CASE NO.:
Appeal (civil) 4168 of 2003

PETITIONER:
S.B.P. & CO.

RESPONDENT:
PATEL ENGINEERING LTD. & ANR

DATE OF JUDGMENT: 26/10/2005

BENCH:
R.C.LAHOTI CJI & B.N.AGRAWAL & ARUN KUMAR & G.P.MATHUR & A.K.MATHUR &
P.K.BALASUBRAMANYAN & C.K.THAKKER

JUDGMENT:
JUDGMENT

DELIVERED BY:
P.K.BALASUBRAMANYAN, J.
C.K.THAKKER,J.

WITH

CIVIL APPEAL NOs.4169/2003, 4170-4173/2003, 4076/2004,
3777/2003 and CIVIL APPEAL
NOs.6562,6563-6564,6565-6566 of 2005
of 2005 arising out of S.L.P. (CIVIL) NOs.3205/2004, 14033-
14034/2004, 21272-21273/2002,

P.K. Balasubramanyan, J.

Leave granted in SLP(C) Nos. 3205/2004, 14033-14034/2004, 21272-273/2002.

1. What is the nature of the function of the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996 is the question that is posed before us. The three judges bench decision in Konkan Rly. Corporation Ltd. v. Mehul Construction Co. as approved by the Constitution Bench in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. has taken the view that it is purely an administrative function, that it is neither judicial nor quasi-judicial and the Chief Justice or his nominee performing the function under Section 11(6) of the Act, cannot decide any contentious issue between the parties. The correctness of the said view is questioned in these appeals.
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2. Arbitration in India was earlier governed by the Indian Arbitration Act, 1859 with limited application and the Second Schedule to the Code of Civil Procedure, 1908. Then came the Arbitration Act, 1940. Section 8 of that Act conferred power on the Court to appoint an arbitrator on an application made in that behalf. Section 20 conferred a wider jurisdiction on the Court for directing the filing of the arbitration agreement and the appointment of an arbitrator. Section 21 conferred a power on the Court in a pending suit, on the agreement of parties, to refer the differences between them for arbitration in terms of the Act. The Act provided for the filing of the award in court, for the making of a motion by either of the parties to make the award a rule of court, a right to have the award set aside on the grounds specified in the Act and for an appeal against the decision on such a motion. This Act was replaced by the Arbitration and Conciliation Act,

1996 which, by virtue of Section 85, repealed the earlier enactment.

3. The Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') was intended to comprehensively cover international and commercial arbitrations and conciliations as also domestic arbitrations and conciliations. It envisages the making of an arbitral procedure which is fair, efficient and capable of meeting the needs of the concerned arbitration and for other matters set out in the objects and reasons for the Bill. The Act was intended to be one to consolidate and amend the law relating to domestic arbitrations, international commercial arbitrations and enforcement of foreign arbitral awards, as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The preamble indicates that since the United Nations Commission on International Trade Law (UNCITRAL) has adopted a Model Law for International Commercial Arbitration and the General Assembly of the United Nations has recommended that all countries give due consideration to the Model Law and whereas the Model Law and the Rules make significant contribution to the establishment of a unified legal framework for a fair and efficient settlement of disputes arising in international commercial relations and since it was expedient to make a law respecting arbitration and conciliation taking into account the Model Law and the Rules, the enactment was being brought forward. The Act replaces the procedure laid down in Sections 8 and 20 of the Arbitration Act, 1940. Part I of the Act deals with arbitration. It contains Sections 2 to 43. Part II deals with enforcement of certain foreign awards, and Part III deals with conciliation and Part IV contains supplementary provisions. In this case, we are not concerned with Part III, and Parts II and IV have only incidental relevance. We are concerned with the provisions in Part I dealing with arbitration.

4. Section 7 of the Act read with Section 2 (b) defines an arbitration agreement. Section 2(h) defines 'party' to mean a party to an arbitration agreement. Section 4 deals with waiver of objections on the part of the party who has proceeded with an arbitration, without stating his objections referred to in the section, without undue delay. Section 5 indicates the extent of judicial intervention. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in Part I. The expression 'judicial authority' is not defined. So, it has to be Page 1800 understood as taking in the courts or any other judicial fora. Section 7 defines an arbitration agreement and insists that it must be in writing and also explains when an arbitration agreement could be said to be in writing. Section 8 confers power on a judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement, to refer the dispute to arbitration, if a party applies for the same. Section 9 deals with the power of the Court to pass interim orders and the power to give interim protection in appropriate cases. It gives a right to a party, before or during arbitral proceedings or at any time after the making of the arbitral arbitral award but before its enforcement in terms of Section 36 of the Act, to apply to a court for any one of the orders specified therein. Chapter III of Part I deals with composition of arbitral tribunals. Section 10 gives freedom to the parties to determine the number of arbitrators but imposes a restriction that it shall not be an even number. Then comes Section 11 with which we are really concerned in these appeals.

5. The marginal heading of Section 11 is 'Appointment of arbitrators'. Sub-Section (1) indicates that a person of any nationality may be an arbitrator, unless otherwise agreed to by the parties. Under sub-Section (2), subject to sub-Section (6),the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Under sub- Section (3), failing any agreement in terms of sub-Section (2), in an arbitration with three arbitrators, each party could appoint one arbitrator, and the two arbitrators so appointed, could appoint the third arbitrator, who would act as the presiding arbitrator. Under sub- Section (4), the Chief Justice

or any person or institution designated by him could make the appointment, in a case where sub-Section (3) has application and where either the party or parties had failed to nominate their arbitrator or arbitrators or the two nominated arbitrators had failed to agree on the presiding arbitrator. In the case of a sole arbitrator, sub- Section (5) provides for the Chief Justice or any person or institution designated by him, appointing an arbitrator on a request being made by one of the parties, on fulfilment of the conditions laid down therein. Then comes sub-Section (6), which may be quoted hereunder with advantage:

"(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."

Sub-Section (7) gives a finality to the decision rendered by the Chief Justice or the person or institution designated by him when moved under sub-Section (4), or sub-Section (5), or sub-Section (6) of Section 11. Sub-Section (8) enjoins the Chief Justice or the person or institution designated by Page 1801 him to keep in mind the qualifications required for an arbitrator by the agreement of the parties, and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Sub-Section (9) deals with the power of the Chief Justice of India or a person or institution designated by him to appoint the sole or the third arbitrator in an international commercial arbitration. Sub-Section (10) deals with Chief Justice's power to make a scheme for dealing with matters entrusted to him by sub-Section (4) or sub-Section (5) or sub-Section (6) of Section 11. Sub-Section (11) deals with the respective jurisdiction of Chief Justices of different High Courts who are approached with requests regarding the same dispute and specifies as to who should entertain such a request. Sub-Section 12 clause (a) clarifies that in relation to international arbitration, the reference in the relevant sub-sections to the 'Chief Justice' would mean the 'Chief Justice of India'. Clause (b) indicates that otherwise the expression 'Chief Justice' shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Court is situated. 'Court' is defined under Section 2(e) as the principal Civil Court of original jurisdiction in a district.

6. Section 12 sets out the grounds of challenge to the person appointed as arbitrator and the duty of an arbitrator appointed, to disclose any disqualification he may have. Sub-Section (3) of Section 12 gives a right to the parties to challenge an arbitrator. Section 13 lays down the procedure for such a challenge. Section 14 takes care of the failure of or impossibility for an arbitrator to act and Section 15 deals with the termination of the mandate of the arbitrator and the substitution of another arbitrator. Chapter IV deals with the jurisdiction of arbitral tribunals. Section 16 deals with the competence of an arbitral tribunal, to rule on its jurisdiction. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. A person aggrieved by the rejection of his objection by the tribunal on its jurisdiction or the other matters referred to in that Section, has to wait until the award is made to challenge that decision in an appeal against the arbitral award itself in accordance with Section 34 of the Act. But an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under Section 37 of the Act. Section 17 confers powers on the arbitral tribunal to make interim orders. Chapter V comprising of Sections 18 to 27 deals with the conduct of arbitral proceedings. Chapter VI containing Sections 28 to 33 deals with making of the arbitral award and termination of the proceedings. Chapter VII deals with recourse against an arbitral

award. Section 34 contemplates the filing of an application for setting aside an arbitral award by making an application to the Court as defined in Section 2(e) of the Act. Chapter VIII deals with finality and enforcement of arbitral awards. Section 35 makes the award final and Section 36 provides for its enforcement under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of court. Chapter IX deals with appeals and Section 37 enumerates the orders that are open to appeal. We have already referred to the right of appeal available under Section 37(2) of the Act, on the Tribunal accepting a plea that it does not have jurisdiction or when the arbitral tribunal accepts a plea that it is exceeding the scope of its authority. Page 1802 No second appeal is contemplated, but right to approach the Supreme Court is saved. Chapter X deals with miscellaneous matters. Section 43 makes the Limitation Act, 1963 applicable to proceedings under the Act as it applies to proceedings in Court.

7. We will first consider the question, as we see it. On a plain understanding of the relevant provisions of the Act, it is seen that in a case where there is an arbitration agreement, a dispute has arisen and one of the parties had invoked the agreed procedure for appointment of an arbitrator and the other party has not cooperated, the party seeking an arbitration, could approach the Chief Justice of the High Court if it is an internal arbitration or of the Supreme Court if it is an international arbitration to have an arbitrator or arbitral tribunal appointed. The Chief Justice, when so requested, could appoint an arbitrator or arbitral tribunal depending on the nature of the agreement between the parties and after satisfying himself that the conditions for appointment of an arbitrator under sub-Section (6) of Section 11 do exist. The Chief Justice could designate another person or institution to take the necessary measures. The Chief Justice has also to have the qualification of the arbitrators in mind before choosing the arbitrator. An arbitral tribunal so constituted, in terms of Section 16 of the Act, has the right to decide whether it has jurisdiction to proceed with the arbitration, whether there was any agreement between the parties and the other matters referred to therein.

8. Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, sub-Section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under sub-Sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless, the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty, exist. Therefore, unaided by authorities and going by general principals, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him, is a party, whether the conditions for exercise of the power have been fulfilled and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

9. The very scheme, if it involves an adjudicatory process, restricts the power of the Chief Justice to designate, by excluding the designation of a non-judicial institution or a non-judicial authority to perform the functions. For, under our dispensation, no judicial or quasi-judicial decision can be rendered by an institution if it is not a judicial authority, court or a quasi-judicial tribunal. This aspect is dealt with later while dealing with the right to designate under Section 11(6) and the scope of that designation.

10. The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under Section 11(6) of the Act do not exist or that the qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, are all adjudications which affect the rights of parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party who is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasized, when sub-Section (7) designates the order under sub-sections (4), (5) or (6) a 'decision' and makes the decision of the Chief Justice final on the matters referred to in that sub-Section. Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the Chief Justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

11. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the arbitral tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the arbitral tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the arbitral tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of Page 1804 authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the arbitral tribunal overrules the objections under sub-section (2) or sub-section (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of Sub-Section (7) of Section 11 is, what is the scope of the right conferred on the arbitral tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him

had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-Section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the arbitral tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an arbitral tribunal, the arbitral tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of learned Senior Counsel, Mr. K.K. Venugopal that Section 16 has full play only when an arbitral tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him.

12. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration. But at the same time, it has made some departures from the model law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act, are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. ’Court’ is defined in the Act to be the principal civil court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The principal civil court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the concerned court would be the District Court. Obviously, the Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an arbitral tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Page 1805 Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of ’court’ in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the concerned State or in the country. This is to ensure the utmost authority to the process of constituting the arbitral tribunal.

13. Normally, when a power is conferred on the highest judicial authority who normally performs judicial functions and is the head of the judiciary of the State or of the country, it is difficult to assume that the power is conferred on the Chief Justice as persona designata. Under Section 11(6),

the Chief Justice is given a power to designate another to perform the functions under that provision. That power has generally been designated to a Judge of the High Court or of the Supreme Court respectively. Persona designata, according to Black's Law Dictionary, means "A person considered as an individual rather than as a member of a class". When the power is conferred on the Chief Justices of the High Courts, the power is conferred on a class and not considering that person as an individual. In the Central Talkies Ltd., Kanpur v. Dwarka Prasad while considering the status in which the power was to be exercised by the District Magistrate under the United Provinces (Temporary) Control of Rent and Eviction Act, 1947, this Court held:

"a persona designata is "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character." (See Osborn's Concise Law Dictionary, 4th Edition., p.253). In the words of Schwabe, C.J., in Parthasardhi Naidu v. Koteswara Rao, [I.L.R. 47 Mad 369 F.B.] personae designatae are, "persons selected to act in their private capacity and not in their capacity as Judges." The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purpose of the Eviction Act."

In Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker this Court after quoting the above passage from the Central Talkies Ltd., Kanpur v. Dwarka Prasad, Page 1806 applied the test to come to the conclusion that when Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 constituted the District Judge as an appellate authority under that Act, it was a case where the authority was being conferred on District Judges who constituted a class and, therefore, the appellate authority could not be considered to be persona designata. What can be gathered from P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition, 2005, is that "persona designata" is a person selected to act in his private capacity and not in his capacity as a judge. He is a person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character. It is also seen that one of the tests to be applied is to see whether the person concerned could exercise the power only so long as he holds office or could exercise the power even subsequently. Obviously, on ceasing to be a Chief Justice, the person referred to in Section 11(6) of the Act could not exercise the power. Thus, it is clear that the power is conferred on the Chief Justice under Section 11(6) of the Act not as persona designata.

14. Normally a persona designata cannot delegate his power to another. Here, the Chef Justice of the High Court or the Chief Justice of India is given the power to designate another to exercise the power conferred on him under Section 11(6) of the Act. If the power is a judicial power, it is obvious that the power could be conferred only on a judicial authority and in this case, logically on another Judge of the High Court or on a Judge of the Supreme Court. It is logical to consider the conferment of the power on the Chief Justice of the High Court and on the Chief Justice of India as presiding Judges of the High Court and the Supreme Court and the exercise of the power so conferred, is exercise of judicial power/authority as presiding Judges of the respective courts. Replacing of the word 'court' in the Model Law with the expression "Chief Justice" in the Act, appears to be more for excluding the exercise of power by the District Court and by the court as an entity leading to obvious consequences in the matter of the procedure to be followed and the rights of appeal governing the matter. The departure from Article 11 of the Model Law and the use of the expression "Chief Justice" cannot be taken to exclude the theory of its being an adjudication under Section 11 of the Act by a judicial authority.

15. We may at this stage notice the complementary nature of Sections 8 and 11. Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause,

the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this Section is 'shall' and this Court in P. Anand Gajapathi Raju v. P.V. G. Raju and in Hindustan Petroleum Corporation Ltd. v. Pink City Midway Petroleum Page 1807 has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the Chief Justice under Section 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority under Section 8 can decide, but not a Chief Justice under Section 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration. The interpretation of Section 11 that we have adopted would not give room for such an anomaly.

16. Section 11(6) does enable the Chief Justice to designate any person or institution to take the necessary measures on an application made under Section 11(6) of the Act. This power to designate recognized in the Chief Justice, has led to an argument that a judicial decision making is negatived, in taking the necessary measures on an application, under Section 11(6) of the Act. It is pointed out that the Chief Justice may designate even an institution like the Chamber of Commerce or the Institute of Engineers and they are not judicial authorities. Here, we find substance in the argument of Mr. F.S.Nariman, learned senior counsel that in the context of Section 5 of the Act excluding judicial intervention except as provided in the Act, the designation contemplated is not for the purpose of deciding the preliminary facts justifying the exercise of power to appoint an arbitrator, but only for the purpose of nominating to the Chief Justice a suitable person to be appointed as arbitrator, especially, in the context of Section 11(8) of the Act. One of the objects of conferring power on the highest judicial authority in the State or in the country for constituting the arbitral tribunal, is to ensure credibility in the entire arbitration process and looked at from that point of view, it is difficult to accept the contention that the Chief Justice could designate a non- judicial body like the Chamber of Commerce to decide on the existence of an arbitration agreement and so on, which are decisions, normally, judicial or quasi judicial in nature. Where a Chief Justice designates not a Judge, but another person or an institution to nominate an arbitral tribunal, that can be done only after questions as to jurisdiction, existence of the agreement and the like, are decided first by him or his nominee Judge and what is to be Page 1808 left to be done is only to nominate the members for constituting the arbitral tribunal. Looking at the scheme of the Act as a whole and the object with which it was enacted, replacing the Arbitration Act of 1940, it seems to be proper to view the conferment of power on the Chief Justice as the conferment of a judicial power to decide on the existence of the conditions justifying the constitution of an arbitral tribunal. The departure from the UNCITRAL model regarding the conferment of the power cannot be said to be conclusive or significant in the circumstances. Observations of this Court in paragraphs 389 and 391 in Supreme Court Advocates on Record Association v. Union of India support the argument that the expression chief justice is used in the sense of collectivity of judges of the Supreme Court and the High Courts respectively.

17. It is true that the power under Section 11(6) of the Act is not

conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power.

18. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See Fair Air Engineers (P) Ltd. and Anr. v. N.K. Modi . When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, Page 1809 disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See R.M.A.R.A. Adaikappa Chettiar and Anr. v. R. Chandrasekhara Thevar (AIR 1948 P.C. 12)]

19. Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections,

before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal. In Konkan Railway (Supra) what is considered is only the fact that under Section 16, the arbitral tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the arbitral tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an arbitral tribunal. Once it is held that there is an Page 1810 adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the arbitral tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

20. We will now consider the prior decisions of this Court. In Sundaram Finance Ltd. v. NEPC India Ltd. this Court held that the provisions of the Act must be interpreted and construed independently of the interpretation placed on the Arbitration Act, 1940 and it will be more relevant to refer to the UNCITRAL model law while called upon to interpret the provisions of the Act. This Court further held that under the 1996 Act, appointment of arbitrator(s) is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing an arbitrator or arbitrators. It is seen that the question was not discussed as such, since the court in that case was not concerned with the interpretation of Section 11 of the Act. The view as above was quoted with approval in Ador Samia Private Limited v. Peekay Holdings Limited and Ors. and nothing further was said about the question. In other words, the question as to the nature of the order to be passed by the Chief Justice when moved under Section 11(6) of the Act, was not discussed or decided upon.

21. In Wellington Associates Ltd. v. Kirit Mehta it was contended before the designated Judge that what was relied on by the applicant was not an arbitration clause. The applicant contended that the Chief Justice of India or the designate Judge cannot decide that question and only the arbitrator can decide the question in view of Section 16 of the Act. The designated Judge held that Section 16 did not exclude the jurisdiction of the Chief Justice of India or the designated Judge to decide the question of the existence of an arbitration clause. After considering the relevant aspects, the learned Judge held:
"I am of the view that in cases where --- to start with - there is a dispute raised at the stage of the application under Section 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the "existence" of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16."

22. Then came Konkan Railway Corporation Ltd. v. Mehul Construction Co. in which
the first question framed was, what Page 1811 was the nature of the order passed by the Chief Justice or his nominee in exercise of his power under Section 11(6) of the Arbitration and Conciliation Act, 1996? After noticing the Statement of Objects and Reasons for the Act and after comparing the language of Section 11 of the Act and the corresponding article of the model law, it was stated that the Act has designated the Chief Justice of

the High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of an arbitrator, whereas under the model law, the said power was vested with the court. When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it was imperative for the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues left to be raised before the arbitral tribunal itself. It was further held that at that stage, it would not be appropriate for the Chief Justice or his nominee, to entertain any contention or decide the same between the parties. It was also held that in view of the conferment of power on the arbitral tribunal under Section 16 of the Act, the intention of the legislature and its anxiety to see that the arbitral process is set in motion at the earliest, it will be appropriate for the Chief Justice to appoint an arbitrator without wasting any time or without entertaining any contentious issue by a party objecting to the appointment of an arbitrator. The Court stated:

"Bearing in mind the purpose of legislation, the language used in Section 11(6) conferring power on the Chief Justice or his nominee to appoint an arbitrator, the curtailment of the power of the court in the matter of interference, the expanding jurisdiction of the arbitrator in course of the arbitral proceeding, and above all the main objective, namely, the confidence of the international market for speedy disposal of their disputes, the character and status of an order appointing an arbitrator by the Chief Justice or his nominee under Section 11(6) has to be decided upon. If it is held that an order under Section 11(6) is a judicial or quasi-judicial order then the said order would be amenable to judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting the UNCITRAL Model."

23. The Court proceeded to say that if it were to be held that the order passed was purely administrative in nature, that would facilitate the achieving of the object of the Act, namely, quickly setting in motion the process of arbitration. Great emphasis was placed on the conferment of power on the Chief Justice in preference to a court as was obtaining in the model law. It was concluded " The nature of the function performed by the Chief Justice being essentially to aid the constitution of the arbitral tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative Page 1812 order as has been held by this Court in Ador Samia case (supra) and the observations of this Court in Sundaram Finance Ltd. case (supra) also are quite appropriate and neither of those decisions require any reconsideration."

24. It was thus held that an order passed under Section 11(6) of the Act, by the Chief Justice of the High Court or his nominee, was an administrative order, its purpose being the speedy disposal of commercial disputes and that such an order could not be subjected to judicial review under Article 136 of the Constitution of India. Even an order refusing to appoint an arbitrator would not be amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution. A petition under Article 32 of the Constitution was also not maintainable. But, an order refusing to appoint an arbitrator made by the Chief Justice could be challenged before the High Court under Article 226 of the Constitution. What seems to have persuaded this Court was the fact that the statement of objects and reasons of the Act clearly enunciated that the main object of the legislature was to minimize the supervisory role of courts in arbitral process. Since Section 16 empowers the arbitral tribunal to rule on its own jurisdiction including ruling on objections with respect to the existence or validity of an arbitration agreement, a party would have the opportunity

to raise his grievance against that decision either immediately or while challenging the award after it was pronounced. Since it was not proper to encourage a party to an arbitration, to frustrate the entire purpose of the Act by adopting dilatory tactics by approaching the court even against the order of appointment of an arbitrator, it was necessary to take the view that the order was administrative in nature. This was all the more so, since the nature of the function performed by the Chief Justice was essentially to aid the constitution of the arbitral tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not on the court, it was apparent that the order was an administrative order. With respect, it has to be pointed out that this Court did not discus or consider the nature of the power that the Chief Justice is called upon to exercise. Merely because the main purpose was the constitution of an arbitral tribunal, it could not be taken that the exercise of power is an administrative power. While constituting an arbitral tribunal, on the scheme of the Act, the Chief Justice has to consider whether he as the Chief Justice has jurisdiction in relation to the contract, whether there was an arbitration agreement in terms of Section 7 of the Act and whether the person before him with the request, is a party to the arbitration agreement. On coming to a conclusion on these aspects, he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only on being satisfied in that behalf, he could appoint an arbitrator or an arbitral tribunal on the basis of the request. It is difficult to say that when one of the parties raises an objection that there is no arbitration Page 1813 agreement, raises an objection that the person who has come forward with a request is not a party to the arbitration agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Can he constitute an arbitrary tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power under Section 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an arbitral tribunal the rights of parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his objection is upheld by the arbitral tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an arbitral tribunal.

25. It is also somewhat incongruous to permit the order of the Chief Justice under
Section 11(6) of the Act being subjected to scrutiny under Article 226 of the Constitution at the hands of another Judge of the High Court. In the absence of any conferment of an appellate power, it may not be possible to say that a certiorari would lie against the decision of the High Court in the very same High Court. Even in the case of an international arbitration, the decision of the Chief Justice of India would be amenable to challenge under Article 226 of the Constitution before a High Court. While construing the scope of the power under Section 11(6), it will not be out of place for the court to bear this aspect in mind, since after all, courts follow or attempt to follow certain judicial norms and that precludes such challenges (see Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. and Rupa Ashok Hurra v. Ashok Hurra and Anr..

26. In Nimet Resourcs Inc. and Anr. v. Essar Steels Ltd. the question of existence or otherwise of an arbitration agreement between the parties was itself held to be referable to the arbitrator since the order proceeded on the basis that the power under Section 11(6) was merely administrative.

27. The correctness of the decision in Konkan Railway Corporation Ltd. v. Mehul Construction Co. (supra) was doubted in Konkan Railway Cooperation Ltd. v. Rani Construction Pvt. Ltd. The reconsideration was recommended on the ground that the Act did not take away the power of the Court to decide preliminary issues notwithstanding the arbitrator's competence to decide such issues including whether particular matters were "excepted matters", or whether an arbitration agreement existed or whether there was a dispute in terms of the agreement. It was noticed that in other countries where UNCITRAL model was being followed, the court could decide such issues judicially and need not mechanically appoint an arbitrator. There were situations where preliminary issues would have to be decided by the court rather than by the arbitrator. If the order of the Chief Justice or his nominees were to be treated as an administrative one, it could be challenged before the single Judge of the High Court, then before a Division Bench and then the Supreme Court under Article 136 of the Constitution, a result that would cause further delay in arbitral proceedings, something sought to be prevented by the Act. An order under Section 11 of the Act did not relate to the administrative functions of the Chief Justice or of the Chief Justice of India.

28. The reference came up before a Constitution Bench. In Konkan Railway Construction Ltd. v. Rani Construction Pvt. Ltd., the Constitution Bench reiterated the view taken in Mehul Construction Co.'s case (supra), if we may say so with respect, without really answering the questions posed by the order of reference. It was stated that there is nothing in Section 11 of the Act that requires the party other than the party making the request, to be given notice of the proceedings before the Chief Justice. The Court went on to say that Section 11 did not contemplate a response from the other party. The approach was to say that none of the requirements referred to in Section 11(6) of the Act contemplated or amounted to an adjudication by the Chief Justice while appointing an arbitrator. The scheme framed under the Arbitration Act by the Chief Justice of India was held to be not mandatory. It was stated that the UNCITRAL model law was only taken into account and hence the model law, or judgments and literature thereon, was not a guide to the interpretation of the Act and especially of Section 11.

29. With respect, what was the effect of the Chief Justice having to decide his own jurisdiction in a given case was not considered by the Bench. Surely, the question whether the Chief Justice could entertain the application under Section 11(6) of the Act could not be left to the decision of the arbitral tribunal constituted by him on entertaining such an application. We also feel that adequate attention was not paid to the requirement of the Chief Justice having to decide that there is an arbitration agreement in terms of Section 7 of the Act before he could exercise his power under Section 11(6) of the Act and its implication. The aspect, whether there was an arbitration agreement, was not merely a jurisdictional fact for commencing the arbitration itself, but it Page 1815 was also a jurisdictional fact for appointing an arbitrator on a motion under Section 11(6) of the Act, was not kept in view. A Chief Justice could appoint an arbitrator in exercise of his power only if there existed an arbitration agreement and without holding that there was an agreement, it would not be open to him to appoint an arbitrator saying that he was appointing an arbitrator since he has been moved in that behalf and the applicant before him asserts that there is an arbitration agreement. Acceptance of such an argument, with great respect, would reduce the high judicial authority entrusted with the power to appoint an arbitrator, an automaton and sub-servient to the arbitral tribunal which he himself brings into existence. Our system of law does not contemplate such a situation.

30. With great respect, it is seen that the court did not really consider the nature of the rights of the parties involved when the Chief Justice exercised the power of constituting the arbitral tribunal. The court also did not consider whether it was not necessary for the Chief Justice to satisfy himself of the existence of the facts which alone would entitle him

or enable him to accede to the request for appointment of an arbitrator and what was the nature of that process by which he came to the conclusion that an arbitral tribunal was liable to be constituted. When, for example, a dispute which no more survives as a dispute, was referred to an arbitral tribunal or when an arbitral tribunal was constituted even in the absence of an arbitration agreement as understood by the Act, how could the rights of the objecting party be said to be not affected, was not considered in that perspective. In other words, the Constitution Bench proceeded on the basis that while exercising power under Section 11(6) of the Act there was nothing for the Chief Justice to decide. With respect, the very question that fell for decision was whether there had to be an adjudication on the preliminary matters involved and when the result had to depend on that adjudication, what was the nature of that adjudication. It is in that context that a reconsideration of the said decision is sought for in this case. The ground of ensuring minimum judicial intervention by itself is not a ground to hold that the power exercised by the Chief Justice is only an administrative function. As pointed out in the order of reference to that Bench, the conclusion that it is only an administrative act is the opening of the gates for an approach to the High Court under Article 226 of the Constitution, for an appeal under the Letters Patent or the concerned High Court Act to a Division Bench and a further appeal to this Court under Article 136 of the Constitution of India.

31. Moreover, in a case where the objection to jurisdiction or the existence of an arbitration agreement is overruled by the arbitral tribunal, the party has to participate in the arbitration proceedings extending over a period of time by incurring substantial expenditure and then to come to court with an application under Section 34 of the Arbitration Act seeking the setting aside of the award on the ground that there was no arbitration agreement or that there was nothing to be arbitrated upon when the tribunal was constituted. Though this may avoid intervention by court until the award is pronounced, it does mean considerable expenditure and time spent by the party before the arbitral tribunal. On the other hand, if even at the initial stage, the Chief Justice judicially pronounces that he has jurisdiction to appoint an arbitrator, Page 1816 that there is an arbitration agreement between the parties, that there was a live and subsisting dispute for being referred to arbitration and constitutes the tribunal as envisaged, on being satisfied of the existence of the conditions for the exercise of his power, ensuring that the arbitrator is a qualified arbitrator, that will put an end to a host of disputes between the parties, leaving the party aggrieved with a remedy of approaching this Court under Article 136 of the Constitution. That would give this Court, an opportunity of scrutinizing the decision of the Chief Justice on merits and deciding whether it calls for interference in exercise of its plenary power. Once this Court declines to interfere with the adjudication of the Chief Justice to the extent it is made, it becomes final. This reasoning is also supported by sub-section (7) of Section 11, making final, the decision of the Chief Justice on the matters decided by him while constituting the arbitral tribunal. This will leave the arbitral tribunal to decide the dispute on merits unhampered by preliminary and technical objections. In the long run, especially in the context of the judicial system in our country, this would be more conducive to minimising judicial intervention in matters coming under the Act. This will also avert the situation where even the order of the Chief Justice of India could be challenged before a single judge of the High Court invoking the Article 226 of the Constitution of India or before an arbitral tribunal, consisting not necessarily of legally trained persons and their coming to a conclusion that their constitution by the Chief Justice was not warranted in the absence of an arbitration agreement or in the absence of a dispute in terms of the agreement.

32. Section 8 of the Arbitration Act, 1940 enabled the court when approached in that behalf to supply an omission. Section 20 of that Act enabled the court to compel the parties to produce the arbitration agreement and then to appoint an arbitrator for adjudicating on the

disputes. It may be possible to say that Section 11(6) of the Act combines both the powers. May be, it is more in consonance with Section 8 of the Old Act. But to call the power merely as an administrative one, does not appear to be warranted in the context of the relevant provisions of the Act. First of all, the power is conferred not on an administrative authority, but on a judicial authority, the highest judicial authority in the State or in the country. No doubt, such authorities also perform administrative functions. An appointment of an arbitral tribunal in terms of Section 11 of the Act, is based on a power derived from a statute and the statute itself prescribes the conditions that should exist for the exercise of that power. In the process of exercise of that power, obviously the parties would have the right of being heard and when the existence of the conditions for the exercise of the power are found on accepting or overruling the contentions of one of the parties it necessarily amounts to an order, judicial in nature, having finality subject to any available judicial challenge as envisaged by the Act or any other statute or the Constitution. Looked at from that point of view also, it seems to be appropriate to hold that the Chief Justice exercises a judicial power while appointing an arbitrator.

33. In Attorney Geenral of the Gambia v. Pierre Sarr N'jie (1961 Appeal Cases 617) the question arose whether the power to judge an alleged professional misconduct could be delegated to a Deputy Judge by the Chief Justice who Page 1817 had the power to suspend any barrister or solicitor from practicing within the jurisdiction of the court. Under Section 7 of the Supreme Court Ordinance of the Gambia, the Deputy Judge could exercise "all the judicial powers of the Judge of the Supreme Court". The question was, whether the taking of disciplinary action for professional misconduct; was a judicial power or an administrative power. The Judicial Committee of the Privy Council held that a judge exercises judicial powers not only when he is deciding suits between the parties but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. By way of illustration, Lord Dening stated "Suppose, for instance, that a judge finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see Myers v. Elman, per Lord Wright). That would be an exercise of the judicial powers of the judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off."

34. The above example gives an indication that it is the nature of the power that is relevant and not the mode of exercise. In Shankarlal Aggarwal and Ors. v. Shankar Lal Poddar and Ors. this Court was dealing with the question whether the order of the Company Judge confirming a sale was merely an administrative order passed in the course of the administration of the assets of the company under liquidation and, therefore, not a judicial order subject to appeal. This Court held that the order of the Company Judge confirming the sale was not an administrative but a judicial order. Their Lordships stated thus:

"It is not correct to say that every order of the Court, merely for the reason that it is passed in the course of the realization of the assets of the Company, must always be treated merely as an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely an administrative order, for before confirming the sale the court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realization.

It is not possible to formulate a definition which would satisfactorily distinguish between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a court is not decisive of the question whether the act or decision is administrative or judicial. An administrative order would be one which is directed to the

regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, Page 1818 and if the discretion has to be exercised on objective, as distinguished from a purely subjective consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there would be two parties and a lis between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt it would not be possible to describe an order passed deciding a lis between the authority that is not a judicial order but it does not follow that the absence of a lis necessarily negatives the order being judicial. Even viewed from this narrow standpoint, it is possible to hold that there was a lis before the Company Judge which he decided by passing the order. On the one hand were the claims of the highest bidder who put forward the contention that he had satisfied the requirements laid down for the acceptance of his bid and was consequently entitled to have the sale in his favour confirmed, particularly so as he was supported in this behalf by the Official Liquidators. On the other hand, there was the first respondent and the large body of unsecured creditors whose interests, even if they were not represented by the first respondent, the court was bound to protect. If the sale of which confirmation was sought was characterized by any deviation subject to which the sale was directed to be held or even otherwise was for a gross undervalue in the sense that very much more could reasonably be expected to be obtained if the sale were properly held, in view of the figure of Rs. 3,37,000/- which had been bid by Nandlal Agarwalla it would be duty of the court to refuse the confirmation in the interests of the general body of creditors, and this was the submission made by the first respondent. There were thus two points of view presented to the court by two contending parties or interests and the court was called upon to decide between them, and the decision vitally affected the rights of the parties to property. Under the circumstances, the order of the Company Judge was a judicial order and not administrative one, and was therefore not inherently incapable of being brought up in appeal."

35. Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties in that, either the claim for appointing an arbitral tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to opposite side before appointing an arbitrator.

36. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order Page 1819 appointing an arbitrator or an arbitral tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the concerned party had certified that he had no further claims against the other contracting party. In other words, there have been occasions when

dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the concerned arbitration clause at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by Ridge v. Baldwin [(1963) 2 ALL ER 66] are well known, therefore, to the extent, Konkan Railway (supra) states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable.

37. It is true that finality under Section 11 (7) of the Act is attached only to a decision of the Chief Justice on a matter entrusted by sub-Section (4) or sub-Section (5) or sub-Section (6) of that Section. Sub-Section (4) deals with the existence of an appointment procedure and the failure of a party to appoint the arbitrator within 30 days from the receipt of a request to do so from the other party or when the two appointed arbitrators fail to agree on the presiding arbitrator within 30 days of their appointment. Sub-Section (5) deals with the parties failing to agree in nominating a sole arbitrator within 30 days of the request in that behalf made by one of the parties to the arbitration agreement and sub-Section (6) deals with the Chief Justice appointing an arbitrator or an arbitral tribunal when the party or the two arbitrators or a person including an institution entrusted with the function, fails to perform the same. The finality, at first blush, could be said to be only on the decision on these matters. But the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the concerned State. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-Section (4), sub-Section (5) or sub-Section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator. It is difficult to understand the finality to referred to in Section 11(7) as excluding the decision Page 1820 on his competence and the locus standi of the party who seeks to invoke his jurisdiction to appoint an arbitrator. Viewed from that angle, the decision on all these aspects rendered by the Chief Justice would attain finality and it is obvious that the decision on these aspects could be taken only after notice to the parties and after hearing them.

38. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be

appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.

39. An aspect that requires to be considered at this stage is the question whether the Chief Justice of the High Court or the Chief Justice of India can designate a non-judicial body or authority to exercise the power under Section 11(6) of the Act. We have already held that, obviously, the legislature did not want to confer the power on the Court as defined in the Act, namely, the District Court, and wanted to confer the power on the Chief Justices of the High Courts and on the Chief Justice of India. Taking note of Section 5 of the Act and the finality attached by Section 11 (7) of the Act to his order and the conclusion we have arrived at that the adjudication is judicial in nature, it is obvious that no person other than a Judge and no non-judicial body can be designated for entertaining an application for appointing an arbitrator under Section 11(6) of the Act or for appointing an arbitrator. In our dispensation, judicial powers are to be exercised by the judicial authorities and not by non-judicial authorities. This scheme cannot be taken to have been given the go-by by the provisions in the Act in the light of what we have discussed earlier. Therefore, what the Chief Justice can do under Section 11(6) of the Act is to seek the help of a non-judicial body to point out a suitable person as an arbitrator in the context of Section 11(8) of the Act and on getting the necessary information, if it is acceptable, to name that person as the arbitrator or the set of persons as the arbitral tribunal.

40. Then the question is whether the Chief Justice of the High Court can designate a district judge to perform the functions under Section 11(6) of the Act. We have seen the definition of 'Court' in the Act. We have reasoned that the intention of the legislature was not to entrust the duty of appointing an arbitrator to the District Court. Since the intention of the statute was to entrust the power to the highest judicial authorities in the State and in the country, we have no hesitation in holding that the Chief Justice cannot designate a district judge to perform the functions under Section 11(6) of the Act. This restriction on the power of the Chief Justice on designating a district judge or a non-judicial authority flows from the scheme of the Act.

41. In our dispensation of justice, especially in respect of matters entrusted to the ordinary hierarchy of courts or judicial authorities, the duty would normally be performed by a judicial authority according to the normal procedure of that court or of that authority. When the Chief Justice of the High Court is entrusted with the power, he would be entitled to designate another judge of the High Court for exercising that power. Similarly, the Chief Justice of India would be in a position to designate another judge of the Supreme Court to exercise the power under Section 11(6) of the Act. When so entrusted with the right to exercise such a power, the judge of the High Court and the judge of the Supreme Court would be exercising the power vested in the Chief Justice of the High Court or in the Chief Justice of India. Therefore, we clarify that the Chief Justice of a High Court can delegate the function under Section 11(6) of the Act to a judge of that court and he would actually exercise the power of the Chief Justice conferred under Section 11(6) of the Act. The position would be the same when the Chief Justice of India delegates the power to another judge of the Supreme Court and he exercises that power as designated by the Chief Justice of India.

42. In this context, it has also to be noticed that there is an ocean of difference between an institution which has no judicial functions and an authority or person who is already exercising judicial power in his capacity as a judicial authority. Therefore, only a judge of the Supreme Court or a judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a non-judicial authority cannot exercise judicial powers.

43. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Page 1822 Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

44. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

45. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

46. We, therefore, sum up our conclusions as follows:
i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.
(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.
(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.
(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.
(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.
(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.
(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.
(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.
(x) Since all were guided by the decision of this Court in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.
(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending Page 1824 before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.
(xii) The decision in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. is overruled.

44. The individual appeals will be posted before the appropriate bench for being disposed of in the light of the principles settled by this decision.

C.K. Thakker, J.

1. I have had the benefit of going through the judgment prepared by my

learned brother P.K. Balasubramanyan (’majority judgment’ for short). I, however, express my inability to agree with the majority judgment on the question as to the nature of function performed by the Chief Justice of the High Court/Chief Justice of India or ’any person or institution designated by him’ under Sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996.

2. The concept of arbitration is not unknown to India. In good old days, disputes between private individuals used to be placed before Panchas and Panchayats. Likewise, commercial matters were decided by Mahajans and Chambers. Formal arbitration proceedings, however, came into existence after Britishers started commercial activities in India. The provisions relating to arbitration were found in the Code of Civil Procedure, 1859 (Act VIII of 1859) which was repealed by Act X of 1877. A full-fledged law pertaining to arbitration in India was the Arbitration Act, 1899. A consolidated and amended law relating to arbitration was passed in 1940, known as the Arbitration Act, 1940 (Act X 1940).
As has been said, protracted, time consuming, atrociously expensive and complex court procedure impelled the commercial-world to an alternative, less formal, more effective and speedy mode of resolution of disputes by a Judge of choice of the parties which culminated into passing of an Arbitration Act. Experience, however, belied expectations. Proceedings became highly technical and thoroughly complicated. The provisions of the Act made ’lawyers laugh and litigants weep’. Representations were made from all quarters of the society to amend the law by making it more responsive to contemporary requirements. Moreover, apart from arbitration, conciliation has been getting momentum and worldwide recognition as an effective instrument of settlement of disputes. There was no composite statute dealing with all matters relating to arbitration and conciliation.

3. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law in 1985 on International Commercial Arbitration. The Page 1825 General Assembly of the United Nations recommended member - States to give due consideration to the Model Law to have uniformity in arbitration procedure which resulted in passing of the Arbitration and Conciliation Act, 1996. The Act is a complete Code in itself and consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The Preamble expressly refers to UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Conciliation Rules.

4. Over and above ’Preliminary’ (Section 1), the Act is in four parts. Part I (Sections 2 to 43) deals with Arbitration. Part II (Sections 44 to 60) contains provisions relating to Enforcement of Foreign Awards. While Part III (Section 61 to 81) provides for Conciliation, Part IV (Sections 82 to 86) relates to Supplementary Provisions. In these cases, we are mainly concerned with Part I.
General provisions are found in Chapter I (Sections 2 to 6). Section 2(b) defines ’arbitration agreement’ as referred to in Section 7. ’Arbitral tribunal’ means a sole arbitrator or a panel of arbitrators - Section 2 (d). Clause (h) defines ’party’ as a party to arbitration agreement.
Section 5 restricts judicial intervention. The said section is material and reads thus ;

"5. Extent of judicial intervention. -Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."
Chapter II deals with ’Arbitration agreement’. Section 7 declares that by an arbitration agreement, the parties may submit to arbitration all or certain disputes between them. Such agreement must be in writing. Section 8 confers power on a judicial authority to refer the dispute to arbitration in certain cases. Section 9 enables the court to make interim orders.
Chapter III provides for composition of Arbitral Tribunal. Section 10 allows parties to determine the number of arbitrators but declares that

'such number shall not be an even number'. Section 11 relates to appointment of arbitrators. It is relevant and material and may be quoted in extenso;

"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; Page 1826 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 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 qualification required for 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 Page 1827 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."

Section 12 requires the arbitrator to disclose the disqualification, if any. It also permits parties to challenge such arbitrator. Whereas Section 13 lays down procedure for challenge, Sections 14 and 15 deal with special situations.
Chapter IV relates to jurisdiction of Arbitral Tribunals. Section 16 is another important provision and confers power on the Arbitral Tribunal to rule on its own jurisdiction. It reads thus ;
"16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose. -
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the submission clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.
(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
(4) The arbitral tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3) admit a later plea if it considers the delay justified.
(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."
Chapters V and VI relate to 'Conduct of Arbitral Proceedings' and 'Making of Arbitral Award and Termination of Proceedings'. Chapters VII, VIII and IX provide for 'Recourse Against Arbitral Award', 'Finality and Enforcement of Arbitral Awards' and 'Appeals' respectively. Chapter X covers 'Miscellaneous' matters.

5. The controversy in the present group of matters centres round interpretation of Section 11 and the nature of function performed by the Chief Justice under Sub-section (6) thereof. According to one view, it is administrative, while according to the other view, it is judicial or quasi-judicial.

6. I have already quoted Section 11. It provides for appointment of arbitrators. Sub-sections (1) to (3) which confer power on parties to arbitration agreement to appoint arbitrators present no difficulty. Sub-sections (4) to (6) deal with cases where there is failure by the parties to appoint an arbitrator or arbitrators or default by two arbitrators in appointing the third arbitrator. The Act in such eventuality empowers the Chief Justice or any person or institution designated by him to take necessary steps for securing the appointment. Sub-section (7) of Section 11 makes the 'decision' of the Chief Justice 'final'. Sub-section (8) requires the Chief Justice or the person or institution designated by him in appointing an arbitrator to have due regard to qualifications required of the arbitrator by the agreement of the parties as also other considerations as are likely to secure the appointment of independent and impartial arbitrator. Sub-section (10) enables the Chief Justice to frame a scheme dealing with matters entrusted to him by Sub-sections (4) to (6).
Section 11 came to be interpreted by this Court in few cases. In Sundaram Finance Ltd. v. NEPC India Ltd., a two Judge Bench was called upon to consider whether under Section 9 of the Act, the 'court' had jurisdiction to pass interim orders before arbitral proceedings commenced and before an arbitrator was appointed. Considering the scope of the said provision, this Court held that the 'court' had no jurisdiction to entertain application under Section 9 before initiation of arbitration proceedings.

7. The Court, however, taking note of UNCITRAL Model Law, observed:
"Under the 1996 Act, appointment of Arbitrator(s) is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing Arbitrator(s)".
(emphasis supplied)
It is, no doubt, true that the question about nature of function to be performed by the Chief Justice under Section 11 did not strictly arise in that case and, hence, the above observation could not be termed as 'ratio'. As I will presently show, in a subsequent case, it was submitted that the statement was in the nature of 'passing observation' or 'obiter'.

8. In Ador Sami Private Ltd. v. Peekay Holdings Ltd. and Ors., a direct question arose before a two-Judge Bench. There, an order passed by the Chief Justice under Sub-section (6) of Section 11 of the Act was challenged in this Court under Article 136 of the Constitution. The question before the Court was whether a special leave petition was maintainable.
Reproducing the observation in Sundaram Finance Ltd., the Court held that Page 1829 the order passed by the Chief Justice under Section 11 of the Act was administrative in nature. Referring to a decision of the Constitution Bench in Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs and Ors., , the Court observed that it is well settled that a petition under Article 136 of the Constitution would lie against an order made by a Court or Tribunal. Since the Chief Justice or his designate acts under Section 11(6) of the Act in administrative capacity, the order could not be said to have been passed by a court or by a tribunal having trappings of a court. Special leave petition was hence held not maintainable.
In Konkan Railway Corporation Ltd. v. Mehul Construction Co. (Konkan Railway Corporation Ltd. I), the point was again considered by a three-Judge Bench. It was observed that an important question had arisen for consideration of the Court as to the nature of the order passed by the Chief Justice under Section 11(6) of the Act and the remedy available to the aggrieved party against such order. Referring to Sundaram Finance Ltd. and Ador Samia Private Ltd., the Court held that the function performed by the Chief Justice was essentially to aid the constitution of Arbitral Tribunal. The Legislature had consciously chosen to confer the power on the 'Chief Justice' and not on the 'Court'. The order passed by the Chief Justice or his nominee was administrative order. The Court considered UNCITRAL Model Law of International Commercial Arbitration, the old Act of 1940 and the relevant provisions of 1996 Act and observed that the sole objective was to resolve disputes as expeditiously as possible so that trade and commerce are not adversely affected on account of litigation. The Statement of Objects and Reasons of the Act clearly enunciated the object of the legislation that it was intended to minimize the supervisory role of the court in arbitral process.
According to the Court, when the matter is placed before the Chief Justice or his nominee under Section 11 of the Act, it is imperative for the Chief Justice or his nominee to bear in mind the legislative intent. The Chief Justice or his nominee is not expected to entertain contentious issues between the parties and decide them. Section 16 of the Act empowers the Arbitral Tribunal to rule on its own jurisdiction. Combined reading of Sections 11 and 16 make it crystal clear that questions as to qualifications, independence and impartiality of Arbitral Tribunal as also of the jurisdiction of the tribunal can be raised before the arbitrator who will decide them. The function of the Chief Justice or his nominee is just to appoint an arbitrator without wasting time. The nature of the function to be performed by the Chief Justice is essentially to aid the constitution of the tribunal and is administrative. If the function is held to be judicial or quasi-judicial, the order passed by the Chief Justice or his nominee would be amenable to judicial intervention and a Page 1830 reluctant litigant would attempt to frustrate the object of the Act by adopting dilatory tactics by approaching a court of law against an appointment of arbitrator. Such an interpretation should be avoided to achieve the basic objective for which the Act has been enacted.

In Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd. (Konkan Railway Corporation Ltd. II), a similar question had come for consideration before a two-Judge Bench. The attention of the Court was invited to earlier decisions including a three-Judge Bench decision in Konkan Railway Corporation Ltd. I. It was, however, argued by the learned Solicitor General that once a contention is raised that the matter cannot be referred to arbitration, the issue has to be decided by the Chief Justice or his nominee and such an order cannot be characterized as administrative. When the attention of the learned Solicitor General was invited to Sundarm Finance Ltd., submitted that the question about nature of the order under Section 11 was never raised before the Court and the observation that the order passed by the Chief Justice or his nominee under Section 11 was administrative was merely 'passing observation' or 'obiter'. In Ador Samia, special leave petition under Article 136 of the Constitution was dismissed merely relying upon observation in Sundaram Finance Ltd. It was no doubt true that in Konkan Railway Corporation Ltd.I, a three-Judge Bench held that an order passed under Section 11 of the Act by the Chief Justice or his nominee was administrative in nature but it required reconsideration in view of several factors. It was submitted that the Act did not take away the power of the court to decide preliminary issues; the Chief Justice or his nominee was bound to consider whether there was an arbitration agreement, or whether an arbitration clause existed or the matters were 'excepted matters'. Again, if the order of the Chief Justice or his nominee would be treated as administrative, it could be challenged before a High Court under Article 226 of the Constitution, then before a Division Bench in Letters Patent Appeal/Intra-court Appeal and then before the Supreme Court under Article 136 of the Constitution which would further delay arbitration proceedings. It was, therefore, necessary to reconsider the law laid down in Konkan Railway Corporation Ltd. I.

9. In view of the contentions raised before a two-Judge Bench, an order was passed directing the Registry to place the papers before Hon. the Chief Justice for passing appropriate orders. Konkan Railway Corporation Ltd. I was thus placed before a Constitution Bench of five Judges. The Constitution Bench, Page 1831 considered the relevant provisions of the Act and the scheme framed by the Chief Justice of India known as "The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996". Discussing the Statement of Objects and Reasons and considering the relevant provisions of the Act, the Court held that the only function the Chief Justice or his designate was required to perform was to fill the gap left by a party to the arbitration agreement or two arbitrators appointed by the parties and nominate an arbitrator or umpire so that Arbitral Tribunal is expeditiously constituted and arbitration proceedings commenced. According to the Constitution Bench, the order passed by the Chief Justice or his designate under Section 11 nominating an arbitrator could not be said to be 'adjudicatory order' and the Chief Justice or his designate could not be described as 'Tribunal'. Such an order, therefore, could not be challenged under Article 136 of the Constitution. The decision of three-Judge Bench in Konkan Railway Corporation Ltd. I was thus affirmed.
The Court observed:
"Section 11 of the Act deals with the appointment of arbitrators. It provides that the parties are free to agree on a procedure for appointing an arbitrator or arbitrators. In the event of there being no agreement in regard to such procedure, in an arbitration by three arbitrators each party is required to appoint one arbitrator and the two arbitrators so appointed must appoint the third arbitrator. If a party fails to appoint an arbitrator within thirty days from the request to do so by the other party or the two arbitrators appointed by the parties fail to agree on a third arbitrator within thirty days of their appointment, a party may request the Chief Justice to nominate an arbitrator and the nomination shall be made by the Chief Justice or any person or institution designated by him. If the parties have not agreed on a procedure for appointing an arbitrator in an arbitration with a sole arbitrator and the parties fail to agree on an arbitrator within thirty days from receipt of a request to one party by the

other party, the nomination shall be made on the request of a party by the Chief Justice or his designate. Where an appointment procedure has been agreed upon by the parties but a party fails to act as required by that procedure or the parties, or the two arbitrators appointed by them, fail to reach the agreement expected of them under that procedure or a person or institution fails to perform the function entrusted to him or it under that procedure, a party may request the Chief Justice or his designate to nominate an arbitrator, unless the appointment procedure provides other means in this behalf. The decision of the Chief Justice or his designate is final. In nominating an arbitrator the Chief Justice or his designate must have regard to the qualifications required of the arbitrator in the agreement between the parties and to other considerations that will secure the nomination of an independent and impartial arbitrator.

There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in Page 1832 regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word ‘decision’ is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.

It might be that though the Chief Justice or his designate might have taken all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrator’s independence or impartiality. In that event it would be open to that party to challenge the arbitrator under Section 12, adopting the procedure under Section 13. There is no reason whatever to conclude that the grounds for challenge under Section 13 are not available only because the arbitrator has been nominated by the Chief Justice or his designate under Section 11. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the arbitral tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal’s authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned Counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that,

therefore, it had no jurisdiction."

Regarding the scheme, the Court observed that such scheme could not govern the Act. Since Section 11 did not contain any element of 'adjudication' and the function of the Chief Justice or his designate was purely administrative, there was no question of issuing notice to affected persons or to afford opportunity of hearing. The scheme, however, contained Clause 7 (Notice to affected persons) and expressly provided for issuance of notice to persons likely to be affected thereby. It thus went 'beyond terms of Section 11' and was, therefore, bad.
The Court, in this connection, observed ;
"The schemes made by the Chief Justices under Section 11 cannot govern the interpretation of Section 11. If the schemes, as drawn, go beyond the terms of Section 11 they are bad and have to be amended. To the extent that The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, goes beyond Section 11 by requiring, in Clause 7, the service of a notice upon the other party to the arbitration agreement to show cause why the nomination of an arbitrator, as requested, should not be made, it is bad and must be amended. The other party needs to be given notice of the request only so that it may know of it and it may, if it so chooses, assist the Chief Justice or his designate in the nomination of an arbitrator."
The point was thus concluded by a Constitution Bench of five Judges wherein it was held that the function performed by the Chief Justice or his designate was administrative and did not contain any adjudicatory process. The order passed by the Chief Justice or his designate could not be challenged before this Court under Article 136 of the Constitution.

10. In the light of the above legal position, when these matters were placed
before a Constitution Bench of five Judges on July 19, 2005, the following order was passed :
"After hearing the learned Counsel for the parties, we are of the opinion that the cases may call for re-consideration of the decision of this Court in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd., , in particular the view taken in paras 18 to 21 thereof, which is by a Constitution Bench.
Be placed before a seven-Judge Bench."

11. That is how, the matters have been placed before us.
We have heard the learned Counsel for the parties at considerable length. It was urged by Mr. Venugopal, Senior Advocate that when the Chief Justice is requested to make an appointment of an arbitrator under Sub-section (6) of Section 11 of the Act, the Chief Justice must apply his mind and satisfy himself about the fulfillment of conditions for the exercise of power for appointment of an arbitrator. The Chief Justice for that purpose, is bound to Page 1834 decide certain preliminary or 'jurisdictional' facts before taking a decision of appointment of arbitrator. He must be convinced that there is an 'arbitration agreement' under Section 7 of the Act, the other party has refused to make an appointment, or parties or two arbitrators have failed to reach an agreement or a person or institution has failed to perform the function entrusted to him or it. Moreover, the Chief Justice in appointing an arbitrator 'shall have regard to' qualifications, independence and impartiality of the arbitrator. The Chief Justice, after considering all those factors will come to a conclusion whether the provisions of law have been complied with and only then he may make such order. The issues arise before the Chief Justice are thus contentious issues and require adjudication. Such adjudication affects rights of parties. The 'duty to act judicially' is, therefore, implicit and the decision is judicial or quasi-judicial.
I am unable to uphold the argument. In my view, it is based on the misconception that wherever a statute requires certain matters to be taken into account and the authority is obliged to apply its mind to those considerations, the action, decision or adjudication must be held judicial or quasi-judicial. With respect, this is not the legal position.

12. It is settled law that in several cases, an appropriate authority may have to consider the circumstances laid down in the Act, apply its mind and then to take a decision. Such decision may affect one or the other party and may have far reaching consequences. But from that it cannot be concluded that the decision is judicial or quasi-judicial and not administrative.
Before more than fifty years, in State of Madras v. C.P. Sarthy, the Constitution Bench of this Court, while interpreting the provisions of Section 10 of the Industrial Disputes Act, 1947 held that the action of the Government of referring or refusing to refer the matter for an adjudication to Labour Court or Industrial Tribunal is administrative.
The Court stated:
This is, however, not to say that the Government will be justified in making a reference under Section 10(1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry. It is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But it must be remembered that in making a reference under Section 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred Page 1835 by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters.
(emphasis supplied)

13. Now, it cannot be disputed that the action of the Government (of referring the dispute or refusing to refer it) certainly affects one party or the other. Still an action which is otherwise administrative in nature does not change its character and remains as it is irrespective of the consequences likely to ensue or the effect of decision on parties to such dispute. [See also Prem Kakar v. State of Haryana, Sultan Singh v. State of Haryana, Secretary Indian Tea Association v. Ajit Kumar Barat,]
Several similar actions having far reaching consequences have been held administrative, for instance, an order of acquisition or requisition of property; an order making an appointment to a civil post, an order granting sanction to prosecute a public servant; etc.
It cannot be gainsaid that there must be an 'arbitration agreement' between the parties. It also cannot be denied that there must be default or failure on the part of one party to appoint an arbitrator. But that will not make the function performed by the Chief Justice as judicial or quasi-judicial. Chapter II (Arbitration Agreement) precedes Chapter III (Composition of Arbitral Tribunal). Therefore, when the question as to composition of Arbitral Tribunal and appointment of an arbitrator comes up for consideration, it can safely be assumed that there is an arbitration agreement, inasmuch as it is in consonance with the legislative scheme and the question as to the appointment of arbitrator arises only in view of such agreement. Moreover, before exercising the power to appoint an arbitrator, the Chief Justice must peruse the relevant record relating to an agreement and failure by one party in making an appointment which would enable him to act. There is, however, no doubt in my mind that at that stage, the satisfaction required is merely of prima facie nature and the

Chief Justice does not decide lis nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters.

14. The Law Commission, in 176th Report on Arbitration and Conciliation (Amendment) Bill, 2001, after referring to the relevant Rules and legal opinion, stated:
It is, therefore, clear that the ICC Rules and the opinion of jurists support the view that at the stage of Section 11, it is permissible to decide preliminary issues. There are considerable advantages if such issues are decided at that stage, inasmuch as a decision at that stage saves time and expense for the parties. As pointed out by Fouchard and others, there is no question of an 'automatic appointment' of arbitrators, whenever an application is made for an appointment of arbitrators. The appointing authority normally considers if a case is made out for appointment of arbitrators and such a decision can be taken on undisputed facts available at that stage.
(emphasis supplied)

15. As Fouchard, Gaillard, Goldman on International Commercial Arbitration (1994 edn.); (para 854) pithily put it; "the Court should only verity that the clause is not patently void, as it would be unreasonable to require it to appoint an arbitrator where there is no indication that an arbitration clause exists. The Court should not be seen to automatically appoint arbitrators in cases where the arbitration clearly has no contractual basis and the award has no chance of being recognized in any jurisdiction".
(emphasis supplied)

16. At the stage of exercising powers under Sub-section (6) of Section 11, the Chief Justice is bound to apply his mind to allegations and counter-allegations of the parties and will form an opinion on the available material. Thus, in Wellington Associates Ltd. v. Kirit Mehta, at the stage of Section 11, it was argued that the relevant clause relied upon by the applicant was not an 'arbitration clause'. It merely permitted parties to agree, in future, to go to arbitration.
Upholding the objection, the Court observed that the clause was not an arbitration clause and the application was not maintainable. It held that Section 16 did not take away the jurisdiction of the Chief Justice to decide the question of 'existence' of the arbitration agreement. The said section did not declare that except the Arbitral Tribunal, none else could determine such question. "Merely because the new Act permits the arbitrator to decide this question, it does not necessarily follow that at the stage of Section 11, the Chief Justice of India or his designate cannot decide the question as to the existence of the arbitration clause." [See also Malaysian Airlines System v. Stic Travels (P) Ltd., (2001) 1 SCC 509; Nimeet Resources INC v. Essar Steels Ltd.; (2000) SCC 497; Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr.].
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17. It was then argued that Sub-section (7) of Section 11 empowers the Chief Justice to decide the question and uses the expression 'decision' which is significant. Whenever a statute confers power on an authority to pass an order or to take a decision, it must be held that the function is judicial or quasi-judicial and duty to act judicially must be inferred. Even this contention is not well founded. Sub-section (7), no doubt, uses the term 'decision'. But as I have already observed earlier, the Chief Justice forms prima facie opinion as to the fulfillment of conditions specified in Sub-section (6). The decision neither contemplates adjudication of lis between two or more parties nor resolves controversial and contentious issues. It merely requires the Chief Justice to take an appropriate action keeping in view the provisions of Part II and Sub-sections (1), (4) and (5) of Section 11. Regarding matters which the Chief Justice is expected to consider, such as qualification, independence and impartiality of arbitrator, they are statutory provisions and the Chief

Justice is obliged to keep them in view as per mandate of the Legislature. The said fact, however, does not make the function of the Chief Justice judicial or quasi-judicial.

18. It was also submitted that there is an important provision which cannot be lost sight of and it is the finality of decision rendered by the Chief Justice. Sub-section (7) expressly declares that the decision of the Chief Justice under Sub-section (6) of Section 11 is 'final'. It was submitted that in view of finality attached to the order passed by the Chief Justice, the order passed by him cannot be made subject-matter of dispute under the Act and all provisions, including Section 16 must be read in conformity with 'finality clause'. For that reason also, the action must be held judicial or quasi-judicial.

19. As to the ambit and scope of Section 16, I will refer to little later, but in my view, finality of an order has nothing to do with the nature of function to be performed by the Chief Justice. Several statutes declare an order passed, decision taken or declaration made by the competent authority 'final' or 'final and conclusive' or 'final and conclusive and is not open to challenge in any court'. This is known as 'statutory finality' and such clauses require to be interpreted in juxta-position of constitutional provisions. As a general rule, no appeal, revision or review lies against an order which has been treated by a statute as 'final'. It may not be challenged by instituting a civil suit in certain cases. But such finality cannot take away the jurisdiction of High Courts or the Supreme Court and judicial review is available against 'final' orders albeit on limited grounds. [Vide Somvanti v. State of Punjab; Neelima Misra v. Harvinder Kaur Paintal and Ors.]

20. But there is another important reason why the function of the Chief Justice under Section 11 should be considered administrative. All the three Sub-sections, (4), (5) and (6) of the said section empower the Chief Justice or 'any person or institution designated by him' to exercise the power of the Chief Page 1838 Justice. No provision similar to the one in hand was present in 1940 Act. Parliament, therefore, has consciously and intentionally made the present arrangement for the first time allowing exercise of the power by the Chief Justice himself or through 'any person or institution designated by him', since the function is administrative in character and is required to be performed on prima facie satisfaction under Sub-section (6) of Section 11 of the Act.

21. Now, let us consider Section 16 of the Act. This section is new and did not find place in the old Act of 1940. Sub-section (1) of that section enables the Arbitral Tribunal to rule on its own jurisdiction. It further provides that the jurisdiction of the tribunal includes ruling on any objections with respect to existence or validity of the arbitration agreement. Sub-sections (2), (3) and (4) lay down procedure of raising plea as to the jurisdiction of the Arbitral Tribunal and entertaining such plea. Sub-section (5) mandates that the Arbitral Tribunal 'shall decide' such plea and, 'where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitration proceedings and make an arbitral award'. Sub-section (6) is equally important and expressly enacts that a party aggrieved by arbitral award may invoke Section 34 of the Act for setting aside such award. The provision appears to have been made to prevent dilatory tactics and abuse of immediate right to approach the court. If an aggrieved party has right to move the court, it would not have been possible to preclude the court from granting stay or interim relief which would bring the arbitration proceedings to a grinding halt. The provisions of Section 16 (6) read with Section 5 now make the legal position clear, unambiguous and free from doubt.

22. Section 16 (1) incorporates the well-known doctrine of Kompetenz - Kompetenz or competence de la competence. It recognizes and enshrines an important principle that initially and primarily, it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter,

subject of course, to ultimate court-control. It is thus a rule of chronological priority. Kompetenz -Kompetenz is a widely accepted feature of modern international arbitration, and allows the Arbitral Tribunal to decide its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration-agreement, subject to final review by a competent court of law; i.e. subject to Section 34 of the Act.

23. Chitty on Contract (1999 edn.; p. 802) explains the principle thus:
English law has always taken the view that the arbitral tribunal cannot be the final adjudication of its own jurisdiction. The final decision as per the substantive jurisdiction of the tribunal rests with the Court. However, there is no reason why the tribunal should not have the power, subject to review by the Court, to rule on its own jurisdiction. Indeed such a power (often referred to as the principle of "Kompetenz - Kompetenz" has been generally recognized in other legal systems. It had also been recognized by English Law before the 1986 Act, but Section 30 of the Act put this on a statutory basis. Unless otherwise agreed by the parties, the arbitral tribunal Page 1839 may rule on its substantive jurisdiction that is, as to (a) whether there is valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Any such ruling may be challenged by any arbitral process of appeal or review or in accordance with the provisions of Part I of the Act, notably by an application under Section 32 or by a challenge to the award under Section 67. (emphasis supplied) Alan Redfern and Martin Hunter in their work on "Law and Practice of International Commercial Arbitration", (4th edn.), (para 5-34) also said:
When any question is raised as to the jurisdiction of the Arbitral Tribunal, a two stage procedure is followed. At the first stage, if one of the parties raises 'one or more pleas concerning the existence, validity or scope of the agreement to arbitrate', the ICC's Court must satisfy itself of the prima facie existence of such an agreement [ICC Arbitration Rules 6(2)]. If it is satisfied that such an agreement exists, the ICC's Court must allow the arbitration to proceed so that, at the second stage, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.

24. To cite Fouchard, Gaillard, Goldman again:
658. - More fundamentally, although the arbitrators' jurisdiction to rule on their own jurisdiction is indeed one of the effects of the arbitration agreement (or even of a prima facie arbitration agreement, since the question would not arise in the absence of a prima facie arbitration agreement), the basis of that power is neither the arbitration agreement itself, nor the principle of pacta sunt servanda under which the arbitration agreement is Binding.
The competence-competence principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement has been challenged by one of the parties for reasons directly affecting the arbitration agreement, and not simply on the basis of allegations that the main contract is void or otherwise ineffective. The principle that the arbitration agreement is autonomous of the main contract is sufficient to resist a claim that the arbitration agreement is void because the contract containing it is invalid, but it does not enable the arbitrators to proceed with the arbitration where the alleged invalidity directly concerns the arbitration agreement. That is a consequence of the competence-competence principle alone. The competence-competence principle also allows arbitrators to determine that an arbitration agreement is invalid and to make an award declaring that they lack jurisdiction without contradicting themselves.
Of course, neither of those effects results from the arbitration agreement. If that were the case, one would immediately be confronted with the "vicious circle" argument put forward by authors opposed to the competence-competence principle: how can an arbitrator, solely on the basis of an arbitration agreement, declare that agreement to be void or even hear a claim to that effect? The answer is simple: the basis for the competence-

competence Page 1840 principle lies not in the arbitration agreement, but in the arbitration laws of the country where the arbitration is held and, more generally, in the laws of all countries liable to recognize an award made by arbitrators concerning their own jurisdiction. For example, an international arbitral tribunal sitting in France can properly make an award declaring that it lacks jurisdiction for want of a valid arbitration agreement, because it does so on the basis of French arbitration law, and not on the basis of the arbitration agreement held to be non-existent or invalid. Similarly, it is perfectly logical for the interested party to rely on that award in other jurisdictions, provided that those other jurisdictions also recognize the competence-competence principle. As we shall now see, the legal basis for the principle does not prejudice the subsequent review by the courts, in France or in the country where recognition is sought, of the arbitrators' finding that the arbitration agreement is non-existent or invalid.

659. - Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence-competence rule ties in with the idea that there are no grounds for the prima facie suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties to the dispute. This same philosophy is also found in the context of arbitrability, where it serves as the basis for the case law which entrusts arbitrators with the task of applying rules of public policy (in areas such as antitrust law and the prevention of corruption), subject to subsequent review by the courts.

660. - However, it is important to recognize that the competence-competence rule has a dual function. Like the arbitration agreement, it has or may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognized by international conventions and by recent statutes on international arbitration. However, the negative effect is equally important. It is to allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal - regarding, for example, the constitution of the tribunal or the validity of the arbitration agreement - to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. In that sense, the competence-competence principle is a rule of chronological priority. Taking both of its facets into account, the competence-competence principle can be defined as the rule whereby arbitrators must have the first Page 1841 opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts. From a practical standpoint, the rule is intended to ensure that a party cannot succeed in delaying the arbitral proceedings by alleging that the arbitration agreement is invalid or non-existent. Such delay is avoided by allowing the arbitrators to rule on this issue themselves, subject to subsequent review by the courts, and by inviting the courts to refrain from intervening until the award has been made. Nevertheless, the interests of parties with legitimate claims concerning the invalidity of the arbitration agreement are not unduly prejudiced, because they will be able to bring those claims before the arbitrators themselves and, should the arbitrators choose to reject them, before the courts thereafter.

The competence-competence rule thus concerns not only the positive, but also the negative effects of the arbitration agreement.

25. In Renusagar Power Co. Ltd. v. General Electric Co. and Anr., considering the relevant provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, this Court held that the arbitrator or umpire is competent to provisionally decide his own jurisdiction, if the arbitration agreement so provides, however, subject to final determination by a competent court.
The Court stated:
"As explained earlier the scheme that emerges on a combined reading of Sections 3 and 7 of the Foreign Awards Act clearly contemplates that questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where such agreement is wide enough to include within its ambit such questions, may be decided by the arbitrators initially but their determination is subject to the decision of the Court and such decision of the Court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided in a Section 3 petition or can be had under Section 7 after the award is mane and filed in the Court and is sought to be enforce by a party thereto. In the face of such schemes envisaged by the Foreign Awards Act which governs this case it will be difficult to accept the contention that the arbitrators will have no jurisdiction to decide questions regarding the existence, validity or effect (scope) of the arbitration agreement. In fact the scheme makes for avoidance of dilatory tactics on the part of any party to such agreement by merely raising a plea of lack of arbitrator's competence -and a frivolous plea at that - and enables the arbitrator to determine the plea one way or the other and if negatived to proceed to make his award with the further safeguard that the Court would be in a position to entertain and decide the same plea finally when the award is sought to be enforced."
(emphasis supplied)

In the instant case, according to the majority, Section 16(1) only makes explicit what is even otherwise implicit, namely, that the tribunal has the jurisdiction to rule its own jurisdiction, 'including ruling on any objections with respect to the existence or validity of the arbitration agreement.'
So far, so good and I am in respectful agreement with these observations. The matter, however, does not rest there. Over and above Sub-section (1), Section 16 contains other sub-sections and in particular, Sub-sections (5) and (6). The former requires the tribunal to continue the proceedings in case it decides that the tribunal has jurisdiction in the matter and the latter provides remedy to the aggrieved party.

26. In my opinion, conjoint reading of Sub-sections (1), (4), (5) and (6) makes it abundantly clear that the provision is 'self-contained' and deals with all cases, even those wherein the plea as to want of jurisdiction has been rejected. As a general rule, such orders are subject to certiorari jurisdiction since a court of limited jurisdiction or an inferior tribunal by wrongly interpreting a statutory provision cannot invest itself with the jurisdiction which it otherwise does not possess. But it is always open to a competent Legislature to invest a tribunal of limited jurisdiction with the power to decide or determine finally the preliminary or jurisdictional facts on which exercise of its jurisdiction depends. In such cases, the finding recorded by the tribunal cannot be challenged by certiorari. (Vide Ujjam Bai v. State of U.P.

27. As a general rule, neither in England, nor in India, such jurisdiction is granted on a court of limited jurisdiction or on an inferior tribunal. In Halsbury's Laws of England, (4th edn. vol. 1; para 56); it has been stated;
It is possible for an inferior tribunal to be vested with power to determine conclusively questions demarcating the limits of its own jurisdiction. Such a grant of power must now be regarded as exceptional, in view of the very restrictive interpretation placed by the courts on statutory formulae purporting to exclude their inherent supervisory jurisdiction, and their reluctance to be precluded by subjectively worded

grants of power from determining judicially ascertainable matters delimiting the area of competence of inferior tribunals, especially where the relevant question is one of law.
(emphasis supplied)
In fact, one of the points of differentiation between a Crown's Court and a statutory tribunal is that whereas a court has inherent power to decide the question of its own jurisdiction, although as a result of inquiry, it may turn out that it has no jurisdiction to try the suit, the jurisdiction of a tribunal constituted under a statute is strictly confined to the terms of the statute creating it. The existence of preliminary or 'jurisdictional' fact is a sine qua non to the assumption of jurisdiction by a tribunal of limited jurisdiction. If the jurisdictional fact does not exist, the tribunal cannot act. But a Legislature Page 1843 may confer such power on a court of limited jurisdiction or on an inferior tribunal (vide Ebrahim Aboobaker v. Custodian General; Ujjam Bai v. State of U.P.,; Raja Anand v. State of U.P.,; Naresh Shridhar Mirazkar v. State of Maharashtra, ; Raza Textiles Ltd. v. I.T.O.,; Shiv Chander v. Amar Bose,; Shrisht Dhawan v. Shaw Brothers,; Vatticherubura Village Panchayat v. Nari Venkatarama Deekshithulu,; Executive Officer, Arthanareswarar Temple v. R. Sathyamoorthy and Ors.].

28. Let us consider the principle in the light of case-law on the point: Keeping in view, the distinction referred to hereinabove, before more than hundred years, in Queen v. Commissioner of Income Tax (1888) 21 QB 313: 33 WR 776, Lord Esher, M.R. made the following observations:
"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider, what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to Page 1844 determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."
(emphasis supplied)

29. The above statement of law has been quoted with approval by this Court in several cases. In Chaube Jagdish Prasad and Anr. v. Ganga Prasad Chaturvedi the Court stated:
"These observations which relate to inferior courts or tribunals with limited jurisdiction show that there are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists."

(emphasis supplied)
Again, in Addanki Tiruvenkata Thata Desika Charyulu v. State of Andhra Pradesh and Anr., the Settlement Officer was empowered to decide finally as to whether inam village was an 'inam estate'. It also barred jurisdiction of Civil Court from
questioning the correctness of the decision.

30. Considering the question as to extent to which the powers of statutory tribunals are 'exclusive', the Constitution Bench after referring to Commissioner of Income Tax, stated:
"It is manifest that the answer to the question as to whether any particular case falls under the first or the second of the above categories would depend on the purpose of the statute and its general scheme, taken in conjunction with the scope of the enquiry entrusted to the tribunal set up and other relevant factors."

31. As already indicated by me earlier, Sub-section (1) of Section 16 does not merely enable the Arbitral Tribunal to rule on its own jurisdiction, but requires it to continue arbitral proceedings and pass an arbitral award. [Sub-section (5)] It allows the aggrieved party to make an application for setting aside the award in accordance with Section 34. [Sub-section (6)]. Thus, in my judgment, Section 16 can be described as 'self-contained Code' as regards the challenge to the jurisdiction of Arbitral Tribunal. As per the scheme envisaged by Parliament, once the Arbitral Tribunal rules that it has jurisdiction, it will proceed to decide the matter on merits and make an award. Parliament has also provided the remedy to the aggrieved party by enacting that he may make an application under Section 34 of the Act. In the circumstances, the proceedings cannot be allowed to be arrested or interference permitted during the pendency of arbitration proceedings.
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It was submitted by Mr. Venugopal that once the Chief Justice is satisfied as to fulfillment of conditions for the exercise of power to appoint an arbitrator and his decision is 'final', it would be impossible to hold that the Arbitral Tribunal can go behind the decision of the Chief Justice and hold otherwise.
Mr. Venugopal suggested that Section 16 should be so construed that it would apply only to the cases covered by Sub-sections (2) and (3) of Section 11 and not to Sub-section (6) of Section 11 and the appointment of an arbitrator made by the Chief Justice. By such interpretation, submitted the counsel, both the provisions can be harmoniously interpreted and properly applied.
Though the majority observed it to be 'one of the ways of reconciliation', I have my own reservation in accepting it. Firstly, the function of the Court is to interpret the provision as it is and not to amend, alter or substitute by interpretative process. Secondly, it is for the Legislature to make a law applicable to certain situations contemplated by it and the judiciary has no power in entering into 'legislative wisdom'. Thirdly, as held by me, the 'decision' of the Chief Justice is merely prima facie decision and Sub-section (1) of Section 16 confers express power on the Arbitral Tribunal to rule on its own jurisdiction. Fourthly, it provides remedy to deal with situations created by the order passed by the Arbitral Tribunal. Finally and importantly, the situation envisaged by Mr. Venugopal would seldom arise. Normally, when parties agree on the appointment of an arbitrator or arbitrators, there would hardly be any dispute between them on such appointment which may call for intervention by Arbitral Tribunal under Section 16 of the Act. For all these reasons, I am unable to persuade myself to hold that Section 16 has limited application to cases covered by Sub-sections (2) and (3) and not to Sub-section (6) of Section 11 of the Act. The phraseology used by the Legislature does not warrant interpretation sought to be suggested by Mr. Venugopal.

32. It was also submitted that in case of failure on the part of the party to the arbitration agreement in appointing an arbitrator, an application can be made under Section 11 of the Act and arbitrator can be appointed by

the Chief Justice or any person or institution designated by him. It was urged that it is settled law that judicial or quasi-judicial power has to be exercised by the authority to whom it is granted and cannot be delegated. As the intention of Parliament was to confer the power on the highest judicial authority in the State and in the country, it cannot be allowed to be exercised by 'any person' or 'institution'.

33. In my view, the submission is ill-conceived and has been made by looking at the matter from an incorrect angle. It first assumes that the function performed by the Chief Justice is judicial or quasi-judicial and then proceeds to examine legal position on that basis and attempts to salvage the situation by urging that the power must be exercised by the Chief Justice. In that case, however, the subsequent part "or any person or institution designated by him" (Chief Justice) would become redundant. Realising the difficulty and keeping in view the principles relating to interpretation of statutes, Mr. Nariman, Senior Advocate submitted that Section 11 provides for dichotomy of functions. It contemplates two situations, and deals with two stages. The first stage consists of consideration of preliminary facts and taking of decision Page 1846 as to whether an arbitrator can be appointed. The second stage allows nomination of an arbitrator. According to Mr. Nariman, the first part is essentially a judicial function, which cannot be delegated to 'any person or institution' and at the most, it can be delegated to any Judge of the court. The second stage, however, is more or less ministerial and at that stage, the Chief Justice may, if he thinks fit, take help of any person or institution so that proper and fit person is appointed as arbitrator.
Though the submission weighed with the majority, I express my inability to agree with it for several reasons. Firstly, as earlier noted, it proceeds on the basis that the function of the Chief Justice is judicial or quasi-judicial, which is not correct. In my view, it is administrative which is apparent from the language of Section 11 and strengthened by Section 16 which enables the Arbitral Tribunal to rule on its own jurisdiction. Secondly, a court of law must give credit to Parliament that it is aware of settled legal position that judicial or quasi-judicial function cannot be delegated and if the function performed by the Chief Justice is judicial or quasi-judicial in nature, keeping in view legal position, it would not have allowed delegation of such function to 'any person or authority'. Thirdly, the majority held, and I am in respectful agreement with it, that the conferment of power on the Chief Justice is not as 'persona designata'. Hence, the power can be delegated. Finally, if the legislative intent is the exercise of power by the Chief Justice alone, one fails to understand as to how it can be exercised by a 'colleague' of the Chief Justice as well.
In my opinion, acceptance of the submission of Mr. Nariman would result in rewriting of a statute. The scheme of the legislation does not warrant such construction. No court much less the highest court of the country would interpret one provision (Section 11) of an Act of Parliament which would make another provision (Section 16) totally redundant, otiose and nugatory. The Legislature has conferred power on the Chief Justice to appoint an arbitrator in certain contingencies. By the same pen and ink, it allowed the Chief Justice to get that power exercised through 'any person or institution'. It is not open to a court to ignore the legislative mandate by making artificial distinction between the power to be exercised by the Chief Justice or by his 'colleague' and the power to be exercised by other organs though Legislature was quite clear on the exercise of power by the persons and authorities specified therein. I accordingly reject the argument.

34. It was then urged that the principal ground for holding the function of the Chief Justice under Sub-section (6) of Section 11 as administrative was to ensure immediate commencement of arbitration proceedings and speedy disposal of cases. In reality, however, it is likely to cause delay for the simple reason that if the order passed by the Chief Justice of the High Court is treated as judicial or quasi judicial, it can only be challenged in the Supreme Court under Article 136 of the Constitution. So far as the

order of the Chief Justice of India is concerned, it is 'final' as no appeal/application/writ petition lies against it. But if such decision is held to be administrative, initially, it can be challenged on the judicial side of the High Court under Article 226 of the Constitution. Normally, under the High Court Rules, such petitions are dealt with and decided by a Single Judge. Hence, the decision of a single Page 1847 Judge can further be challenged by filing a Letters Patent Appeal or Intra-court Appeal under the relevant clause of the Letters Patent applicable to the High Court concerned. Finally, an order passed by the Division Bench can always be made subject-matter of challenge before this Court under Article 136 of the Constitution. Thus, an interpretation sought to be adopted for the purpose of reducing litigation and speedy disposal of proceedings would really result in increase of litigation and delay in disposal of cases.
I must admit that once it is held that the order passed by the Chief Justice is administrative, it can be challenged in Writ Petition, Letters Patent Appeal and in Special Leave Petition. But in my opinion, while exercising extraordinary jurisdiction under Article 226 of the Constitution, the High Court would consider the provisions of the Act, such as, limited judicial intervention of Court (Section 5); power of Arbitral Tribunal to rule on its own jurisdiction and the effect of such decision (Section 16). It will also keep in mind the legislative intent of expeditious disposal of proceedings and may not interfere at that stage. Ultimately, having jurisdiction or power to entertain a cause and interference with the order are two different and distinct matters. One does not necessarily result into the other. Hence, in spite of jurisdiction of the High Court, it may not stall arbitration proceedings by allowing the party to raise all objections before the Arbitral Tribunal.

35. In Laxmikant Revchand Bhojwani and Anr. v. Pratapsingh Mohansingh Pardeshi, the relevant Rent Act did not provide for further appeal or revision against an order assed by the appellate authority. The aggrieved party, therefore, invoked supervisory jurisdiction of the High Court. The High Court allowed the petition and set aside the order passed by the appellate court.
Quashing the order of the High Court and keeping in view the legislative scheme, this Court said;
"Before parting with this judgment we would like to say that the High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India in the present case. The Act is a special legislation governing landlord-tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes."
[See also Koyilerian Janaki and Ors. v. Rent Controller (Munsiff), Cannore and Ors.; Ouseph Mathai and Ors. v. M. Abdul Khadir;]

In State of Orissa and Ors. v. Gokulananda Jena, (2003) 6 SCC 456, relying upon Konkan Railway Corporation Ltd. II, the High Court of Orissa held that since the order passed by the Chief Justice was administrative, it was not amenable to writ jurisdiction under Article 226 of the Constitution. Holding that the High Court was wrong and the writ petition under Article 226 was maintainable, a two-Judge Bench stated;
"However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act as interpreted by the Constitution Bench of this Court in the M/s. Konkan Railway (supra) almost all disputes which could be presently contemplated can be raised and agitated before the Arbitrator appointed by the Designated Judge under Section 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the Arbitrator, writ court normally would not

entertain a challenge to an order of the Designated Judge made under Section 11(6) of the Act which includes considering the question of jurisdiction of the Arbitrator himself. Therefore, in our view even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself." (emphasis supplied)

The above observations clearly go to show that though the constitutional remedy cannot be taken away and an aggrieved party can invoke the jurisdiction of the High Court against an order passed by the Chief Justice, the Writ Court will be circumspect in entertaining a petition and in exercising extraordinary jurisdiction in such cases.

36. As has been held in earlier decisions as also in the majority judgment, the paramount consideration of Parliament in selecting the Chief Justice and in conferring upon him the power to appoint an arbitrator is to ensure complete independence, total impartiality and highest degree of credibility in arbitral process. The Chief Justice of India and Chief Justices of High Courts have been specially chosen considering their constitutional status as Judges of superior courts and their rich experience in dealing with such matters. The office occupied by them would infuse greater confidence in the procedure in appointing an arbitrator and in ensuring fairness, integrity and impartiality.

But that does not mean that the Chief Justice is exercising judicial or quasi-judicial power. On the contrary, the Chief Justice, acting in administrative capacity, as distinguished from judicial capacity, is expected to act quickly and expeditiously without being inhibited by procedural requirements and 'technical tortures'. In undertaking the task to appoint an Arbitral Tribunal, he is neither required to consult parties nor arbitrators. The Chief Justice would thus uphold, preserve and protect solemnity of agreement between the parties to arbitration. This practice is prevalent in England and in other countries since several years.

37. I intend to conclude the discussion on this point by quoting the following pertinent observations of Lord Hobhouse in Palgrave Gold Mining Co. v. McMillan, 1892 AC 460 : 61 LJ PC 85. Dealing with a similar situation and repelling an identical contention, before more than hundred years, the Law Lord rightly declared;

It is very common in England to invest responsible public officials with the duty of appointing Arbitrators under given circumstances. Such appointment should be made with integrity and impartiality, but it is new to their Lordships to hear them called judicial acts..." (emphasis supplied)

38. The last question relates to issuance of notice to the party likely to be affected and affording an opportunity of hearing before making an order of composition of Arbitral Tribunal. Section 8 of the old Act of 1940 expressly provided written notice and opportunity of hearing in case of appointment of an arbitrator or umpire. The present Act of 1996 neither provides for issuance of notice nor for opportunity of being heard.

In exercise of power under Sub-section (10) of Section 11 of the Act, the Chief Justice of India had framed a scheme, known as "The Appointment of Arbitrators by the Chief Justice of India Scheme. 1996". Clause 7 provided for issuing notice to affected persons and read thus;

"Notice to affected persons.- Subject to the provisions of paragraph 6, the Chief Justice or the person or the institution designated by him shall direct that a notice of the request be given to all the parties to the arbitration agreement and such other person or persons as may seem to him or is likely to be affected by such request to show cause, within the time specified in the notice, why the appointment of the arbitrator or the measure proposed to be taken should not be made or taken and such notice shall be accompanied by copies of all documents referred to in paragraph 2 or, as the case may be, by information or clarification, if any, sought under paragraph 5."

39. In Konkan Railway Corporation Ltd. II, the Constitution Bench held the function of the Chief Justice of appointment of an arbitrator under Sub-section (6) of Section 11 as administrative and not judicial. In the light of the said finding, the Court proceeded to state that it was not necessary to issue notice to the parties likely to be affected. Section 11 did not provide for such notice. The Court, however, did not stop there. It held that by making a provision for issuance of notice, the scheme went 'beyond the terms of Section 11' and was bad on that ground. A direction was, therefore, issued to amend it.
Since the majority judgment has held the function of the Chief Justice as judicial, it ruled that such notice ought to be issued and opportunity of hearing ought to be afforded by the Chief Justice to the person or persons likely to be affected thereby in an appointment of arbitrator.
I have, on the other hand, held that the function of the Chief Justice under Sub-section (6) of Section 11 is neither judicial nor quasi-judicial but administrative. It is also true that unlike Section 8 of the 1940 Act, 1996 Act does not envisage issuance of notice to the party likely to be affected by the order of the Chief Justice.

40. The question, however, is : Can such clause in the scheme prepared by the Chief Justice of India be held bad as going 'beyond the terms of Section 11'? The Constitution Bench so held in Konkan Railway Corporation Ltd. II. With great respect to the Constitution Bench, such provision cannot be held inconsistent with the parent Act or otherwise bad in law. The Constitution Bench did not assign any reason as to why it was of the view that Clause 7 could not stand or how it violated Section 11. But reference to Jaswant Sugar Mills Ltd v. Lakshmi Chand,; Engineering Mazdoor Sabha v. Hind Cycles Ltd., and Associated Cement Companies Ltd. v. P.N. Sharma, clearly shows that since the Constitution Bench was of the view that while performing function of appointing an Arbitral Tribunal the Chief Justice was not acting as a Court or Tribunal, he was not expected to issue notice or afford an opportunity of hearing to the parties likely to be affected by such decision.
Once the function of the Chief Justice is held to be administrative, there may not be 'duty to act judicially' on the part of the Chief Justice. Nevertheless in such cases, an administrative authority is required to act 'fairly'. Basic procedural fairness requires such notice to the opposite party. The principle in R. v. Electricity Commissioners, or Ridge v. Baldwin, may not apply to administrative functions, but another concept which developed at a later stage and accepted in public law field and found place in Administrative Law of 'duty to act fairly' would apply to administrative actions as well.

41. By now, it is well settled that when an administrative action is likely to affect rights of subjects, there would be a duty on the part of the authority to act fairly.
In Pearlberg v. Varty (Inspector of Taxes), Lord Pearson said;
"A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles (i.e. the rules of natural justice) in performing those functions unless there is a provision to title contrary. But where some person or body is entrusted by Parliament that administrative or executive functions there is no presumption that compliance with the principles of natural justice is required although, as 'Parliament is not to be presumed to act unfairly', the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness." 5
(emphasis supplied)
In R. v. Commissioner for Racial Equality, Lord Diplock stated;
"Where an act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights Page 1851 of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions."

The above principles have been accepted and applied in India also. In the leading case of Keshav Mills Co. Ltd. v. Union of India, a textile mill was closed down. A Committee was appointed by the Government of India to investigate into the affairs of the mill-company under the Industries (Development and Regulation) Act, 1951. After affording opportunity to the Company, a report was prepared by the Committee and submitted to the Government. A copy of the report, however, was not supplied to the Company. On the basis of the report, the Government took over the management of the Company. The said action was challenged by the company inter alia on the ground of violation of principles of natural justice inasmuch as no copy of the report submitted by the Committed to the Government was supplied to the Company nor was hearing afforded before finally deciding to take over the management.

Rejecting the contention and observing that no prejudice had been caused to the mill-company, this Court did not interfere with the order.

Speaking for the Court, A.K. Mukherjea, J. stated:

"The second question, however, as to what are the principles of natural justice that should regulate an administrative act or order is a much more difficult one to answer. We do not think it either feasible or even desirable to lay down any fixed or rigorous yardstick in this manner. The concept of natural justice cannot be put into a straitjacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. (emphasis supplied)

In Mohinder Singh Gill v. Chief Election Commission after considering several cases, Krishna Iyer, J. stated :

"Once we understand the soul of the rule as fairplay in action -and it is so - we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet: Its essence is good conscience in a given situation; nothing more - but nothing less."
(emphasis supplied)

In Nally Bharat Engineering Co. Ltd. v. State of Bihar, the Government, on an application by a dismissed workman transferred his case from one Labour Court to another Labour Court without issuing a notice or giving opportunity to the employer.

Setting aside the order and referring to several cases, the Supreme Court invoked the 'acting fairly' doctrine. The Court stated: "Fairness, in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness, is also a principle to ensure that statutory authority arrives at a just decision either in promoting the interest or affecting the rights of persons. To use the timehallowed phrase that 'justice should not only be done but be seen to be done' is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procedure. It depends upon the facts of each case."
(emphasis supplied)

Quoting the observations of Paul Jackson, the Court said:

"It may be noted that the terms 'fairness of procedure', 'fair play in action', 'duty to act fairly' are perhaps used as alternatives to 'natural justice' without drawing any distinction. But Prof Paul Jackson points out

that 'such phrases may sometimes be used to refer not to the obligation to observe the principles of natural justice but, on the contrary, to refer to a standard of behavior which increasingly, the courts require to be followed even in circumstances where the duty to observe natural justice is inapplicable'."
(emphasis supplied)
de Smith states:
"The principal value of the introduction of the 'duty to act fairly' into the courts' vocabulary has been to assist them to extend the benefit of basic procedural protections to situations where it would be both confusing to characterize as judicial or even quasi-judicial, the decision-makers' functions, and inappropriate to insist on a procedure analogous to a trial."
['Judicial Review of Administrative Action'; (1995); p. 399]

42. It is thus clear that the doctrine of 'fairness' has become all pervasive. As has been said, the 'acting fairly' doctrine proved useful as a device for evading confusion which prevailed in the past. "The courts now have two strings to their bow." An administrative act may be held to be subject to the requirement and observance of natural justice either because it affects rights or interests and hence would involve a 'duty to act judicially' or it may be administrative, pure and simple, and yet, may require basic procedural Page 1853 protection which would involve 'duty to act fairly'. [Wade & Forsyth; 'Administrative Law'; (2005); pp. 492-94; de Smith; "Judicial Review of Administrative Action", (1995); pp. 397-98]
'Acting fairly' is thus an additional weapon in the armoury of the court. It is not intended to be substituted for another much more powerful weapon 'acting judicially'. Where, however, the former ('acting judicially') cannot be wielded, the court will try to reach injustice by taking resort to the latter - less powerful weapon ('acting fairly'). [See C.K. Thakker : "From Duty to Act Judicially to Duty to Act Fairly",].

43. As the Chief Justice is performing administrative function under Sub-section (6) of Section 11 in appointing an arbitrator, mere is no 'duty to act judicially' on his part, nonetheless there is 'duty to act fairly' which requires him to issue notice to the other side before taking a decision to appoint an arbitrator. I am, therefore, of the view that Clause 7 of the scheme as stood prior to the amendment, could neither be held bad in law nor inconsistent with Section 11 of the Act. I am, therefore, in respectful agreement with the majority judgment on that point.

44. On the basis of the above findings, my conclusions are as under;
(i) The function performed by the Chief Justice of the High Court or the Chief Justice of India under Sub-section (6) of Section 11 of the Act (i.e. Arbitration and Conciliation Act, 1996) is administrative, - pure and simple -, and neither judicial nor quasi-judicial.
(ii) The function to be performed by the Chief Justice under Sub-section (6) of Section 11 of the Act may be performed by him or by 'any person or institution designated by him'.
(iii) While performing the function under Sub-section (6) of Section 11 of the Act, the Chief Justice should be prima facie satisfied that the conditions laid down in Section 11 are satisfied.
(iv) The Arbitral Tribunal has power and jurisdiction to rule 'on its own jurisdiction' under Sub-section (1) of Section 16 of the Act.
(v) Where the Arbitral Tribunal holds that it has jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award.
(vi) A remedy available to the party aggrieved is to challenge the award in accordance with Section 34 or Section 37 of the Act.
(vii) Since the order passed by the Chief Justice under Sub-section (6) of Section 11 of the Act is administrative, a Writ Petition under Article 226 of the Constitution is maintainable. A Letters Patent Appeal/Intra-court Appeal is competent. A Special Leave Petition under Article 136 of the Constitution also lies to this Court.
(viii) While exercising extraordinary jurisdiction under Article 226 of the Constitution, however, the High Court will be conscious and mindful of the

relevant provisions of the Act, including Sections 5, 16, 34 to 37 as also the object of the legislation and exercise its power with utmost care, caution and circumspection.

(ix) The decision of the Constitution Bench in Konkan Railway Corporation Ltd. II, to the extent that it held the function of the Chief Justice under Sub-section (6) of Section 11 of the Act as administrative is in consonance Page 1854 with settled legal position and lays down correct law on the point.

(x) The decision of the Constitution Bench in Konkan Railway Corporation Ltd. II, to the extent that it held Clause 7 of "The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996" providing for issuance of notice to affected parties as 'beyond the term of Section 11' and bad on that ground is not in accordance with law and does not state the legal position correctly.

(xi) Since the Chief Justice is performing administrative function in appointing an Arbitral Tribunal, there is no 'duty to act judicially' on his part. The doctrine of 'duty to act fairly', however, applies and the Chief Justice must issue notice to the person or persons likely to be affected by the decision under Sub-section (6) of Section 11 of the Act.

(xii) All appointments of Arbitral Tribunals so far made without issuing notice to the parties affected are held legal and valid. Henceforth, however, every appointment will be made after issuing notice to such person or persons. In other words, this judgment will have prospective operation and it will not affect past appointments or concluded proceedings.