

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

Arbitration Application No.55 of 2015

Gamesa Wind Turbines Pvt. Ltd, Chennai.

.... Applicant

v.

Mytrah Energy (India) Ltd, Hyderabad.

.... Respondent

DATE OF JUDGMENT PRONOUNCED: 27.12.2017.

SUBMITTED FOR APPROVAL:

THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

.....

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? ----

2. Whether the copies of judgment may be marked to Law Reports/Journals - Yes -

3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? - Yes -

RAMESH RANGANATHAN, ACJ

*** THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN**

+ Arbitration Application No.55 of 2015

% Dated: 27-12-2017

Gamesa Wind Turbines Pvt. Ltd, Chennai.

.... Applicant

v.

\$ Mytrah Energy (India) Ltd.

.... Respondent

!Counsel for Applicant: Sri B.Chandrasen Reddy

^ Counsel for respondent: Sri Vedula Venkataramana, Learned
Senior Counsel for Sri Girish
Govardhan Deshmukh, Learned
Counsel.

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> HEAD NOTE:

? Citations:

1. (1988) 4 SCC 534
2. (1992) 2 SCC 683
3. (2017) 7 SCC 729
4. AIR 1964 SC 1419
5. (2005) 6 SCC 138
6. (2000) 2 SCC 617
7. AIR 1987 SC 2235
8. AIR 1989 SC 1972
9. AIR 1999 SC 393
10. (1997) 1 SCC 134
11. (1985) 1 SCC 260



HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

ARBITRATION APPLICATION NO.55 OF 2015

ORDER:

Arbitration Application No.819 of 2016 is filed, by the applicant in Arbitration Application No.55 of 2015, to appoint a co-Arbitrator in the place of late Sri Justice T.Ch. Surya Rao by modifying the order dated 11.12.2015 in Application No.1451 of 2015.

Facts, to the limited extent necessary, are that the applicant herein filed Arbitration Application No.55 of 2015 under Section 11(4) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act") requesting this Court to appoint an Arbitrator, as the respondent had failed to appoint its nominee as an Arbitrator in terms of the Arbitration Agreement dated 25.04.2013. Originally an order dated 20.11.2015 was passed appointing Sri Justice M. Jagannadha Rao, retired Judge of the Supreme Court, as the sole arbitrator. Thereafter Arbitration Application No.1451 of 2015 was filed by the applicant bringing it to the notice of this Court that, in terms of the Clause 22-A of the Agreement dated 25.04.2013, the earlier order dated 20.11.2015 was required to be modified as the Arbitration Agreement required each party to the agreement to appoint an arbitrator, and the two appointed Arbitrators to appoint a third arbitrator to act as the Presiding Arbitrator; the applicant had appointed Sri Justice R. Balasubrahmanian, Retired Judge of the Madras High Court, as their nominee, and this Court should appoint an arbitrator on behalf of the respondent.

The earlier order dated 20.11.2015 was modified in Application No.1451 of 2015 in Arbitration Application No.55 of 2015 dated 11.12.2015, and Sri Justice T.Ch.Surya Rao, a retired Judge of this High Court, was appointed as an Arbitrator on behalf of the respondent. Both the arbitrators were requested to appoint a third arbitrator to act as the Presiding Arbitrator, and the then Acting Chief Justice left it open to them to consider Sri Justice M. Jagannadha Rao, retired Judge of the Supreme Court, as the third arbitrator. Sri Justice T.Ch. Surya Rao passed away on 01.02.2016 before the first hearing scheduled to be held on 20.02.2016.

The Applicant submits that, in view of the demise of the Co-Arbitrator, it has become necessary for them to approach this Court for appointment of a Co-Arbitrator to be a member of the Arbitral Tribunal; and this Court should appoint a co-arbitrator in the place of late Sri Justice T.Ch. Surya Rao by modifying the order dated 11.12.2015 passed in Application No.1451 of 2015 in Arbitration Application No.55 of 2015. In the counter-affidavit, filed on behalf of the respondent, it is stated that, on the demise of late Sri Justice T.Ch. Surya Rao, the answering respondent had the right to suggest/nominate its arbitrator to make up the vacancy which had occurred due to his death; they had already exercised such a right by communicating, to Justice M. Jagannadha Rao, the Presiding Officer of the Tribunal through e-mail dated 26.02.2016, that they had approached Sri Justice C.V. Ramulu as their arbitrator; and, as the agreed procedure prescribed under the contract had been followed, there was no

cause of action for maintaining the present application under Section 11 of the Act.

Sri B. Chandrasen Reddy, Learned counsel for the applicant, would submit that the present application, filed under Section 11(6) of the Act, is maintainable as the earlier appointment of Late Sri Justice T.Ch. Surya Rao was made by this Court under Section 11(6) of the Act; under Section 15(2) of the Act, once the mandate of the arbitrator terminates, substitution of the arbitrator shall be made according to the rules that were applicable to the appointment of the arbitrator being replaced; the rules, that are applicable to an arbitrator being replaced, should be read as the rules that were applicable at the time of appointment of the earlier arbitrator; the earlier arbitrator was appointed by this Court under the Act, and the same rules are applicable, the substitute Arbitrator should also be appointed by this Court in the same manner; the intention of the legislature, in using the expression, *“that the substitute Arbitrator should be appointed according to the rules that were applicable for appointment of the arbitrator being replaced”*, should be given due regard; the legislature has not used the expression that the substitute arbitrator shall be appointed *“in accordance with the procedure laid down in the arbitrator agreement”* executed between the parties; there is a clear distinction between the two propositions; and only this Court has jurisdiction to appoint the substitute Arbitrator.

On the other hand Sri Vedula Venkataramana, Learned Senior counsel appearing on behalf of the respondent, would submit that, since Arbitration Application No.55 of 2015 filed

under Section 11 (5) and (6) of the Act has already been disposed of, the present petition, filed under Section 151 CPC, is not maintainable; the power of the High Court to appoint an arbitrator would arise only when there is a default by either of the parties to appoint their respective arbitrators; this is evident from the language of Section 11 (3) and (4) of the 1996 Act; except for Section 11(6), this Court lacks jurisdiction to appoint or supply a vacancy in the office of an arbitrator; there is no default on the part of the respondent in suggesting/appointing its arbitrator; it has already appointed Justice C.V. Ramulu, as its nominee, after the death of Justice T. Ch. Surya Rao; Section 15 (2) of the Act provides for the substitution of an arbitrator as per the original rules; the Rules would mean the arbitral clause also; the respondent would be disentitled to appoint an arbitrator on its behalf, in terms of the arbitration clause of the agreement, only during the lifetime of the arbitrator appointed by the court; when once the arbitrator, appointed by the Court, ceases to hold office either due to resignation or death, the situation reverts back to the original stage enabling a party to the agreement to suggest/appoint its arbitrator in accordance with the arbitration agreement; failure to appoint an arbitrator at an earlier point of time, cannot result in a permanent disqualification; Section 15 (2) of the Act would revive the lost opportunity, and enable the respondent to nominate/appoint its arbitrator on the demise of the earlier arbitrators, appointed on its behalf, by this Court; any other construction placed on Section 15(2) of the Act would result in anomaly and injustice; it is only if the respondent had not appointed its arbitrator, within 30 days from the date of the death

of late Sri Justice T.Ch. Surya Rao, would the Applicant be entitled to seek appointment of a substitute arbitrator under Section 11 (6) of the Act; and since there is no vacancy requiring the Court to appoint an arbitrator, for the reason that the respondent has already appointed Justice C.V. Ramulu as its arbitrator, this petition, filed under Section 11(6) of the Act, is not maintainable in law.

Before considering the rival submissions, it is useful to refer, albeit briefly, to the Statement of Objects and Reasons, and the relevant provisions of the Act. The Statement of Objects and Reasons for enacting the Arbitration and Conciliation Act, 1996 (for short, “the Act”) lists the main objects of the Bill which, among others, is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration; and to minimise the supervisory role of Courts in the arbitral process. Section 5 prescribes the extent of judicial intervention and provides that, notwithstanding anything contained in any other law for the time being in force, in matters governed by Part – I of the Act (Section 2 to 43), no judicial authority shall intervene except where so provided in Part – I of the Act. Section 7(1) of the Act defines an “arbitration agreement” to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them, in respect of a defined legal relationship, whether contractual or not.

Chapter III of the Act relates to the composition of the Arbitral Tribunal, and Section 10(1) gives the parties the freedom to determine the number of arbitrators, provided that such

number shall not be an even number. Section 11 relates to the appointment of arbitrators. Section 11(1) stipulates that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. Section 11(2) provides that, subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Section 11(3) stipulates that 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. Section 11(4) stipulates that, if the appointment procedure in sub-section (3) applies, and (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon the request of a party, by the High Court. Section 11(6) stipulates that 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 High Court to take necessary measures, unless the agreement, or the appointment procedure, provides other means for securing the appointment. Section 11(6A), as inserted by Act 3 of 2016 with effect from 23.10.2015, stipulates that the High Court, while considering any application under sub-sections (4) or (5) or (6), shall, notwithstanding any

judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

While Sub-section (5) of Section 11, as it stood prior to its amendment by Act 3 of 2016 with effect from 23.10.2015, enabled a party to the arbitration agreement to request the Chief Justice, or his designate, to appoint an arbitrator, Sub-section (6) enabled the party to request that "*the necessary measure*" be taken. The distinction between the words "*the necessary measure*" in Sub-section (6) of Section 11 of the Act, and the word "*appointment*" in Sub-section (5), is significant. In the absence of an appointment procedure being prescribed, in the arbitration agreement, a request could be made to the Chief Justice or his designate (now the "High Court") to appoint an arbitrator. Where, however, a procedure to secure the appointment of an arbitrator is prescribed in the arbitration agreement, then the Chief Justice or his designate can only be requested to "*take the necessary measure*". If the legislature intended to confer power on the High Court to appoint an arbitrator it would have used the same language in sub-section (6) as it had employed in sub-section (5) of Section 11. The power of the High Court under sub-section (6) is to take "*the necessary measure*" for securing the appointment of an arbitrator and, ordinarily, not to take upon itself the task of appointing an arbitrator merely because one of the parties to the arbitration agreement had requested it to do so. If the parties have agreed on a procedure for appointing the arbitrator, as contemplated by Section 11(2), then the appointment must be in accordance with the said procedure and recourse to the High Court cannot be taken straightaway. (**The Iron and Steel Company Ltd. v. Tiwari Road**

Lines¹). Section 11(6) has application only when a party has failed to act in terms of the arbitration agreement. (**National Highways Authority of India v. Bumihiway DDB Ltd²; Yashwitha Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. rep by its Managing Director³**).

Section 14(1)(a) of the Act stipulates that the mandate of an arbitrator shall terminate, and he shall be substituted by another arbitrator if he becomes de jure or de facto unable to perform his functions. Section 15 relates to the termination of mandate and substitution of arbitrator. Section 15(1)(a) provides that, in addition to the circumstances referred to in Section 13 or 14, the mandate of an arbitrator shall terminate where he withdraws from office for any reason. Section 15(2) stipulates that, where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Section 15(3) stipulates that unless otherwise agreed by the parties, where an arbitrator was replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

Clause 22A of the agreement dated 04.05.2011, entered into between the applicant and the respondent, reads thus:

22A. ARBITRATION

- (i) If any disagreement arises out of or in connection with the validity, application or interpretation of this agreement (the 'Dispute'), the parties shall endeavour in good faith to resolve the dispute through negotiation within 30 (thirty) days of a written notice setting out the nature of such dispute.

¹ 2007 AIR SCW 3172

² (2006) 10 SCC 763

³ 2008 (4) ALT 266

- (ii) In the event that any dispute is unable to be resolved between the parties pursuant to Clause 22A(1) within 30 (thirty) days of receipt of the notice under Clause 22A(1), then such dispute shall be referred to arbitration.
- (iii) The arbitration will be conducted as per the Arbitration and Conciliation Act, 1996 under the rules of the Singapore International Arbitration Centre. The arbitral tribunal shall comprise of 3 (three) arbitrators. Each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator. The place of arbitration for any disputes shall be Bangalore. The language to be used in the arbitral proceedings shall be English.
- (iv) Responsibility of payment for all costs of arbitration, excepting counsel fees, shall be as per the arbitration award.
- (v) While any dispute under this agreement is pending and except where this agreement has been terminated in accordance with the terms of this agreement and/or any of the project agreements, the parties shall continue to perform all of their respective obligations under this agreement without prejudice to the final determination in accordance with the provisions under this Clause 22A.

In terms of sub-clause (iii) of Clause 22-A of the aforesaid agreement, the arbitral tribunal is to comprise of three arbitrators, each party to appoint one arbitrator, and the two arbitrators to appoint the third arbitrator. As the respondent had earlier failed to appoint an arbitrator on their behalf, the jurisdiction of the Chief Justice was invoked by the applicant, under Section 11(4) and (6) of the Act, complaining that, while they had appointed Justice R. Balasubramannian, (Retd. Judge of the Madras High Court), the respondent had failed to appoint an arbitrator on their behalf. The then Acting Chief Justice had appointed Sri Justice T.Ch. Surya Rao as an arbitrator on behalf of the respondent. On the demise of Justice T.Ch. Surya Rao, a substitute arbitrator was required to be appointed in his place. While the aforesaid

arbitration clause does not specifically provide for appointment of a substitute arbitrator, Section 15(2) of the 1996 Act requires a substitute arbitrator to be appointed in accordance with the rules applicable to the appointment of the arbitrator being replaced.

The question which arises for consideration is what do the words, “*rules that are applicable to the appointment of the arbitrator being replaced*”, used in Section 15(2) of the Act, mean? A party, who has entered into an arbitration agreement with another, should not be permitted to resile therefrom. When the mandate of the arbitrator stands terminated, appointment of an arbitrator should, necessarily, be made in accordance with the arbitration clause of the agreement. (**National Highways Authority of India²; Yashwitha Constructions (P) Ltd.³**). Where the mandate of the arbitrator stands terminated for any reason, it falls within the purview of Section 15(1)(a) of the Act, and attracts Section 15(2) of the Act. (**National Highways Authority of India²**).

Unless the arbitration agreement between the parties categorically prohibits or debars resolution of a dispute or difference between the parties by a substitute arbitrator, in the case of death of the named arbitrator or non-availability of the said arbitrator, the power to appoint a substitute arbitrator is given by Section 15(2) of the Act which should be given liberal interpretation so as to apply to all possible circumstances under which the mandate of the earlier arbitrator may have been terminated. (**SBP and Co. v. Patel Engg. Ltd.⁴**). Even if there is no specific provision in the arbitration agreement authorizing appointment of a substitute arbitrator on the termination of the

⁴ (2005) 8 SCC 618

original appointment, or when the originally appointed arbitrator withdraws from arbitration or is no more, this omission in the arbitration agreement is made up by the specific provision in Section 15(2) of the Act. (**Yashwitha Constructions (P) Ltd.**³).

Section 15(2), when it refers to the applicable rules, does not confine appointment of a substitute arbitrator to a statutory rule, or a rule framed under the Act, or under the scheme. It refers to the provision for appointment contained in the arbitration agreement, or any rules of any institution under which the disputes are to be referred to arbitration. Section 15(2) requires a substitute arbitrator to be appointed according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. (**Shailesh Dhairyawan v. Mohan Balkrishna Lulla**⁵; **Yashwitha Constructions (P) Ltd.**³).

As the rules referred to in Section 15(2) is the arbitration agreement, the procedure prescribed, for appointment of arbitrators, in the arbitration agreement are the rules which are applicable to the appointment of a substitute arbitrator also. Since the arbitration agreement (i.e., Clause 22-A(iii)) of the agreement requires each party to nominate an arbitrator, the requirement of the rules, referred to in Section 15(2) of the Act, is for the respondent to nominate its arbitrator on the death of the previous arbitrator appointed on their behalf. The procedure, to be followed in the appointment of a substitute arbitrator, is the same as the procedure relating to the initial appointment of the arbitrator, i.e., in terms of Clause 22-A(iii) of the agreement dated 04.05.2011. Consequently it is only if the respondent had failed to adhere to

⁵ (2016) 3 SCC 619

the procedure, prescribed in Clause 22-A(iii) of the agreement, in appointing an arbitrator (be it the original or the substitute arbitrator), could the applicant have invoked the jurisdiction of the High Court under Section 11(6) of the Act requesting it to take the necessary measure.

Primacy is given to the procedure agreed upon by the parties, to appoint an arbitrator, failing which alone does the Act permit judicial interference. In exercising its jurisdiction under Section 11(6) to take "*the necessary measure*", the High Court should, as far as possible, act in such a manner as to effectuate the arbitration agreement entered into between the parties. (**Yashwitha Constructions (P) Ltd.**³). When parties have entered into a contract, and have settled on a procedure, due importance should be given by the High Court to such a procedure. The parties are, normally, bound by the arbitration clause, and are obliged to comply with the procedure laid down therein. (**Datar Switchgears Ltd. v. Tata Finance Ltd.**⁶). Since Section 15(2) requires a substitute arbitrator to be appointed in accordance with the arbitration agreement, the High Court, while taking "*the necessary measure*" under Section 11(6), cannot usurp the powers conferred by the agreement on the respondent to appoint a substitute arbitrator. On a harmonious construction of Sections 11(6) and 15(2) it must be held that on the mandate of an arbitrator being terminated and only if the respondent, in accordance with the arbitration agreement, fails to appoint a substitute arbitrator, can the jurisdiction of the High Court be

⁶ (2000) 8 SCC 151

invoked under Section 11(6) of the Act. (**Yashwitha Constructions (P) Ltd.**³).

In the present case, soon after the demise of late Sri Justice T.Ch. Surya Rao, and even before the applicant could make a request, the respondent had appointed Sri Justice C.V. Ramulu as an arbitrator on their behalf. The jurisdiction of the High Court, under Section 11(6)(a) of the Act to take the necessary measure, can be invoked by a party only where the other party fails to appoint an arbitrator in terms of the appointment procedure prescribed under the agreement. It is only if, on the termination of the mandate of the earlier arbitrator, the respondent had failed to appoint a substitute arbitrator in accordance with Clause 22A(iii) of the agreement, despite a specific request in this regard by the applicant, could the applicant have invoked the jurisdiction of the High Court under Section 11(4)(a) seeking appointment of an arbitrator on behalf of the respondent, or for necessary measures to be taken under Section 11(6)(a) of the Act. As the respondent has acted in accordance with the appointment procedure prescribed under Clause 22-A(iii) of the arbitration agreement, and has appointed Sri Justice C.V. Ramulu as their arbitrator, Section 11(4)(a) and Section 11(6)(a) are not attracted. Neither Section 11(4)(a) nor Section 11(6)(a) of the Act confer jurisdiction on the High Court to appoint a substitute arbitrator, when the respondent has, in terms of the arbitration agreement, appointed a substitute arbitrator in the place of the arbitrator whose mandate stood terminated. Consequently, the applicant was not entitled to invoke the jurisdiction of the High Court to take the necessary measure,

to appoint an arbitrator in the place of late Sri Justice T.Ch. Surya Rao.

Is a different procedure required to be adopted in cases where failure of one of the parties to the arbitration agreement to nominate its arbitrator earlier, had resulted in an arbitrator being appointed on its behalf by the High Court under Sections 11(4) and (6) of the Act? The answer can only be in the negative. Firstly, because Sections 11(4) and (6) are statutory provisions, and are not the rules applicable to the appointment of the arbitrator being replaced. It is the arbitration agreement which constitutes the rules applicable to the appointment of the arbitrator being replaced. Secondly, the very purpose of the Act, as is evident from the Statement of Objects and Reasons, is to minimise the supervisory role of Courts in the arbitral process, which would mean from the commencement of arbitral proceedings under Section 21 of the Act. The present application, whereby a request is made for appointment of a substitute arbitrator, (in the place of Sri Justice T.Ch. Surya Rao the earlier arbitrator), under Section 11(6) of the Act is on the erroneous premise that since the respondent had failed to appoint an arbitrator on their behalf earlier, which resulted in the then Acting Chief Justice appointing an Arbitrator on their behalf, the respondent had forfeited their right to appoint an arbitrator, on their behalf, for all times to come, and a substitute arbitrator could, therefore, only be appointed by the High Court under Section 11(6) of the Act. This premise is flawed for the reasons that (i) the Act gives primacy to the intention of the parties as is reflected in the arbitration clause of the agreement; (ii) Section 5 of the Act prohibits judicial intervention

except where explicitly provided under the Act, and there is no specific provision in the Act which requires the High Court to appoint a substitute arbitrator if it had earlier appointed the arbitrator whose mandate stood terminated; and (iii) the “rules”, referred to in Section 15(2), is the arbitrator agreement, and not the provisions of the Act or the rules made thereunder.

Further, parties to the arbitration agreement have been statutorily conferred (by Section 11(2) of the Act) the freedom to nominate an arbitrator of their choice. While a party, which had failed to exercise its right earlier to appoint an arbitrator in terms of the agreement, resulting in an arbitrator being appointed by the High Court, under Section 11(4) and (6) of the Act, would not be entitled to seek substitution of such an arbitrator except on grounds specified in Sections 13, 14 and 15(1), and following the procedure prescribed in Section 15(2) of the Act, termination of the mandate of the arbitrator, appointed either by the parties to the agreement or by the High Court, would result in the situation reverting back to the original position, and thereafter the procedure prescribed under the agreement, for appointment of the original arbitrator, would apply in the appointment of the substitute arbitrator. Consequently, it is only if, on a request made by the other party, the party which is required to nominate the substitute arbitrator fails to do so, would the party making the request then be entitled to invoke the jurisdiction of the High Court, under Section 11(4) and (6) of the Act, seeking appointment of an arbitrator on behalf of the other. If, on the other hand, the party to the agreement has exercised its right to appoint a substitute arbitrator, and the vacancy caused, as a result of the

mandate of the earlier arbitrator being terminated, has been filled up, the High Court cannot be called upon to fill up a non-existent vacancy. The mere fact that they had failed to nominate an arbitrator earlier, in terms of the arbitration agreement, would not disable them, for all times to come, from exercising their right, under the arbitration agreement, to nominate their arbitrator in the place of the arbitrator whose mandate stood terminated under Sections 13, 14 and 15 of the Act (in the present case on the death of the earlier arbitrator).

It is only if the respondent had failed to exercise their right to appoint a substitute arbitrator, could the High Court have assumed jurisdiction under Section 11(6) of the Act. (**National Highways Authority of India**²; **Yashwitha Constructions (P) Ltd.**³). Section 11(6) of the Act has application only when a party, or the person concerned, has failed to act in terms of the arbitration agreement. (**Shailesh Dhairyawan**⁵; **Yashwitha Constructions (P) Ltd.**³). In the present case, the agreement specifically prescribes a procedure for appointment of an arbitrator, which rules also apply for appointment of a substitute arbitrator. (**Yashwitha Constructions (P) Ltd.**³).

In the light of the aforesaid observations, let us now examine the judgments relied on by Learned Counsel on either side. In **Datar Switchgears Ltd.**⁶, the respondent appointed an arbitrator beyond 30 days of the request, but before the appellant had filed the application under Section 11 of the Act. The question, which arose for the consideration of the Supreme Court, was whether, in a case falling under Section 11(6), the opposite party was disabled from appointing an arbitrator after expiry of 30 days from the date

of demand. It is in this context that the Supreme Court held that an application, under Section 11(6), can be filed when there is a failure of the procedure for appointment of Arbitrator; this failure of procedure can arise under different circumstances; it can be a case where a party who is bound to appoint an Arbitrator refuses to appoint the Arbitrator or where two appointed Arbitrators fail to appoint the third Arbitrator; the aggrieved party can then approach the Chief Justice for appointment of Arbitrator; no time limit has been prescribed under Section 11(6) of the Act, whereas a period of 30 days has been prescribed under Sections 11(4) and (5) of the Act; so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator, and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days; if the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11(6), that would be sufficient; but an appointment has to be made before an application is filed under Section 11(6) seeking appointment of an arbitrator; and thereafter the right of the party, to appoint an arbitrator, ceases.

The law declared in **Datar Switchgears Ltd.**⁶ is that, failure of one of the parties to the agreement to appoint an arbitrator on being so requested by the other party, resulting in the latter invoking the jurisdiction of the High Court under Section 11(6) of the 1996 Act, would disable the party, who failed to appoint an arbitrator, from doing so thereafter, and it is only the High Court which can then appoint an arbitrator. In **Datar Switchgears Ltd.**⁶ neither was the scope of Section 15(2) examined, nor the question

whether, consequent upon the earlier arbitrator having been appointed by the High Court under Section 11(6) of the Act, the substitute arbitrator should also be appointed only by the High Court, and not by the party on whom the right to appoint an arbitrator is conferred by the arbitration agreement.

In **M/s. Yashwith Constructions (P) Ltd. v. M/s. Simplex Concrete Piles India Ltd.**⁷, on a dispute having arisen, the Managing Director of the respondent company appointed an arbitrator in terms of the arbitration clause; the arbitrator resigned; thereupon the Managing Director of the respondent company, in view of the mandate in the arbitration agreement, promptly appointed another arbitrator; at that stage, the petitioner approached the Chief Justice of the High Court under Section 11(6) read with Section 15(2) of the Act praying that the Chief Justice may appoint a substitute arbitrator to resolve the disputes between the parties; and the Chief Justice held that no occasion arose for him to appoint an arbitrator under Section 11(6) of the Act in the case.

It is in this context that the Supreme Court observed that there was no specific provision in the arbitration agreement authorizing the Managing Director to appoint a substitute arbitrator if the original appointment terminated or if the originally appointed arbitrator withdrew from arbitration; this so called omission in the arbitration agreement was made up by the specific provision contained in Section 15(2) of the Act; withdrawal of an arbitrator from office for any reason was within the purview of Section 15(1)(a) of the Act; therefore Section 15(2) would be

⁷ AIR 2006 SC 2798

attracted, and a substitute arbitrator had to be appointed according to the rules that were applicable for the appointment of the arbitrator to be replaced; what Section 15(2) contemplated was appointment of a substitute arbitrator, or the replacement of the arbitrator by another, according to the rules that were applicable to the appointment of the original arbitrator who was being replaced; the term "rules", in Section 15(2), obviously referred to the provision for appointment contained in the arbitration agreement, or any Rules of any Institution under which the disputes were referred to arbitration; when Section 15(2) said that a substitute arbitrator can be appointed, according to the rules that were applicable for the appointment of the arbitrator originally, it was not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme; it only meant that appointment of a substitute arbitrator must be done according to the original agreement, or provision applicable to the appointment of the arbitrator at the initial stage; and they were not in a position to agree with the contrary view taken by some of the High Courts. The law declared in **M/s. Yashwith Constructions (P) Ltd.**⁷ is that the "rules" governing appointment of a substitute arbitrator, (as is referred to in Section 15(2) of the Act), is not confined to any statutory rules or rules made under the Act or under a Scheme framed under the Act, but only means that a substitute arbitrator should be appointed in accordance with the arbitration agreement.

In **National Highways Authority of India**², after appointment of the presiding arbitrator, the arbitrator, appointed by the appellant, resigned; the new arbitrator, nominated by the

appellant, did not accept the appointment; thereafter on the vacancy created by the resignation of the presiding arbitrator, the process of appointment of the presiding arbitrator started afresh in accordance with the agreed terms of the contract; the appellant appointed its arbitrator, and the process of discussion, between the two nominated arbitrators, was reinitiated as per the agreed contractual terms, and in accordance with Section 15(2) of the Act; the two arbitrators failed to arrive at a consensus and therefore, after 30 days, the appellant referred the issue of appointment of the presiding arbitrator to the IRC; however, the process which had been reinitiated by the two nominated arbitrators was restrained by the High Court.

It was contended, on behalf of the appellant, that Sections 15(1) and 15(2) were complete and wholesome, and contradistinct to Section 11(6); the resignation of the presiding arbitrator brought the matter back from the vestiges of Section 11(6), (though in the first place in law there were none), and brought the matter squarely within Section 15(2); any decision given under Section 11(6) would tantamount to putting the Act upside down; and the scope of Section 15(2) was no longer *res integra* as per the dictum in **M/s. Yashwith Constructions (P) Ltd.**⁷. On the other hand, it was contended on behalf of the respondent, that there had been a judicial determination by the High Court which was based on the reasoning that, hierarchically, a judicial arbitrator must sit with another Judge only.

It is in this context that the Supreme Court held that the situation which existed prior to the resignation of the presiding arbitrator, and those which came about subsequent thereto, only

affirmed that the vacancy created by the resignation of the presiding arbitrator was accepted by the parties to be filled up in accordance with the original rules of appointment, which was wholly in consonance with Section 15(2) of the Act; the appointment, made by the High Court, was against the express provisions of the contract as held in **You One Engg. & Construction Co. Ltd. v. National Highways Authority of India**⁸, reaffirming that, once the arbitration agreement clearly envisages appointment of the presiding arbitrator by the IRC, there was no qualification that the arbitrator had to be a different person depending on the nature of the dispute; if the parties had entered into such an agreement with open eyes, it was not open to ignore it and invoke the powers under Section 11(6); in the present case, by making a reference to the High Court under Section 11(6) and alleging that one of the arbitrators was a retired judicial person, the respondent has only admitted to rewrite the contract between the parties, which is against the law of the land; the respondent had wrongly invoked the jurisdiction of the High Court, without first following the procedure agreed to between the parties; no cause of action had arisen in the facts of the case to seek appointment from the High Court under Section 11(6) of the Act, and the said petition was premature; there did not exist any such provision in law which required that, if one of the arbitrators was a retired Judge, the presiding arbitrator also had to be a retired Judge; the parties had entered into a contract after fully understanding the import of the terms so agreed upon, from which

⁸ (2006) 4 SCC 372

there could not be any deviation; and the parties were required to comply with the procedure of appointment as agreed to.

In **Magma Leasing Limited v. Tonganagaon Tea Co Pvt. Ltd.**⁹ the Calcutta High Court held that, under Section 15(2) of the Act, where the mandate of the Arbitrator is terminated, a substitute Arbitrator should be appointed according to the rules that were applicable to the appointment of the Arbitrator being replaced; the named Arbitrator had refused to act and, on an application under Section 11 of the Act, the Chief Justice had appointed Mr. P.K. Banerjee, retired Chief Justice of the Rajasthan High Court, as the learned Arbitrator; and when the mandate of the learned Arbitrator had been terminated, the petitioner had rightly approached the Court for appointment of the Arbitrator by the Chief Justice in the place of the outgoing learned Arbitrator. In **Magma Leasing Limited**⁹, while appointment of a substitute arbitrator by the Chief Justice of the Calcutta High Court was held valid, the said judgment does not indicate why, on the mandate of the earlier arbitrator being terminated, the party, on whom the arbitration agreement confers a right to appoint an arbitrator, cannot do so.

In **Ramjee Power Construction Ltd. v. Damodar Valley Corporation**¹⁰, the question which arose for consideration in the Arbitration Application was whether, upon the death, resignation or termination of the mandate of an Arbitrator appointed by the Chief Justice under Section 11(6) of the Act, a substitute Arbitrator was required to be appointed only by the Chief Justice and/or his

⁹ 2003 (1) ArbLR 173 = 2004(108) CalWN 281) 2003 (1) ArbLR 173 = 2004(108) CalWN 281)

¹⁰ (Judgment of Calcutta High Court in A.P.No.686 of 2008 dated 05.02.2009)

designate, or whether such appointment should be made in accordance with the arbitration agreement. The dispute had arisen in connection with a contract which, *inter alia*, contained an arbitration clause which read thus:-

"ARBITRATION: Except where otherwise provided in the contract all question and disputes relating to the meaning of specifications, designs, drawings and instructions herein contained and as to the quality of the workmanship or materials used on the work or as to any other question claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment therefore shall be referred to the sole arbitration of a person appointed by the DVC who may or may not be a DVC Officer.

Such appointment shall not be objected on the ground that the arbitrator so appointed is a DVC Official or that he had to deal with matters to which the agreement rules and in the course of his duties as DVC official he had expressed views on all or any of the matter in disputes or difference. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the contract."

The Calcutta High Court held that the language and tenor of Section 15(2) was significant; the Legislature had, in its wisdom, carefully used the expression "***the substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced***", instead of using the expression "***the substitute arbitrator shall be appointed in accordance with the procedure for appointment laid down in the arbitration agreement executed between the parties***"; if the legislative intent was that a substitute arbitrator should always be appointed in accordance with the procedure agreed upon by the parties, irrespective of whether the arbitrator being replaced was appointed by the Chief Justice or his designate, the legislature would perhaps have not used the expression "***in accordance with the rules that were applicable to the appointment of the arbitrator being replaced***"; in this case, the erstwhile arbitrator was appointed in accordance with Section 11(6) of the Act, read with the Rules framed by the

Court, and the Rules that have evolved with practice; an arbitrator must be appointed in accordance with the procedure agreed between the parties; if however the party, required in terms of the agreement to appoint or to agree to an arbitrator, fails to do so within the time stipulated in the agreement and/or in Section 11 of the Act, the other party may request the Chief Justice or his designate to appoint an arbitrator under Section 11; once an application under Section 11 is made, the right of the other party to appoint an arbitrator, in accordance with the agreement, gets extinguished; the right under the agreement, of a party, to appoint an arbitrator, which stands extinguished once an application under Section 11(6) is made, does not revive, if the arbitrator appointed by the Chief Justice resigns and/or his mandate is terminated; the expression "*rules that were applicable to the appointment of the arbitrator being replaced*" in Section 15 have been chosen carefully; if the arbitrator being replaced was appointed by the Chief Justice and/ or his designate, in accordance with Section 11 of the Act read with the applicable rules, the substitute arbitrator should also be appointed by the Chief Justice and/or his designate in the same manner; it is immaterial that the respondent has appointed an arbitrator in the meanwhile; and appointment of the arbitrator by the respondent, after filing of this application, is of no consequence.

The Calcutta High Court in **Ramjee Power Construction Ltd**¹⁰, held that if the arbitrator being replaced was appointed by the Chief Justice and/or his designate, in accordance with Section 11 of the Act read with the applicable rules, the substitute arbitrator must also be appointed by the Chief Justice and/or his

designate in the same manner. The premise, on which this conclusion is based, is that the words “*rules that are applicable to the appointment of the arbitrator being replaced*” in Section 15(2) of the Act refers to Section 11 of the Act and the applicable rules, for it is only then can it be said that a party to the agreement loses his right to appoint a substitute arbitrator, if he had failed to exercise his right earlier to appoint the original arbitrator and his failure to do so had resulted in the jurisdiction of the High Court, under Section 11(6) of the Act, being invoked. As noted hereinabove, the Supreme Court, in **M/s. Yashwith Constructions Pvt Ltd**⁷, has held that the rules, referred to in Section 15(2), are the rules applicable to the appointment of the original arbitrator (the arbitration agreement), and not to any statutory rules or rules made under the Act or a Scheme framed under the Act.

In **Ignatius Tony Pereira v. Mr. Pifran Sanjivan Fernandes**¹¹, the Bombay High Court, following the judgment of the Calcutta High Court in **Ramjee Power Construction Ltd.**¹⁰, held that an arbitrator must be appointed in accordance with the procedure agreed between the parties; if, however, the party required, in terms of the agreement, to appoint or to agree to an arbitrator failed to do so within the time stipulated in the agreement, and/or in Section 11 of the Act, the other party may request the Chief Justice or his designate to appoint an arbitrator under Section 11; once an application under Section 11 is made, the right of the other party to appoint an arbitrator, in accordance with the agreement, gets extinguished; the right of a party to appoint an arbitrator under the agreement, which stands

¹¹ 2016 SCC Online Bom 5470

extinguished once an application under Section 11 (6) is made, does not revive, if the arbitrator appointed by the Chief Justice resigns and/or his mandate is terminated; the expression "*rules that were applicable to the appointment of the arbitrator being replaced*" in Section 15, have been carefully chosen; if the arbitrator being replaced was appointed by the Chief Justice and/ or his designate, in accordance with Section 11 of the Act read with the applicable rules, the substitute arbitrator would also have to be appointed by the Chief Justice and/or his designate in the same manner; it was immaterial that the respondent had appointed an arbitrator in the meanwhile; and appointment of the arbitrator by the respondent, after filing of the application, was of no consequence.

I find it difficult to concur with the opinion of the Bombay High Court in **Ignatius Tony Pereira**¹¹, and the Calcutta High Court in **Ramjee Power Construction Ltd**¹⁰, wherein it has been held that, once an arbitrator is appointed by the Chief Justice of the High Court under Section 11, the right of the other party to appoint a substitute arbitrator, in accordance with the agreement, gets extinguished forever. My inability to agree is, firstly, because the "*rules*" referred to in Section 15(2), (as held by the Supreme Court in **M/s. Yashwith Constructions (P) Ltd**⁷), is the arbitration agreement; secondly, because Section 5 of the Act permits judicial intervention only when specifically provided under Part-I of the Act; and there is no specific provision in Part-I of the Act, much less in Section 15 thereof, stipulating that, if the earlier arbitrator is appointed by the High Court under Section 11(4) & (6) of the Act, the substitute arbitrator must also be appointed only by the High Court and not by the party to the agreement. Since the very object

of the Act is to minimise the supervisory role of Courts in the arbitral process, and to give primacy to the agreement between the parties, there is no justifiable reason why a party to the arbitration agreement should, forever, be denied his right to appoint a substitute arbitrator, on the mandate of the earlier arbitrator being terminated, merely because he had failed to exercise his right, to appoint an arbitrator, earlier.

The respondent is entitled, in terms of Clause 22-A(iii) of the agreement, to appoint a substitute arbitrator even if they had failed to appoint an arbitrator earlier. On their exercising their right to appoint a substitute arbitrator, no other person can be appointed as an arbitrator, in substitution, by the High Court. It is only if they had failed to appoint a substitute arbitrator, despite being requested to do so by the applicant, would the applicant then have been entitled to invoke the jurisdiction of the High Court, under Section 11(6) of the Act, requesting it to take the “*necessary measure*”. As the respondent has appointed Justice C.V. Ramulu as their substitute arbitrator, even before they were called upon by the applicant to do so, the applicant is not entitled to invoke the jurisdiction of the High Court, under Section 11(6) of the Act, seeking appointment of a substitute arbitrator. The application, as filed, is therefore not maintainable.

The arbitration application is, accordingly dismissed. The miscellaneous petitions pending, if any, shall stand closed. No costs.

RAMESH RANGANATHAN, ACJ

Date: 27.12.2017.

Note: L.R. copy to be marked.

B/o
MRKR/CS