.

At this stage, the witness was asked to leave the room.

Mr. Diwan objects to the question on the ground that the decision to appoint an arbitrator was made, that it was to be made within 30 days was not the decision, but that the efforts would be made to make such an appointment within 30 days. This is what has been stated till now by the witness and not that the decision was made to appoint the arbitrator within 30 days.

Mr. Joshi states that he fails to see the objections to the questions. The question does not state that the witness has taken any particular decision. What is sought, is the witness’s statement on whether, such a decision was taken. Furthermore, the question is necessary, as the witness has not given clear answers. In any event, it is not for the Respondents’ Counsel to state what the witness has stated earlier or to interpret the witness’s answers. The answers are already on record and if the witness wants to say what the Respondents’ Counsel is suggesting, it is for the witness to say so.

Mr. Diwan in response to the submission of Mr. Joshi, states that the submission is contrary to the question.

A.: I had not specified the period of 30 days or anything to Mr. Modi. I had just informed him that I am making all my best efforts to appoint an arbitrator as early as possible.

Q.201 : Are you aware of whether Mr. T.V. Holay had contacted either Mr. K.R.Modi or M/s. Kanga & Co., between 19th April 2006 and 21st April 2006 ?

A.: I am not aware."

57. It is now admitted, therefore, that the witness personally informed the Respondent's advocates, the said K.R. Modi about the revised decision on 20th April 2006. There is no explanation why then the Respondent's advocate addressed the letter dated 21st April 2006 itself as per the instructions based on the earlier decision of 19th April 2006. The said K.R. Modi is a partner of M/s. Kanga and Co., which is one of the oldest and one of the most reputable and renowned firm of Solicitors in the city. It is impossible to believe that one of its senior partners who was informed of the decisions of 19th April 2006 and 20th April 2006 would on the next day address a letter not as per the final decision but as per the earlier decision which was admittedly abandoned.

58. The further clarification regarding the explanation given to the Respondent's advocate has not been confirmed in any other manner.

59. The answer to Question 199 is important as it belies the same. The witness stated that if he was able to make the appointment within

30 days, he would revert to his advocate and then "necessary intimation can be sent to the other party." He admits having reverted to the advocate of 24th April, 2006 about the alleged appointment. It is of vital importance to note that the advocate never sent "the necessary intimation" to the Petitioner. There is no explanation for this.

60. Most important is the fact that the Respondent has chosen not to examine its solicitor. His evidence would have been extremely important in this regard. It is not the Respondent's case that it was unable to examine its solicitor's partner attending to the matter. I am inclined, therefore, to draw an adverse inference against the Respondents to the effect that it refused to examine its solicitor for the reason that had he been examined his evidence would have militated against the Respondent's case in this regard.

61. I am also inclined to draw an adverse inference against the Respondent for having failed to call upon the said arbitrator to produce the originals of the alleged letters dated 24th April 2006 and 8th May 2006 as the Respondent was aware that it had not addressed the said letters to the said arbitrator. The failure to do so was despite

the fact that the letters were of crucial importance to the Respondent's case.

62. The doubt if any in this regard is removed by what transpired even thereafter.

In answer to questions 59 and 118, the witness stated that on 24th April 2006, he orally informed his advocates about having appointed the said arbitrator. In answer to Question 114 and 115, he admitted that this information was furnished by the Respondent to its advocate in writing only in the first week of May 2006. Significantly, despite the same, the Respondent's advocate addressed no further communication to the Applicant's advocate. Nor is there any explanation as to why the Respondent's advocate did not write a further letter to the Applicants or its advocate stating the same.

Here again the evidence of the Respondent's advocate would have been of considerable importance. The witness has not given a convincing explanation regarding the instructions to its advocate about writing a further letter referring to the alleged appointment of the arbitrator. His answers to question 121 to 125 are as follows:

> "Q.121 : Did you tell Mr. Modi to inform the Applicants about the alleged appointment of an

arbitrator by you ?

A.: As I have mentioned earlier, all the actions which are required after an act which has been made by me as the Chairman of the Company, is taken by our various executives and legal departments. So, I do not have to personally write to, inform anybody. Verbally, of course, I did mention to Mr. Modi on that day as mentioned earlier.

Q.122 : I repeat my earlier question. Did you tell Mr. Modi to inform the Applicants about the alleged appointment of an arbitrator by you ?

A.: I would not be able to further clarify the exact verbatim discussions which I do not remember. However, in practice it is not required that I have to personally discuss on any of these issues.

Q.123. So, according to you, you do not remember whether you told Mr. K.R.Modi to inform the Applicants regarding your alleged appointment of an arbitrator ?

A.: The point is that I do not have to instruct Mr. Modi. It was expected to be done by our people and in my conversation with him, I had conveyed to him about the appointment. Any action further than that, was expected to happen in the normal course. So, I do not have to give specific instructions. The question of remembering this conversation does not arise.

Q.124 : So, would I be correct in saying that you did not give instructions to Mr. Modi on 24th April 2006 to inform the Applicants regarding the alleged appointment of an arbitrator by you ?

A. : I have already answered that in my earlier reply. I have clearly told you what I feel on that issue.

> Q.125 : I am unable to understand your answer. Please tell me in "yes" or "no", whether you told Mr. Modi to inform Mr. Modi to inform the Applicant about he alleged appointment of an arbitrator by you ?
>
> A. : The point is that my discussion and informing Mr. Modi, I thought, was adequate. As I have said earlier, I have no remembrance of that conversation."

63. It is clear, therefore, that according to the witness he informed the Respondent's Solicitors of having appointed the arbitrator. The Solicitors evidence yet again would have been of crucial importance, as to why he did not address a letter informing the Petitioner of the appointment. The witness has also not offered any explanation why he did not take the matter up with his Solicitor for not having addressed such a letter.

64. The witness alleges having instructed another firm of advocates M/s. Arvind Rathod and Company to inform the Applicant of the appointment of the said arbitrator after the receipt of the alleged letter dated 2nd May 2006. This letter was received by the Respondent only on 6th May 2006 as admitted in the answer to question 210. I will ignore the discrepancy in his evidence in his answer to question nos. 2 & 3 that he made efforts around 5th to 8th May 2006 to contact M/s.

Arvind Rathod and Company. This is a minor discrepancy. It does not effect the Respondent's case at all. Nor does the fact that M/s. Arvind Rathod & Company in the letter dated 17th May 2006, did not mentioned the name of the arbitrator affect the Respondent's case. The letter states that the arbitrator had been appointed. Merely because the name was not mentioned, it would make no difference. However, the letter not having named the arbitrator cannot be considered to be a communication of the appointment of the arbitrator.

65. In the result, even if the disputed letters dated 24th April 2006 and 8th May 2006 addressed by the CMD to the arbitrator are admitted in evidence for the limited purpose suggested by Mr.Dwarkadas viz. that they were written it would not assist the Respondent for it has not been established that they were forwarded to the arbitrator.

66. The Respondent has therefore, failed to prove that it appointed the arbitrator at any stage upto date. I must clarify, however, that although I have held that the Respondent has not proved the disputed letters and that the evidence does not support the Respondent's case

on facts, I have not accepted the submission that the letters were fabricated. A finding of fabrication and perjury must meet a much higher test.

III. The Respondent and its CMD having failed to appoint an arbitrator within thirty days from the receipt of the Petitioner's letter dated 29th March 2006 invoking arbitration and before the above application was filed, had forfeited its right to appoint an arbitrator.

67. Mr. Khambatta submitted that if an appointment is not made within thirty days of the appointor being called upon to do so and before the other side files an application under section 11, which it is entitled to after the said period of thirty days, the right to appoint an arbitrator conferred by an arbitration agreement is forfeited and in that case, only the Chief Justice or his designate can make the appointment. In other words, according to him, upon the expiry of the said period of thirty days, the other party is entitled to file an application under section 11 and once that is done, the party entitled to

appoint the arbitrator forfeits its right to do so. If, however, the appointment is made after the expiry of thirty days from the date of the appointor being called upon to appoint the arbitrator but before the other side files an application under section 11, the right to appoint an arbitrator conferred by the arbitrator agreement is not forfeited.

68. Mr. Khambatta submitted that the appointment not having been made by the Respondent within thirty days of the Appellant's letter dated 29th March, 2006, invoking the arbitration agreement and before the filing of this application, the Applicant has forfeited its right under clause 17(B) of the agreement to appoint an arbitrator and that now only the Chief Justice or his designate is entitled to appoint an arbitrator in this application.

69. The first question, therefore, is whether the said period of thirty days is mandatory and whether if the appointment is not made within thirty days, the Chief Justice or his designate is bound to presume that the party has failed to act as required under the procedure for the appointment of the arbitrator or a person, including an institution, has failed to perform the function entrusted to him or it under that

procedure for the appointment of an arbitrator. I have answered the question in the negative.

70. This submission was based on the contention that the Supreme Court had, in a series of judgments, commencing with the judgment in the case of *Datar Switchgears Limited vs. Tata Finance Limited (2000) 8 SCC 151*, held that a party has only thirty days to appoint an arbitrator after being called upon to do so. He submitted that although section 11(6) does not stipulate any such period for the appointment of an arbitrator, the Supreme Court had, by these judgments, determined the same to be thirty days.

71. The submission is based on a misconstruction of the judgments relied upon by Mr. Khambatta. The error in this submission is a consequence of reading stray sentences and parts of sentences instead of reading the judgment as a whole. The judgments, read as a whole, do not support this submission at all. In fact, the judgments of the Supreme Court in *Ace Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corporation Limited (2007) 5 SCC 304, Indian Oil Corporation vs. Raja Transport Pvt. Ltd. (2009) 8 SCC 520*, as also

the observation in certain other cases conclusively negate the submission.

72. I will, first construe the provisions of section 11 myself and refer to the judgments which support the view I have taken and thereafter deal with the judgments relied upon by Mr. Khambatta.

73. Section 11 reads :-

> "11. Appointment of arbitrators.-(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (4) If the appointment procedure in sub-section (3) applies and-
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,
>
> the appointment shall be made, upon request of a party,

by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall 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 and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) 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."

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

The parties have proceeded on the basis that the present case falls under section 11(6)(a) and (c). I have proceeded accordingly.

74. As far as precedent is concerned, I will deal with the question as to whether the Supreme Court has in any of its judgments stipulated a period of thirty days later. I have found the submission to be not well founded on precedent. On principle too, the submission is not well founded.

75. The clearest aspect that establishes the fallacy in Mr. Khambatta's submission is the contrast between sub-sections (4) and (5) on the one hand and sub-section (6) ,which applies in this case, on the other. If the Legislature intended fixing a limit of thirty days to determine whether or not there has been a failure on the part of a party, person or institution as contemplated in sub-section (6), it would have stipulated the same. This is established by the fact that whereas the Legislature fixed the period of thirty days in sub-sections (4) and (5), it did not do so in sub-section (6). This establishes that the Legislature intended the Chief Justice or his designate to determine whether there was a failure on the part of a party, person or institution to act as required or to perform any function entrusted under the procedure agreed upon by the parties, as the case may be,

depending upon the facts of each case.

I find nothing in section 11 that warrants reading into sub-section (6), a period of thirty days or any other fixed period. Nor do I find any reason to compel fixing a particular period in sub-section (6).

76. Mr. Khambatta submitted that there are two competing considerations in a case such as this – the right of a party to appoint an arbitrator and the need for expedition in arbitration proceedings. These competing interests, he submitted, were balanced by the Supreme Court by fixing a period of thirty days in sub-section (6). He submitted that otherwise the Chief Justice or his designate would in each case have to enter upon a detailed enquiry requiring evidence as to whether there was a failure on the part of the party, person or institution as provided in sub-section (6).

77. If the Legislature has placed the burden of deciding this ground on the Chief Justice or his designate, they must do so. If this involves a detailed enquiry, they must still do so.

78. In any event, I do not share Mr. Khambatta's apprehension. An

enquiry of this aspect is normally not a complicated one involving a trial of the issue. It can be dealt with summarily if the Chief Justice or his designate thinks it fit to do so.

79. This brings me to the judgments cited by the learned counsel.

80. Mr. Dwarkadas's reliance upon the judgment of the Supreme Court in *Ace Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corporation Limited (2007) 5 SCC 304*, is well founded. In that case, the arbitration agreement provided that the disputes would be referred to the sole arbitration of the Director (Marketing) of the Respondent or some officer of the Respondent nominated by him. Disputes and differences having arisen between the parties, the Appellant, by a letter dated 21st July, 2005, invoked the arbitration agreement. On 22nd August, 2005, the Appellant filed an application under section 11. The Respondent, on that day, appointed an arbitrator. The arbitrator received the letter of appointment on 26th August, 2005. It was contended that the appointment having been made after the filing of the petition, the Respondent's Director ceased to have any right to appoint the arbitrator after the expiry of thirty days. The Respondent

alleged having sent a communication of the appointment of the arbitrator on 22nd August, 2005. The Respondent also offered an explanation as to why the appointment was made only on 22nd August, 2005. It was on account of certain holidays that intervened during the period prior thereto and on account of the Respondent's Director seeking certain information about the appointment procedure. The single Judge of the High Court came to the conclusion that it could not be said that the appointing authority did not act with due despatch. After referring to the provisions of section 11 in paragraph 10, the Supreme Court held :-

> "10**. .....**
> Therefore, so far as the period of thirty days is concerned, it is not mentioned in sub-section (6). The period of limitation is only provided under sub-sections (4) and (5) of Section 11. As such, as per the statute, the period of limitation of thirty days cannot be invoked under sub-section (6) of Section 11 of the Act. In this context, their Lordships in *Datar Switchgears Ltd.* did not permit to count 30 days as such in sub-section (6). We cannot do any better than to reproduce paras 19, 20 and 21 of the judgment in that case: (SCC p.158)
>
> > "*19*. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, *so far as Section 11(6) is concerned*, if

one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

21. We need not decide whether for purposes of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not."

(emphasis in original)

11. The observations made by their Lordships are very clear and their Lordships negatived the contention that 30 days should not (*sic*) be read in sub-section (6) of Section 11 of the Act; if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues. Their Lordships in para 20 have also very categorically held that in the present case the respondent made the appointment before the appellant filed the application under Section 11(6), though it was beyond 30 days from the date of demand, the appointment of the arbitrator by the respondent was valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand. Their Lordships were also very clear in their mind in para 21 and observed: (*Datar Switchgears Ltd. case*, SCC p.158)

> "*21*. We need not decide whether for purposes of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not."

We are only concerned with reading of 30 days within sub-section (6) of Section 11. So far as the period of 30 days with regard to Section 11(6) is concerned, there is no manner of doubt that their Lordships had not invoked 30 days as mandatory period under Section 11(6) and beyond that it cannot be invoked by the appointing authority. Therefore, it is totally a misnomer to read 30 days in Section 11(6) of the Act, though Shri Sorabjee, learned Senior Counsel appearing for the appellant tried to emphasise that the decision in *Datar* has been affirmed by a three-Judge Bench and therefore, that 30 days should be read in Section 11(6) of the Act is also not correct.

12. In *Punj Lloyd Ltd.* their Lordships only quoted para 19 in part and not in full. Full para 19 of the judgment in *Datar* has been reproduced above. In fact subsequent observation (at SCC p.158, para 19) of their Lord-

ships,

"[w]e do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited",

this portion of order was not reproduced. Therefore, it is not a case that the decision given by two-Judge Bench in *Datar* has been reaffirmed and this is binding on us. We regret to say this is not correct. In *Punj Llyod Ltd.* their Lordships only set aside the order and remitted the matter back to the High Court for appointment of arbitrator by the Chief Justice. But the ratio laid down in *Datar* holds good and it is not negatived, the period of 30 days cannot be read in Section 11(6) of the Act. The relevant portion of *Punj Lloyd case* reads as under: (SCC p.640, para 5)

"*5*. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in *Datar Switchgears Ltd.* v. *Tata Finance Ltd.* (SCC p.158, para 19) wherein this Court has held as under:

'*[S]o far as Section 11(6) is concerned*, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.' " (emphasis in original)

The aforesaid quotation would clearly reveal that the cru-

> cial words in para 5 were not quoted in the aforesaid case which has been reproduced above."
>
> .....
>
> 20**.** It may also not be out of place to mention that we are aware of the departmental lethargy in making appointment of arbitrators in terms of the arbitration clause. Therefore, mandamus can be issued by the courts in exercise of powers under Section 11(6) of the Act but the demand should be in the event of failure by the authorities to appoint arbitrators within the reasonable time. Courts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration clause. 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." (emphasis supplied.)

81. In *Indian Oil Corporation vs. Raja Transport Pvt. Ltd. (2009) 8 SCC 520*, the arbitration agreement required the disputes and differences between the parties to be referred to the sole arbitration of the Appellant's Director or of some officer of the Appellant nominated by the Director. The Supreme Court considered the circumstances in which the Chief Justice or his designate could ignore the appointment procedure or the named arbitrator in the arbitration agreement and appoint an arbitrator of his choice. The Supreme Court held:-

"48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(*i*) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(*ii*) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(*iii*) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(*iv*) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(*v*) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (*a*), (*b*) or (*c*) of sub-section (6) has not arisen,

> then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that
>
> (*i*) a party failing to act as required under the agreed appointment procedure; or
>
> (*ii*) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or
>
> (*iii*) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.
>
> (*vi*) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 *shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause*.
>
> (vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

82. These judgments support Mr. Dwarkadas's submissions. The ratio of the judgments is that there is no fixed time within which a party entitled to appoint an arbitrator under the arbitration agreement is to make the appointment. It must be done within a reasonable time, which must depend on the facts of each case. It is only if the appointment is not made within a reasonable time that the other party is entitled to seek the appointment of an arbitrator by the Chief Justice or his designate under section 11(6). Section 11(6) does not stipulate

any period from the date of the invocation of the arbitration agreement by the other side within which the party is bound to exercise its right to appoint an arbitrator. It is only when the appointment is not made within a reasonable time of the letter of invocation, that the other party is entitled to call upon the Chief Justice or his designate to appoint an arbitrator under section 11(6).

The fact that in a given case a period of thirty days may be deemed to be reasonable is another matter altogether. What is a reasonable period must depend on the facts of each case.

83. The judgments also interpret the judgments of the Supreme Court in Datar Switchgears Ltd. and Punj Lloyd Ltd. on the above basis. Mr. Khambatta's interpretation of the judgments in Datar Switchgears Ltd. and Punj Lloyd Ltd. is therefore rejected on principle and on precedent.

84. A view to the contrary would negate the contractual provision. Take for instance a case where the appointor is unable to make the appointment within thirty days of being called upon to do so on account of illness or injury. It can hardly be suggested that if he made

the appointment as soon as possible after a quick recovery albeit after thirty days of the letter of invocation, he must be deemed to have failed to act as required under the procedure for the appointment of an arbitrator within the ambit of that expression in sub-section (6) of section 11.

85. The only question is whether the above judgments are *per incuriam* or contrary to the other judgments of the Supreme Court. I think not. I will now deal with the judgments relied upon by Mr. Khambatta in support of his submission.

86(A). In *Datar Switchgears Limited vs. TATA Finance Ltd (2008) 8 SCC 151*, a notice of demand for payment of the outstanding amount was served by the first Respondent on 5th August, 1999. The notice stated that it should be treated as one issued under the arbitration clause. The first Respondent did not appoint an arbitrator even after a lapse of thirty days, but filed an application under section 9 for interim reliefs on 26th October, 1999. The first Respondent appointed the sole arbitrator only on 25th November, 1999. Thereafter, the Appellant filed an application under section 11 for the

appointment of an arbitrator.

It was contended that though section 11(6) does not prescribe a period of thirty days, it must be implied that thirty days is a reasonable time for the purpose of section 11(6) and thereafter, the right to appoint is forfeited. It is important to note that in paragraph 12 of the report, the Supreme Court noted : "*It is also contended that under section 11(6), no period of time is prescribed and hence the opposite party can make an appointment even after 30 days, provided it is made before the application is filed under Section 11.*" It was, therefore, not even argued on behalf of the Respondent that the period of thirty days which was fixed must be deemed to be the period beyond which the other side is entitled to file an application under section 11 for the appointment of an arbitrator. In other words, the Respondent proceeded on the basis that in the facts of that case, a thirty-day period for the appointment may be considered to be reasonable. Mr. Khambatta relied upon paragraphs 19, 20 and 21 of the judgment which were the very paragraphs quoted and construed in Ace Pipeline. They are set out earlier by me while referring to the judgment in Ace Pipeline.

(B). Mr. Khambatta's entire submission is based on the following two sentences in paragraph 19 in *Datar Switchgears Ltd.*:-

> "If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

I am not inclined to read the judgment as suggested by him. The judgment must be read as a whole. So read, it is clear that the Supreme Court did not even consider whether in every case it must be presumed that a party who does not make an appointment within thirty days of being called upon by the other side to do so, is deemed to have failed to comply with its obligation under section 11(6) entitling the other side to file an application under section 11. It so happened that the counsel for the Petitioners in that case submitted that the period of thirty days stipulated in sub-sections (4) and (5) ought to be read into sub-section (6) and the counsel for the Respondent proceeded on the basis that even if that were so, the right to appoint is not forfeited so long as the appointment is made before

the application under section 11 is filed although it was made beyond the period of thirty days. The ratio of the judgment, therefore, is not that a party is entitled to file an application under section 11(6) on the expiry of thirty days, but that even if there is a failure on the party of the party entitled to appoint the arbitrator, in appointing one within reasonable time the right to make the appointment would stand forfeited only if the appointment is not made before an application under section 11 is filed.

This is clear from the fact that even where the period of thirty days is stipulated in sub-sections (4) and (5), the Supreme Court kept the question as to whether it is mandatory or not, open. It can hardly be suggested that despite the same, when it comes to sub-section (6), though there is no such period fixed, the Supreme Court held a period of thirty days to be mandatory.

(C) The Supreme Court in *Ace Pipeline* expressly construed the judgment in Datar Switchgears Ltd. to this effect and that the appointment must be made within a reasonable time. The judgment in *Ace Pipeline* cannot be held to be per incuriam as it specifically refers to the judgment in *Datar Switchgears Ltd*. and *Punj Lloyd Ltd*.

87. The judgment in *Punj Lloyd Ltd. vs. Petronet MHB Ltd. (2006) 2 SCC 638* was delivered by a bench of three learned Judges. Paragraph 5 of the judgment quotes the relevant part of the judgment in *Datar Switchgears* and it was observed that the case was covered by that judgment. In that case, the Appellant had served a thirty days notice on the Respondent demanding appointment of an arbitrator and reference of the disputes to him. The Respondent failed to appoint an arbitrator. Upon the expiry of thirty days, the Appellant filed an application under section 11(6). Even till then, the Respondent had not appointed an arbitrator. It is in these circumstances that the Supreme Court held that the case was covered by the judgment in *Datar Switchgears*.

I do not read the judgment as holding as an absolute proposition, that a period of thirty days is fixed for the appointment of an arbitrator from the date of his being called upon to do so, failing which, the other side has a right to file an application under section 11 and thereupon a party's right to appoint an arbitrator stands forfeited if the appointment is not made by then. It was not even contended on behalf of the Respondent that it had appointed an arbitrator within

reasonable time. Here again it cannot be said that the judgment in *Ace Pipeline* is *per incuriam*.

88. The position thus far is clear. A party is bound to make an appointment within a reasonable time. If it fails to do so, the other side is entitled to make an application under section 11. While considering an application under section 11, the Chief Justice or his designate must consider whether there was a failure on the part of the party, person or institution to make the appointment in accordance with the procedure prescribed under the arbitration agreement within a reasonable time. If the question is answered in the negative, the Chief Justice or his designate is entitled to appoint the arbitrator. If not, the right of the party does not stand forfeited merely because the application is filed. The right of the other party to seek an appointment under section 11(6) arises only where there is a failure of a party to make the appointment within a reasonable time.

89. Mr. Khambatta, however, submitted that the judgments that followed construed the judgment in *Datar Switchgears* as contended by him.

90. I do not agree. In fact the Supreme Court in *Ace Pipeline* and *Indian Oil Corporation* militate against his submission. The other judgments relied upon by him, which I will now refer to, do not do so either. Properly construed, there is no conflict between the various judgments either.

91. I must preface a reference to these judgments with these observations. Firstly, a judgment is only an authority for what it decides and not what is logically deducible therefrom. Secondly, when a judgment proceeds on a concession or on a presumption, the concession or presumption does not constitute the ratio of the judgment.

92. The judgment of a learned single Judge of this court in the case of *Jesmajo Industrial Fabrications Pvt. Ltd. vs. Indian Oil Corporation Ltd. (2003) 5 BCR 676 = 2003 9 LJSOFT 110,* does not carry the matter further. In paragraph 6 of the judgment relied upon by Mr. Khambatta, the learned Judge has referred to the case in *Datar Switchgears*. Paragraph 6 reads as under:-

"6. With that let us consider some of the judgments referred to by the learned Counsel to find out whether the controversy can be resolved based on decided authority. In (Datar Switchgears Ltd. v. Tata Finance Ltd.)3, 2001(1) Bom.C.R. (S.C.)778 : 2000(8) S.C.C. 151, the issue was as to when the Chief Justice or designate could invoke the power under section 11 to appoint an arbitrator. It was contended that once notice is given for appointment and once arbitral clause is invoked, and the party or person named fails to make appointment, then appointment could be made under section 11. While considering this aspect of the matter, the Apex Court noted that for cases falling under section 11(6) no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under section 11(4) and section 11(5) of the Act. For invocation of section 11(6), if one party demands of the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under section 11, that would be sufficient. The Court observed that in the cases arising under section 11(6), if the opposite party has not made appointment within 30 days of the demand, right to make appointment is not forfeited but continues but an appointment has to be made before the former files an application under section 11 seeking appointment of an arbitrator. Only then does the right of the opposite party cease. Therefore, what is clear from that judgment is that the Chief Justice or his designate can step in if the party who has to nominate does not do so before the application is made. Once the application is made the power to nominate is of the Chief Justice or his designate. Whether in exercise of that power the Chief Justice or his designate could nominate an outsider was not directly in issue. What was in issue was when the

> Chief Justice or his designate could step in to constitute of the Arbitral Tribunal on failure by the parties. The issue before us therefore, was not really in issue in Datar Switchgears (supra). Learned Counsel seeks to point out that this would indicate that the right of the party to nominate would cease and right to appoint arbitrator under section 11 would be that of the Chief Justice or designate."

In this case also, the question whether the period of thirty days is mandatory or not was not even considered. In other words, the learned Judge did not hold that the period of thirty days having expired, the other side had a right *ipso facto* to file an application under section 11 thereby forfeiting the right of the party to appoint an arbitrator conferred upon him by the arbitration agreement.

Mr. Khambatta relied only upon the three sentences from paragraph 6 I have emphasized. This is to read the sentences out of context. Immediately before these three sentences, the learned Judge has noted that in *Datar Switchgears*, the Supreme Court held that in cases falling under section 11(6), no time limit has been prescribed. The mere reference to 30 days is, therefore, not conclusive of the matter.

93. In *Union of India vs. V.S. Engineering (P) Ltd. (2006) 13 SCC*

240, the Supreme Court held :-

> "**4.** Earlier also in *Datar Switchgears Ltd.* v. *Tata Finance Ltd.* their Lordships have observed that the arbitrator should be appointed within thirty days on demand being made by the other party and the appointment could still be made but before the other party moves the court under Section 11 of the Act. It was observed that once the other party moves the court the right to make the appointment ceases to exist. In the present case as it appears that the General Manager, Railways has already appointed the arbitrator but despite this, the learned Single Judge has overruled the objection of the Union of India and appointed the learned Judge of the High Court as arbitrator.
>
> .....
> **6.** However, before parting with this case we may also observe that Railways and public institutions are very slow in reacting to the request made by a contractor for appointment of the arbitrator. Therefore, in case appointment is not made in time on the request made by the contracting party, then in that case the power of the High Court to appoint arbitrator under Section 11 of the Act will not be denuded. We cannot allow administrative authorities to sleep over the matter and leave the citizens without any remedy. Authorities shall be vigilant and their failure shall certainly give rise to cause to the affected party. In case the General Manager, Railways does not appoint the Arbitral Tribunal after expiry of the notice of 30 days or before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator under Section 11 of the Act. It is the discretion of the High Court that they can appoint any railway officer or they can appoint any

> High Court Judge according to the given situation."

There is nothing in this judgment that supports Mr. Khambatta's submission about the thirty day period being mandatory or fixed. The question was neither raised, nor considered nor decided. The parties did not contend that 30 days was not the reasonable period. The judgment accordingly proceeded on the basis that in that case 30 days would be a reasonable period.

94. I have already dealt with the judgment of the Supreme Court in *BSNL vs. Subash Chandra Kanchan (2006) 8 SCC 279*. In that case, the Supreme Court observed that the Managing Director of the Appellant was required to communicate his decision in terms of clause 25 of the contract. The Supreme Court held :

> **"12.** Evidently, the Managing Director of the appellant was served with a notice on 7-1-2002. The letter appointing the arbitrator was communicated to the respondent on 7-2-2002. By that time, 30 days' period contemplated under the Act lapsed. The Managing Director of the appellant was required to communicate his decision in terms of clause 25 of the contract."

This judgment is also of no assistance to the Petitioner's case

for the same reasons I have furnished in respect of Union of India v. V.S.Engineering (P) Ltd. I do not find well founded, the reliance upon the solitary sentence : "*By that time, 30 days period contemplated under the Act had expired*." The question presently under consideration was neither raised before the Supreme Court nor decided by it. The Act does not specify a thirty day period. The parties in this case too proceeded on the basis that thirty days was a reasonable period. It is in that context that the sentence must be read.

95. I have earlier dealt with the judgment of the Supreme Court in *Ace Pipeline Contracts Pvt. Ltd. vs. Bharat Petroleum Corporation Limited*. The case of *Union of India vs. Bharat Battery Manufacturing Co. Pvt. Ltd. (2007) 7 SCC 684*, was considered by the Supreme Court to be inconsistent with the judgment in Ace Pipelines. The matter was, therefore, referred to a larger bench of three learned Judges. In the case of *Northern Railway Administration, Ministry of Railway vs. Patel Engg. Co. Ltd. (2008) 10 SCC 240*, the question that was decided was whether the provisions of sub-section (8) of section 11 would apply even if an appointment is to be made under sub-section 11(6). The Supreme Court answered the question in the

affirmative, but the question that presently falls for consideration was not decided in *Northern Railway Administration.*

The observations in *Union of India vs. Bharat Battery Manufacturing Co. P. Ltd*. must also be read in the proper perspective. In that case also, the Appellant had failed to appoint an arbitrator within thirty days from the date of receipt of the request to do so and before the Respondent filed an application under section 11(6). It was contended on behalf of the Appellant that the High Court had not followed the procedure under section 11(8). The Supreme Court held :

> **"12.** 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 given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the 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."

It was not even contended before the Supreme Court that a period of thirty days cannot be considered to be the reasonable period. The parties proceeded on the basis that a thirty day period, in the facts

of the case, was reasonable. The question raised by Mr. Khambatta was neither raised before nor considered by the Supreme Court.

96. Mr. Khambatta then relied upon the judgment of the Supreme Court in *BSNL vs. Dhanurdhar Champatiray*, (2010) 1 SCC 673. In paragraph 25, it was observed that the Appellant having failed to respond to the letters of the Respondent requiring them to appoint an arbitrator and to an appoint arbitrator in response to such letters within the stipulated period in accordance with clause 25 of the respective agreements, the Respondent was constrained to file a petition under section 11(6) of the Act for appointment of an arbitrator. Clause 25 is not set out. It appears from the judgment the period was stipulated in clause 25. Paragraphs 4 and 7 of the judgment read as under :

> **"4.** The respondent by letters, requested the Chief Engineer (Civil) for appointment of an arbitrator to adjudicate the disputes between the parties in terms of Clause 25 of the respective agreements. According to the respondent, letters were received by the Chief Engineer of Appellant 1 on different dates. The appellants having failed to respond to the letters of the respondent requiring them to appoint an arbitrator and to appoint an arbitrator in response to such letters within the stipulated period in accordance with Clause 25 of the respective agreements, the respondent was constrained to file petitions under Section 11(6) of the Act for appointment of an arbitrator. However, according to the case made out by the appellants, on

> 9-3-2005, Chief Engineer (Civil), BSNL had already appointed Shri Gurbaux Singh, Principal Chief Engineer (Arbitration), BSNL vide its Office Letter No. 69-41(05)/CE(c)/BBSR/205.
>
> .....
>
> **7.** A plain reading of Section 11(5) of the Act would show that if one party demands appointment of an arbitrator and the other party does not appoint any arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the appellant makes an appointment even after thirty days of demand but the first party has not moved the Court under Section 11, that action on the part of the appellant would be sufficient. In other words, in cases arising under Section 11(6), if the respondent has not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application under Section 11 seeking appointment of an arbitrator before the High Court. It is only then the right of the respondent ceases."

Thereafter, the Supreme Court referred to the judgments of the Supreme Court in *Datar Switchgears, Punj Lloyd, Ace Pipeline and Northern Railway Administration*. Paragraph 7 relied upon by Mr. Khambatta does not state that if the Respondent has not made an appointment within thirty days of demand, the right to make an appointment is forfeited once the other party files an application under section 11. The Supreme Court neither considered nor held that a party would be deemed to have failed to discharge its obligation as contemplated under section 11(6) merely upon expiry of a period of

thirty days. The question was neither raised nor considered. It was presumed that in that case, a thirty day period was reasonable. Either that or as is indicated in paragraph 4, the period was stipulated in clause 25 itself.

97. Nor do I find the judgment of a learned single Judge of this court in the case of *Khurana Constructions vs. IOT Infrastructure & Energy Services Ltd. & Anr., Manu/MH/1009/2010*, of any assistance to the Petitioner. The question whether section 11(6) stipulates or was deemed to have stipulated thirty days as the reasonable time for a party to discharge its obligations under the procedure for the appointment of an arbitrator was neither raised nor decided. The Petitioner, by a letter dated 18th February, 2009, invoked the arbitration agreement. The Respondent not having responded, the Petitioner filed the application under section 11 on 16th July, 2009. IT is apparent from paragraph 10 of the judgment that the appointment was not made within a reasonable time. Paragraph 10 reads as under :-

> "10. Now in the present case, the facts to which a reference has been made earlier would show that after the Petitioner raised a dispute on 1 September 2008. Sufficient opportunities were granted to the Respondents

to follow the procedure prescribed in the contract. The First Respondent was called upon to negotiate with a view to resolving the dispute amicably by the Petitioner's letter dated 12 November 2008 and it was after the expiry of ninety days that the Petitioner invoked arbitration by its letter dated 18 February 2009. The First Respondent chose to remain completely silent save and except for a formal letter of 1 October 2008 baldly refuting all claims and contentions. It was after the Petition was instituted on 16 July 2009 that the First Respondent by a letter dated 17 August, 2009 purported to inform the Petitioner of the appointment of an arbitrator. However, upon the institution of the Petition under Section 11(6) the right of the First Respondent to nominate an arbitrator stood forfeited in view of the judgments of the Supreme Court in Datar Switchgears and Punj Lloyd. In terms of the law laid down by the Supreme Court in Northern Railway Administration, this Court, undoubtedly has to have due regard to the requirements under sub Section (8) of Section 11 insofar as they relate to the qualifications required of the arbitrator by the agreement and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Insofar as the issue of qualifications is concerned, it may be noted that in sub Clause (c) of Clause 83 of the contract, the arbitrator is at liberty to appoint, if necessary an accountant, engineer or technical person to assist him in the case. This would take due account of any technical issues that may arise in the course of the proceedings. Insofar as the issues of impartiality and independence are concerned, there can be no gainsaying fact that as opposed to an officer of the First Respondent who was purported to be nominated by the Managing Director after the institution of the Section 11(6) proceedings, the interests of justice would be better sub served by the appointment of an independent and impartial arbitrator by this Court under Section 11(6). Above all, this Court must be guided by the circumstance that the First Respondent, despite ample opportunities prior to the institution of the proceedings, failed to take

> steps under the agreement. The First Respondent refused even to negotiate in good faith and thereafter failed to appoint an arbitrator until the date of the institution of the petition."

98. The judgments, therefore, do not take a different view from those taken in *Ace Pipeline* and *Indian Oil Corporation*.

99. The question, therefore, is whether there was any failure on the part of the Respondent or its CMD which would deprive them of the right to appoint an arbitrator under the arbitration agreement.

100. The Petitioner invoked the arbitration agreement by the said letter dated 29th March, 2006. There is nothing in the nature of the agreement which indicates urgency of the nature such as in a Centrocon arbitration agreement referred to in the *Tradax* judgment. Considering the facts of this case, I would not fix a period of thirty days from the date of the invocation of the arbitration agreement to be the reasonable period within which the Respondents ought to have appointed an arbitrator.

101. The Respondent's CMD was admittedly abroad when the letter

of invocation was received. He returned to India on 19th April, 2006. The Respondent invited his attention promptly to the letter of invocation. Within two days of the return of the CMD, he instructed his advocates to write the said letter dated 21st April, 2006. I do not find it at all unreasonable that the Respondents had decided to make the appointment within thirty days of the return of the CMD. There is nothing to indicate that the progress of the arbitration would be prejudiced in any manner thereby. There is nothing to indicate that the rights of the Petitioner would be prejudiced or affected in any manner had the appointment been made within thirty days of the CMD returning to India. Thus, had the appointment, in fact, been made within thirty days of the return of the CMD i.e. by 21st May, 2006, the Respondent would not have forfeited its right to make the appointment even though the Petitioners had filed the application under section 11 by them.

102. However, the Respondent did not, in fact, ever appoint an arbitrator. The Respondent quite possibly, on the advise on the bias of the Petitioner's submissions, which I have rejected, thought it advisable to stick to the case that the appointment was made by the

alleged disputed letters. Neither in its advocate's letter dated 17th May, 2006, nor in the affidavit-in-reply dated 9th June, 2006, did the Respondent contend anything, but that it had made the appointment in accordance with the said letter. In other words, the Respondent did not state that even assuming that the appointment was not made earlier, it was now making the appointment. Had that been so, it could well have been a different matter altogether. The mere filing of the application on 3rd May, 2006, then would not have deprived the Respondent of the right to appoint an arbitrator. The Respondent has failed to establish its case that it had appointed the arbitrator by the alleged letters.

103. It would not be correct on my part, even in these circumstances, to make out a case on behalf of the Respondent which they have not pleaded viz. a case in the alternative that even assuming that the appointment had not been made by the alleged letters, it had been made in the affidavit in reply itself.

104. Mr. Dwarkadas submitted that the cause of action for filing an application does not arise till after the expiry of what the court

determines to be a reasonable period for the purpose of section 11(6). I would not accept the submission in absolute terms.

105. There is nothing that prevents the other party from filing an application under section 11(6) upon the expiry of what it perceives to be a reasonable period for the appointment of an arbitrator from the date on which it invokes the arbitration agreement. Even if the court comes to the conclusion that a reasonable period had not expired, it would not affect the maintainability of the application. However, if the court comes to the conclusion that a reasonable period had not expired before the application was filed and before the appointment was made by the Respondent even after the filing of the application, it would not lead to a forfeiture of the Respondent's right to make the appointment, resulting in the Chief Justice or his designate making the appointment.

106. Thus, although I have come to the conclusion that a reasonable period had not expired when the application was filed i.e on 3rd May, 2006, the petition cannot be dismissed as not being maintainable. Had the Respondent made an appointment even thereafter, it would have

required a decision as to whether the appointment so made was within a reasonable time to avoid a forfeiture of the right.

107. It is however, now almost five years since the Petitioner invoked the arbitration agreement by the letter dated 29th March, 2006. The Respondent has not made an appointment except as alleged. Having come to the conclusion that the Respondent has not established the appointment of the arbitrator as alleged and the Respondent not having made any other appointment, it must be held that it has now, after a lapse of almost five years, forfeited its right to make an appointment.

108. Despite my finding that the Respondent has forfeited its right to appoint an arbitrator, considering the facts of this case, I asked Mr. Dwarkadas to suggest the name of any arbitrator that the Respondent would like to have appointed. I even made it clear that this would be without prejudice to the rights of the parties. For some inexplicable reason, the Respondent refused to suggest a name. I have made the appointment consistent with sub-section (8) of section 11. The Respondent's CMD had allegedly appointed a former Judge for his

knowledge of the law. I have, accordingly, appointed a former Judge of the Supreme Court of India.

109. A serious allegation has been made by the Applicant of bias and impropriety against the said arbitrator and the Respondent. It was in respect of the Respondent's witness having admitted in cross-examination that the said arbitrator had visited his witness's office after the alleged appointment without informing the Applicant.

110. I do not suggest that the grievance is unfounded. However, an allegation of bias cannot be raised in an application under section 11 of the Arbitration and Conciliation Act, 1996. If the appointment is held to be valid, a party must challenge the arbitrator on the ground of bias under sections 12 and 13 of the Arbitration and Conciliation Act, 1996.

111. In the circumstances, the application is allowed. Mr. Justice B.N. Srikrishna, a former Judge of the Supreme Court of India, is appointed as the sole arbitrator. This order is stayed upto and including 31st January, 2010, to enable the Respondent to challenge the same.