Practical Implication of Section 11(6) of Arbitration and Conciliation Act, 1996

With increasing popularity of Alternative Dispute Resolution practices in India, some High Courts in excercise of their power under section 89 of Court of Civil Procedure have started maintaining panel of advocates and trained mediators including the Chartered Accountants to help resolve disputes. Taking into account various judicial pronouncements, the question that arises is that "Whether the powers exercised by Chief Justice or any person or Institution designated by him under section 11(6) are administrative or judicial? This article attempts to answer that question.

Uday S. Gandhi

The concept of Arbitration in India is spreading very fast and the chief Justice of various High Courts including Chief Justice of India is encouraging the same. The concept of "Alternative Dispute Resolution" mechanism (ADR) has started picking up momentum. Since it has become the need of the Indian society Various Universities and Education centers and Institutions have started certificate course in ADR. Various mediation centres have been opened to train mediators who can be able to resolve disputes through mechanism of ADR. Various High Courts have started maintaining panel of the Senior Advocates and trained mediators who can mediate and resolve disputes. The selected cases for mediation are allotted to trained mediators by different Courts in exercising its power under section 89 of Court of Civil Procedure. The same is termed either as "Court referred mediation" or "Court annexed mediation".

This Article is restricted to practical implication of Section 11(6) of Arbitration and Conciliation Act, 1996. Taking into account various judicial pronouncement, the question that arises is that "Whether the powers exercised by Chief Justice or any person or Institution designated by him under section 11(6) are administrative or judicial? To learn in detail the reply of this question, first of all, we have to understand what is the provision of section 11 (6) of the

The author is an Advocate. He can be reached at usgandhiandco@rediffmail.com

Act? The same is reproduced as below:

"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, fails 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 measures, unless the agreement on the appointment procedure provides other means for securing the appointment".

The power of appointment of arbitrators has been given to the Chief Justice of High Court and not to the "Court " itself because "Court" and the Chief Justice of High Court are two different distinct and separate identities all together specially when we see the definition of "Court" as occurring in Section 2(1)(e) of the Act., which reads as below:

"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the Arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes".

In Contradistinction to Section 2(1) (e) of the Act in Section 11, sub-sections (4), (5) and (6) and other sub-Sections of Section 11 everywhere term used is "Chief Justice" and as per sub-section (12)(b) of Section 11 the Chief Justice has been

defined to be the Chief justice of the High Court within whose local limits the Principal Civil Court referred to in Clause (e) to sub-section (1) of Section 2 is situate and where the High Court itself is the Court referred to in that Clause to be the Chief Justice of the High Court . Therefore, Section 11 of the Act cannot be grouped in the same clause and category with other referred sections with respect to judicial intervention because it is only the Chief Justice as a persona designata, who has been given the power to appoint Arbitrators under certain situation in some circumstances.

The question is whether such an order is in the nature of an administrative order or it is an order passed on a judicial side and hence it has the trappings of the judicial order. The question assumes additional importance in view of the fact that under the Act the order passed by the Chief Justice (Under section 11) is not appealable or revisable by any superior or higher authority.

A Constitution Bench of the Supreme Court of India, comprising of five Hon'ble Judges in the case of *M/s. Konkan Railway Corporation Ltd. and another vs. M/s Rani Construction P. Ltd. reported in 2002(1) Arb. LR 326(SC)*, has taken the view that the order passed by the Chief Justice under Section 11 of the 1996 Act is in the nature of an administrative order and thus is not subject to judicial review in terms of Article 136 of the Constitution in the sense that a petition for Special Leave to Appeal under this Article is not maintainable in the Supreme Court against such an order passed by the Chief Justice.

However, there are many occasions when the Chief Justice in exercise of his power, under Section 11 of the Act, decides contentious issues arising between the parties to an alleged agreement. If the contentious issues are decided by a Forum, Tribunal, Authority or a Court, in the process of deciding contentious issues there has to be an applications of mind and in deciding contentious issues between two litigating parties under Section 11 of the Act, the application of mind by the Chief Justice has to be on judicial considerations and, therefore, as per my perception, the order passed by the Chief Justice is a judicial order since it has the trapping of judicial order and should not be termed strictly as an administrative order. Actually, in the aforesaid judgment, the Hon'ble judges of the Supreme Court themselves have observed that the Chief Justice has to decide the contentious issues arising between the parties and the same is quoted as below:

"It appears that the Chief Justice or his nominee, acting under Section 11 of the Arbitration and Conciliation Act, 1996, have decided contentious issues arising between the parties to an alleged Arbitration agreement and the question that we are called upon to decide is whether such an order deciding issues a judicial order or an administrative order."

Suppose an application is filed before the Chief Justice for nominat-

ing an Arbitrator in terms of the provisions of the Arbitration agreement and the Chief Justice calls upon the respondent to respond to this application and after sometime or after one month, the respondent informs the Chief Justice that during the pendency of the application in the Court the respondent has itself appointed the Arbitrator. The question that would fall for consideration by the Chief Justice would be whether, when the application was pending before him, was it proper or permissible for the respondent to appoint the Arbitrator and if so to dismiss the application filed by the petitioner or was it improper or impermissible for the respondent to appoint the Arbitrator and correspondingly to annul the appointment of Arbitrator by the respondent; and to allow the application and appoint an Arbitrator. In such an eventuality, the Chief Justice is supposed to apply his judicial mind and by a process of judicial reason to decide the matter. Such an order in my humble view cannot be and should not be considered as an administrative order. The similar situation aroused and was decided by Delhi High Court in the Case of *Mittal Contracts Pvt. Ltd., Bhopal vs. Ircon International Ltd., New Delhi [2004(2) Arb. LR 130 (MP) Madhya Pradesh High Court (Jabalpur Bench) Decided on 18.11.2003]* wherein it was held that appointment of an Arbitrator by the non- applicant (respondent) even after the date application made under section 11(6), was held to be an Arbitrator appointed under section 11(6).

The above provision of section 11(6) of the Act., has been interpreted by the Supreme Court in *Datar Switchgears Ltd. vs. Tata Finance Ltd., (2000) 8 SCC 151=2000(3) Arb. LR 447(SC)*, in which it has been held that 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 has not made an appointment has not made an appointment within 30days 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.

Further in the following cases the Chief Justice or his designated has applied judicial mind while exercising power under 11(6) of the Act, the following judgments are worth noting that clearly states that judicial authority while exercising power under section 11(6) do not act only in administrative capacity but also apply their mind on various issues that come up before them prior to the decision of appointment to be made under Section 11(6) of the Act., the few of the judgments are briefly reproduced as below:

- In case of *M. Krishna Rangaiah vs. Union of India, REP. By The General Manager, S.C. Railway, Secunderabad And ORS. [2004(2) Arb LR. 333 (DB) Andhra Pradesh High Court] Decided on 10.03.2004* – Single Judge held that in view of "no claim certificate" submitted by petitioner, the dispute is no more Arbitrate and, therefore, application under Article 226 of the constitutions of India is not maintainable.
- In case of *Angang Group INTNL. Trade Corp. vs. Pipavav Railway Corp. Ltd. [2004(2) Arb. LR 44 Supreme Court Of India] Decided on 09.05.2003* it was decided that there is no concluded contract hence no arbitration agreement as well – There is no occasion for petitioner to move petition for appointment of Arbitrator – Contentions not acceptable – Matter requires probe and enquiry into objections raised by respondent – Feasible and appropriate that Arbitrator himself may embark upon any such enquiry – Arbitrator appointed only after deciding judicially by the Chief Justice.
- In case of *Sun Techno Const. (p) Ltd. Railway Contractors vs. Union Of India, REP. By its General Manager, South Central Railway, Secunderabad And ORS. [2004(2) Arb. LR 404 A.P. High Court] Decided on 02.04.2004* it was decided that – Petitioner's demand is premature – Petitioner nowhere stated that claims raised by it was final claims on which it was seeking reference for appointment of Arbitrator – Petition dismissed and Arbitrator not appointed at this stage. The Chief Justice decides the same judicially.
- In the Case of *Haryana Telecom Ltd. vs. Union of India & Anr. [2004(2) Arb. 364(Delhi) Delhi High Court decided on 31.05.2004]* Scope and Jurisdiction- Petitioner seeking Arbitration- Number of Arbitrators who were appointed, for one reason or other, either resigned or refused to act and objected to in some cases – Petition under Section 11 for appointment of Arbitrator filed – Respondents appointed Arbi-

trator after issuance of notice and its service upon respondents – Appointment of Arbitrator by respondents contrary to dictum laid down by Supreme Court – Arbitrator appointed by Court. This is a petition under section 11 of the Arbitration and Conciliation Act, 1996, raising a significant question with regard to the scope and exercise of jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 and applied his mind judicially.

The court is conscious of the fact that while exercising jurisdiction under Section 11 of the Act, it is exercising administrative functions as per the dictum of the Supreme Court. The Court is also conscious of the observations made by the Supreme Court in *Grid Corporation of Orissa Ltd. vs. AES Corporation and others reported at (2002) 7 SCC 736=2002(3) Arb. LR 589(SC)*, holding that a conjoint petitions under Section 11(6) and Section 14 of the Act, would not be maintainable. While the above observation itself have been made in petition under Section 11, i.e. a petition involving an exercise of administrative power, nevertheless the court is conscious that the observations, even though not binding as precedent being obiter and in the exercise of administrative powers, they deserves to be given due regard coming from Supreme Court.

The Court has before it a petition under Section 11 for appointment of an Arbitrator. It finds that an Arbitrator has been appointed contrary to the dictum of the Supreme Court in Datar Switchgears (Supra). Can the Court refrain from exercising its jurisdiction under Section 11 or proceed to appoint an Arbitrator in accordance with the duty cast upon it by the statute? The answer to my mind is in the affirmative. Reference may also be made to the decision in *Suresh Chandra Bose vs. State of West Bengal reported at AIR 1976 Calcutta 110*, wherein it was held that:

"A thing which is void is non-est and it is not necessary to set that aside. Though it is sometimes convenient to do so. If that is the position then as the said assessments were nullities those are not required to be actually set aside."

Applying the above ratio it would be seen that the appointment of the Arbitrator by the respondent would be contrary to the dictum as laid down in Datar Switchgears (Supra). In view of the matter, the court is not required either to treat the present petition as one also under Section 14 of the Act which the Hon'ble Supreme Court in Grid Corporation (Supra), held was not maintainable. The Court can simply proceed on the basis that the appointment of order is a nullity and does not require to be separately set aside by appropriate proceedings. This interpretation would also sub serve the ends of justice and avoid multiplicity of proceedings so that Arbitration can proceed.

From the above judicial pronouncement we can state and conclude that:

(1) In many situation Chief Justice of High Court or his designate has first to apply his judicial application of mind under Section 11(6) as to:
   - ❖ Whether there is a concluded contract or not?
   - ❖ Was their dispute aroused or not?
   - ❖ Whether the claim disputed was matured or not?
   - ❖ Whether there exist agreement or not?

(2) While handling the above situations and tackling the issues in day to day life, the Chief Justice or his designate definitely decide judicially and act like a Court and rendered decision, as if, sitting in a Court and to this extent he is exercising his judicial power before implementing his administrative power vested under section 11(6) of the Act.

(3) In many cases his judicial power is camouflaged with an order of appointment of Arbitrator or simply rejecting to appoint an Arbitrator.

(4) In many cases he has to travel beyond his administrative power under section 11(6) of the Act., and has to decide judicially before any appointment is made under section 11(6) of the Act., In view of the above, in a typical situation, he has to act in a dual capacity as administrator as well as a jury and his dubious role under section 11(6) is within the spirit of common law, since no law is above mankind and welfare of the society, in fact regard for public welfare is the highest law. ■

In a typical situation, Chief Justice of High Court or his designate has to act in a dual capacity as administrator as well as a jury and his dubious role under section 11(6) is within the spirit of common law, since no law is above mankind and welfare of the society. In fact regard for public welfare is the highest law.