

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.1664 of 2015

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful respondent is directed against the order dated 21.01.2015 of the learned Principal Senior Civil Judge, Visakhapatnam passed in IA.no.857 of 2014 filed by the petitioner/respondent herein under Section 8 of the Arbitration Act, 1940 ('the Act', for short) requesting to appoint a new Arbitrator by way of substitution in the place of the earlier Arbitrator appointed by the Court in order to take possession of the assets of the dissolved firm M/s.R.K. Enterprises and wind up the same and finalise the accounts of the dissolved firm till taking possession of the assets of the firm as per Section 48 of the Indian Partnership Act.

2. I have heard the submissions of the learned counsel for the revision petitioner/respondent and the learned counsel for the respondent/petitioner. I have perused the material record.

3. The parties shall hereinafter be referred to as they are arrayed in this revision petition for convenience and clarity.

4. It is apt to mention that the revision petitioner resisted the aforementioned application filed by the respondent herein by filing a counter. However, on merits, and, by the order impugned, the trial Court allowed the petition of the respondent herein and appointed Sri N. Jagannadha Rao, retired District Judge as an Arbitrator in the place of Sri T. Indrajee, retired District Judge, the earlier Arbitrator. The operative portion of the order impugned reads as under:

'In the result, the petition is allowed. Sri N. Jagannadha Rao, Retired District Judge, MIG-1274, Behind Water Tank, Mithulapuri Colony, Madhurawada, Visakhapatnam is appointed as an Arbitrator in place of Sri T. Indrajee. The Arbitrator shall take possession of the property of the dissolving firm, M/s. R.K Enterprises and wind up the same as per Section 48 of the Indian Partnership Act, as directed by this Court in IA.no.206 of 2002 dated 09.06.2009 and CMA.132/2004 and CRP.no.236/2004 and 3364/2009 dated 25.03.2010 and shall

complete the same within four months from the date of receipt of the record.'

[Reproduced verbatim]

Aggrieved of the said orders, the revision petitioner, who is the respondent in the aforementioned application, is before this Court.

5. In view of the facts peculiar to the case and its history, it is necessary to refer to the facts and sequence of events, which lead to the filing of the revision. The said facts and sequence of events are as follows:

The revision petitioner and the respondent are brothers. The revision petitioner is a dealer of Hindustan Petroleum Corporation Limited, Visakhapatnam ('the HPCL', for brevity) for sale of Petrol and other allied products. He had obtained licence under the name and style of M/s. R.K Enterprises. For the said business purpose, he had purchased an extent of 1059 square meters of land in Ramakrishnapuram, Malkapuram Post where a retail outlet has been established by the HPCL. While so, a partnership firm was constituted on 31.05.1991 between the revision petitioner and the respondent for running of the business by the partnership firm under the name and style - M/s. R.K. Enterprises. The partnership firm did business in sale of Petrol and other allied products under a dealership agreement with HPCL. The profits and losses of the firm were agreed to be shared between the revision petitioner and the respondent in the ratio of 55% and 45% respectively. As per clause 13 of the Partnership Deed, the firm may be dissolved by giving 3 months notice by either partner and the properties of the firm shall be shared by the partners in profit sharing ratio. Clause 14 of the Partnership Deed contains an arbitration clause in regard to resolution of disputes arising between the parties in respect of the partnership business.

According to the respondent, at the instance of the revision petitioner, the partnership firm was dissolved with effect from 07.03.1994 and that thereafter the revision petitioner has been continuing the business with the assets of the dissolved firm by stating that the business concern is a proprietary concern subsequent to the dissolution and that therefore, the respondent filed OP.no.112 of 1995 for appointment of an Arbitrator for resolution of the disputes, in accordance with the provisions of the Act. The learned Principal

Senior Civil Judge by an order dated 11.06.1997 appointed Sri T. Indrajee, a retired District Judge as an Arbitrator. On the appointment of the said Arbitrator, the respondent filed a detailed claim statement claiming the following reliefs: '(1) the petitioner is entitled at Rs.4,50 lakhs per year from 01.04.1991 till the business of the firm is wound up; (2) After the business is wound up, the petitioner would be entitled to 45% in the fixed assets and dues of the firm; (3) The respondent may be directed to produce the stock registers to show the stocks of petrol and petroleum products as on 01.04.1991, the accounts, the stock registers, daily sales and other registers, bank accounts from 01.04.1991 till the date of the claim petition; and (4) Pass an award for the relief claimed or for such amount as may be found on scrutiny of the accounts with interest at 18% per annum from 01.04.1991 on the same together with costs of Rs.20,000/-.' The revision petitioner filed a detailed counter resisting the claim. The learned Arbitrator, after conducting an enquiry, had passed an Award dated 14.11.1998 holding that the respondent is not entitled to seek reopening of the accounts till the end of 31.03.1993 and that the respondent is entitled to profits in the ratio of 45% from 01.04.1993 till 26.07.1997 and that the respondent is entitled to interest at 10% from the date of dispute i.e., dissolution notice dated 01.03.1994 till the date of decree or payment whichever is earlier. Questioning the said Award of the learned Arbitrator, the revision petitioner filed OP.no.4 of 1999 under Sections 30 and 33 of the Act for setting aside the Award. On the contrary, the respondent filed OP.no.2 of 1999 under Section 17 of the Act for making the Award the Rule of the Court. He had also filed IA.no.206 of 2002 under Section 37 of the Act for a direction to the Arbitrator -

Sri T. Indrajee to take possession of the dissolved firm M/s. R.K. Enterprises and wind up the firm as per Section 48 of the Partnership Act. The learned Principal Senior Civil Judge by an order dated 24.04.2003 had dismissed the OP filed by the revision petitioner for setting aside the Award of the learned Arbitrator and had allowed the OP filed by the respondent and made the Award the Rule of the Court. The said IA.no.206 of 2002 filed by the respondent remained pending. Aggrieved of the orders in the aforementioned

OPs passed by the learned Principal Senior Civil Judge, the revision petitioner had filed an appeal and a revision viz., CMA.no.132 of 2004 questioning the dismissal of OP.no.4 of 1999 and CRP.no.236 of 2004 questioning the order making the Award the Rule of Court. Since IA.no.206 of 2002 filed by the respondent under Section 37 of the Act was still pending on the file of the learned Principal Senior Civil Judge, the learned Judge dismissed the said petition holding that the said petition is not maintainable as OP.no.2 of 1999 was already allowed making the Award the Rule of the Court and that the revision petition against the said order in CRP.no.236 of 2004 is pending before the High Court. Aggrieved of the said order, the respondent preferred CRP.no.5933 of 2004 before this Court. While allowing the said revision petition, this Court had set aside the order of the learned Principal Senior Civil Judge and remitted the matter to the said Court with a direction to consider the petition afresh on its own merits and dispose of the same in accordance with law. On such remand, the learned Principal Senior Civil Judge has again taken up IA.no.206 of 2002 afresh for *de novo* disposal and had eventually allowed the said application by order dated 09.06.2009 and directed the learned Arbitrator-Sri Indrajee to commence the work after expiry of one month from the date of the order. Assailing the said order dated 09.06.2009 in IA.no.206 of 2002 the revision petitioner filed CRP.No.3364 of 2009. Thus, CMA.132 of 2004 against the orders dismissing the OP.4 of 1999 for setting aside the award of the learned Arbitrator; the CRP.no.236 of 2004 against the orders allowing the OP.no.2 of 1999 and making the Award the Rule of the Court and the CRP.no.3364 of 2009 assailing the order allowing the application in IA.no.206 of 2002 came up before this Court for hearing together. This Court by orders dated 25.03.2010 disposed of all the three matters by a common order and dismissed the CMA and the revision petitions of the revision petitioner and held that the learned Arbitrator is entitled to proceed with the winding up proceedings and complete the same within statutory period of four months from the date of the receipt of a copy of the order of the High Court by passing an award for winding up. It is also stated in the said common orders that in the event of the parties not cooperating, it is open to the learned Arbitrator to move the Senior Civil

Judge for extension of time for completion of the winding up proceedings. Thus, by the common order referred to supra, this Court had confirmed the order of the learned Principal Senior Civil Judge in IA.no.206 of 2002 whereby the learned Arbitrator was directed to proceed with winding up of partnership firm and distribute the assets after ascertaining the assets and liabilities of the firm. By the common orders, the revision petitioner's CMA challenging the award and his CRP challenging the order making the Award the Rule of the Court were also dismissed by this Court. Aggrieved of the common orders of the High Court, the revision petitioner filed Special Leave petitions to appeal (Civil Nos.21444 to 21446 of 2010) before the Supreme Court and the said Special Leave Petitions were dismissed. Therefore, the order of the learned Senior Civil Judge in IA.no.206 of 2002 has become final and binding on the parties. The Award which was made the Rule of the Court has also become final. In this background of facts, the learned Arbitrator, who was required to act in accordance with the orders in IA.no.206 of 2002, which were confirmed by the Supreme Court, without carrying out the work had requested the learned Senior Civil Judge to relieve him from the office of the Arbitrator on the ground of his advanced age and sought permission in that regard. On according permission and on relieving him, he had returned the record to the Court. Since the Arbitrator who was required to do the work in accordance with the orders in IA.no.206 of 2002 had got himself relieved by seeking permission of the Court on the ground of advanced age, the respondent filed IA.no.857 of 2014 for appointment of a new Arbitrator by way of substitution in the place of Sri T.Indrajeet, who is relieved. The said petition was resisted by the revision petitioner. On merits, the trial Court had allowed the said petition. The said orders are now under challenge in this revision filed by the revision petitioner.

6. Therefore, the vital question involved in this revision is –

Whether the order of the Court below appointing Sri N. Jagannadha Rao, retired District Judge as an Arbitrator in the place of Sri T. Indrajeet, retired District Judge by way of substitution is not valid under facts and in law?

7. Before proceeding further, it is necessary to advert to the pleadings of the parties in the interlocutory application in which the order impugned is passed.

7.1 The case of the respondent in support of his request for appointment of an Arbitrator in the place of the relieved Arbitrator by way of substitution, in brief, is as under:

The Court below while allowing IA.no.206 of 2002 of the respondent by orders dated 09.06.2009 as prayed for had appointed the very same Arbitrator Sri T. Indrajee to proceed with the winding up proceedings and complete the same within the statutory period. The said order has become final in view of the dismissal of the appeals filed by the revision petitioner by the Supreme Court. Therefore, the said Arbitrator was required to take up the work as per the said orders of the Court below. However, the said Arbitrator did not take up the work. He had requested the Court below to relieve him from the Office of the Arbitrator on the ground of his advanced age and ill health. At his request, by orders dated 18.01.2014, the Court below had relieved the said Arbitrator, however, after hearing both the sides. Accordingly, he had returned the record to the Court as directed by the Court. In the light of the said fact that the Court below was pleased to relieve the Arbitrator and he had returned the record and as he had not completed the work entrusted to him, it has become necessary to appoint another Arbitrator in his place to continue the work of taking possession of the assets of the partnership firm, distribution of the assets and dissolution of the firm. The respondent is a senior citizen and is suffering from ill health; whereas the revision petitioner is happily carrying on the business with the assets of the dissolved firm. Therefore there is urgent necessity to appoint an Arbitrator in the place of an Arbitrator, who is relieved at his request. Hence, the respondent filed the petition under Section 8 of the Act for appointment of an Arbitrator in the place of the relieved Arbitrator by way of substitution.

7.2 The case of the revision petitioner in the counter filed in the said application, in brief, is as follows:

The material allegations pleaded in the case of the respondent are false. However, the facts that lead to the passing of the award and the fact that the award was also made the Rule of the Court *vide* appropriate orders passed in OP.no.2 of 1999 are correct. There was no order in regard to the business conducted after the winding up. There was no claim made before the civil Court at any point of time. The respondent has no right to raise such claim as no such right was ever reserved before the civil Court. The orders of the civil Court have become final. As per the arbitral award, the partnership firm was also ordered to be dissolved. In fact it is deemed that the firm is dissolved from the date the notice was issued by the revision petitioner for dissolution. The respondent has not filed a memo either before the Court or the Arbitrator expressly reserving his right to have his claim adjudicated at a future date. Since no express leave is sought for adjudication of the further claims at a future date, it shall be deemed and treated that all or any other claims are abandoned. The Arbitrator became functus officio. The claim is barred by limitation. The Arbitrator has not passed any preliminary award. There is no scope for the present application to be entertained and the application is liable to be dismissed in limine.

7.3 Having heard the submissions of the learned counsel for both the sides and having adverted to the relevant chronology of events, the Court below, by the order impugned in this revision, had appointed a new Arbitrator, by substitution in the place of the earlier Arbitrator who is relieved by its earlier orders.

8. In this revision, the aggrieved revision petitioner urged the following grounds:

The Court below ought to have dismissed the application filed by the respondent to appoint a new Arbitrator by substituting the earlier Arbitrator, since the same is contrary to the provisions of the Act and the mandatory provision of Arbitration and Conciliation Act, 1996. The observation of the Court below that the present application is filed only to substitute the Arbitrator in the place of the earlier Arbitrator and that there is no impediment

to stop the substitution of the Arbitrator is contrary to the settled principles of law. The Court below ought to have dismissed the application directing the parties to approach the competent authority for appointment of an Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The Court below had exceeded the jurisdiction vested in it and had caused substantial injury to the petitioner.

8.1 Though in the grounds of revision it is urged that the Court below ought to have directed the parties to approach the competent authority for appointment of an Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996, while not advancing the said contention at the time of hearing, it is fairly conceded that the subject matter of the *lis* is covered by the provisions of the Old Act, 1940. Therefore, there is no need to go into the said aspect.

9. At the hearing, the learned counsel for the revision petitioner had raised two sets of contentions.

9.1 Dealing with the first set of contentions, it is to be noted that the said contentions relate to the order passed in IA.no.206 of 2002 whereby the earlier Arbitrator Sri T. Indrajee was appointed to do the work stated in the said orders. The said contentions of the revision petitioner are as follows: 'After passing of the award, the Arbitrator became functus officio. The orders making the Award the Rule of the Court have become final. There was no order originally in regard to the business conducted after the winding up. There was no claim made before the civil Court at any point of time. The respondent has not filed a memo either before the Court or the Arbitrator expressly reserving his right to have his present claim adjudicated at a future date. The respondent has no right to raise such a claim as no such right was ever reserved before the civil Court or the Arbitrator. As per the arbitral award the partnership firm was also ordered to be dissolved. In fact it is deemed that the firm is dissolved from the date the notice was issued by the revision petitioner for dissolution. Since no express leave is sought for adjudication of the further claims at a future date, it shall be deemed and treated that all or

any other claims are abandoned. Therefore, the appointment of the Arbitrator in IA.no.206 of 2002 for the purpose mentioned therein is impermissible. The claim is barred by limitation.’ Having so contended, the learned counsel drew the attention of this Court to the following observations of the Division Bench in the common order dated 25.03.2010 in CMA and the revisions filed by the revision petitioner:

“...When OP.no.2 of 1999 is filed under Section 17 of the Act, the Court has always power to remit the award under Section 16 of the Act where the award was left undetermined on any of the matters referred to in the arbitration. Since the Arbitrator has not decided winding up of partnership firm, and had held that the assets and liabilities of the firm can be decided at the time of winding up of the firm, and the award passed is only a preliminary decree determining the rights of the parties as the genuine partner is liable to be granted profits after dissolution, the lower Court rightly allowed IA.no.206 of 2002 “directing the Arbitrator” to proceed with the winding up of partnership firm and distribute the assets after ascertaining the assets and liabilities of the firm, which do not suffer from any illegality warranting interference this Court.

Accordingly, the Civil Miscellaneous Appeal and the Civil Revision Petitions are dismissed. The Arbitrator is “entitled to proceed” with the winding up proceedings and complete the same within the statutory period of four months prescribed under the Act, from the date of receipt of a copy of this order by passing an award for winding up. In the event the parties do not cooperate, it is always open for the Arbitrator to move the Senior Civil Judge for extension of time for completion of winding up proceedings. There shall be no order as to costs.”

9.2 Based on the above observations, it was further contended as follows: -

‘On a reading of the judgment of the Division Bench it would be clear that it is of the view that the learned trial Judge had remitted the award under Section 16 of the Act while allowing IA.no.206 of 2002 which is factually incorrect. In fact the learned trial Judge had treated the same (award) as a preliminary decree. The contention being projected by the respondent is that the award is a preliminary decree. The order of the Division Bench was also confirmed by the Supreme Court in SLP.no.21444 to 21446 of 2010. The order of the Division Bench was not modified by the Supreme Court. The award of the Arbitrator which culminated into a Rule of the Court was confirmed by the Supreme Court. The trial Court and the Division Bench are confused and had arrived at inconsistent conclusions; infact the trial Court treated the award as a preliminary decree; whereas the Division Bench arrived at a conclusion that it is remitting the matter to the Arbitrator under Section 16 of

the Act. Therefore, the order passed in IA.no.206 of 2002 either treating the award as a preliminary award or as an order remitting the award are contrary to law and facts besides being inconsistent.'

9.3 While answering the first set of contentions the learned counsel for the respondent would contend that the order passed in IA.no.206 of 2002 cannot be challenged in this revision filed assailing the orders in IA.no.857 of 2014.

He would also submit that since the order in IA.no.206 of 2002 was confirmed by a Division Bench of this Court, and as the common order of the Division Bench insofar as it related to confirming the order in IA.no.206 of 2002 was confirmed by the Supreme Court, the said order has become final and binding and, therefore, the appointment of the earlier Arbitrator-Sri T. Indrajee, to do the work as directed in the orders in IA.no.206 of 2002 cannot be challenged in this revision filed against an order whereby the earlier Arbitrator was replaced by the present Arbitrator by way of substitution. His precise contention is that the order in IA.no.206 of 2002 appointing Sri T. Indrajee is not under challenge in this revision. He points out that the order in IA.no.857 of 2014 whereby Sri T. Indrajee was replaced by the new Arbitrator by way of substitution is only under challenge in this revision and, therefore, any contentions of the revision petitioner assailing the order in IA.no.206 of 2002 are devoid of merit and need not be countenanced as the said orders in the said IA are already confirmed by the Supreme Court.

9.4 Having regard to the facts, the sequence of events and the first set of contentions and the rival contentions, it is to be noted that the orders in IA.no.206 of 2002 have become final on the dismissal of the SLPs aforementioned by the Supreme Court. While allowing IA.no.206 of 2002 by orders dated 09.06.2009 the earlier Arbitrator Sri T.Indrajee was directed by the learned Principal Senior Civil Judge by his orders to commence and do the work as sought for in that application. Since that order has become final, the revision petitioner is precluded from challenging the said order and this Court is not obligated to deal with the merits of the order in IA.no.206 of 2002 whereby the application under Section 37 of the Act stood allowed and the earlier Arbitrator was directed to take possession of the assets of the

dissolved firm and wind up the firm as per Section 48 of the Partnership Act.

The order in IA.no.206 of 2002 which has attained finality cannot be now reviewed or allowed to be challenged in this revision filed against the order in IA.no.857 of 2014.

9.5 Therefore, the scope of the present revision is limited to the validity or otherwise of the order in IA.no.857 of 2014 as the said order is only impugned in this revision. Hence, the first set of contentions of the revision petitioner either directly or incidentally challenging the order in IA.no.206 of 2002 need not be countenanced as the said contentions are devoid of merit and as admittedly the said orders have become final having been confirmed by the Supreme Court.

10. Now, it is necessary to deal with the second set of contentions.

10.1 Section 8 of the Act contemplates that if any appointed Arbitrator neglects or refuses to act, or is incapable of acting or dies and the vacancy is to be supplied and the parties do not supply the vacancy, then any party may serve the other party with a written notice to concur in supplying the vacancy and that on such procedure being followed and on the appointment being not made within 15 clear days after service of the said notice, the Court may on the application of the party who gave notice appoint an Arbitrator. The respondent without following the procedure under Section 8, namely, without giving a notice to concur in the appointment in supplying the vacancy had straight away filed an application for substitution of the relieved Arbitrator by a new Arbitrator. Had the respondent issued a notice as contemplated under Section 8 of the Act, the revision petitioner would have suggested the name of an Arbitrator of his choice. Since the respondent had failed to give the notice as contemplated, the petitioner has lost the opportunity of appointing an Arbitrator of his choice. Therefore, the revision petitioner has suffered substantial prejudice in view of the non compliance of the mandatory provision by the respondent. The respondent did not follow the mandatory provision under Section 8 with an oblique motive and to deprive the revision petitioner an opportunity to appoint his own Arbitrator. Having deprived the

petitioner of such opportunity, the respondent filed IA.no.857 of 2014 straight away praying to appoint new Arbitrator by way of substitution. The learned trial Judge by the order impugned appointed a new Arbitrator. When the earlier Arbitrator was relieved, the matter has reached a logical end and, therefore, the only course open to the respondent is to follow the procedure under Section 8 of the Act. He did not follow the mandatory procedure under the Act.

10.1.1 Per contra, the contentions of the learned counsel for the respondent are as follows:

The earlier Arbitrator was only directed by the Court below vide its orders in IA.no.206 of 2002 to take up the claim. The Court which had appointed the Arbitrator has the power to substitute the Arbitrator. When the earlier appointed Arbitrator had expressed his inability and requested the Court to relieve him, the Court had relieved him after hearing the parties. Therefore, the Court has effectively revoked his authority. The revision petitioner was also heard before revoking the authority of the earlier Arbitrator. From the facts it can be visualised that the respondent could have approached the trial Court stating that the Arbitrator is not proceeding with the matter or showing reasonable dispatch and could have sought for the leave for revoking the authority of the Arbitrator or for removal of the Arbitrator. In that event the Court would have done the same thing which it has done now while appointing a new Arbitrator by way of substitution. In the case on hand, the Arbitrator himself approached the Court and sought leave to relieve him of his duty; and, therefore, it does not make any difference. In view of the ratio in the decision in **Union of India v. Bahadur Singh [AIR 1963 Assam 195]** of the Assam High Court, revocation can be implied. The Court below while relieving the Arbitrator at his request did not appoint a new Arbitrator by way of substitution immediately or simultaneously. The Court below appointed a new Arbitrator only on the respondent filing the subject application under Section 8 of the Act. The mentioning of Section 8 does not change the character and the nature of the order if the Court otherwise had the power to pass such an order under Section 12. Therefore, it is to be taken as a case of

appointment under section 12 of the Act. As per the provision of Section 12 no notice before filing an application is necessary. Further, under Section 12 of the Act, the Court is always well within its power to appoint an Arbitrator after revoking by leave under Section 5 or removal under Section 11. The contention of the respondent finds support from the decision in **Banamali Charan Mohanty v. Kamaladebi Saha and others [AIR 1984 Orissa 218]**. Therefore, the provision applicable to the case is Section 12 and not Section 8.

10.1.2 In view of the contentions of the parties, it is necessary to refer to the arbitration agreement in the deed of partnership between the parties and Sections 5, 8, 11 and 12 of the Act, which read as under.

Arbitration agreement/clause:

“Any dispute arising during the course of the business of the firm shall be settled in accordance with principles laid down in Arbitration Act, 1940.”

Section 5: Authority of appointed Arbitrator or umpire irrevocable except by leave of Court: - The authority of an appointed Arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

Section 8: Power of Court to appoint Arbitrator or umpire: - (1) In any of the following cases: -

(a) Where an arbitration agreement provides that the reference shall be to one or more Arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed Arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the Arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the Arbitrators are required to appoint an umpire and do not appoint him;

Any party may serve the other parties or the Arbitrators, as the case may be, with a written notice to concur in the appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the

party who gave the notice and after giving the other parties an opportunity of being heard, appoint an Arbitrator or Arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

Section 11: Power to Court to remove Arbitrators or umpire in certain circumstances: (1) The Court may, on the application of any party to a reference, remove an Arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an Arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an Arbitrator or the umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

Section 12: Power of Court where Arbitrator is removed or his authority revoked: - (1) Where the Court removes an umpire who has not entered on the reference or one or more Arbitrators (not being all the Arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) where the authority of an Arbitrator or Arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole Arbitrator or all the Arbitrators, the Court may, on the application of any party to the arbitration agreement, either –

(a) appoint a person to act as sole Arbitrator in the or place of the person on persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an Arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

10.1.3 I have gone through the enactment and the above provisions of law, in particular. Now the first, short but important, question is as to whether Section 8 applies or Section 12 applies to the facts of the case.

10.1.4 Initially, the Arbitrator was appointed by a civil Court. He had passed an award. Subsequently, the civil Court by orders in IA.no.206 of 2002 directed him to take up the work as directed in its orders. The said orders have become final after confirmation by the Supreme Court. The said

Arbitrator got himself relieved with the permission of the Court. Therefore, the need for appointment of another Arbitrator in the place of the relieved Arbitrator by way of substitution had arisen. It is to be noted that as per the provision of Section 8, if any appointed Arbitrator neglects or refuses to act, or is incapable of acting, or dies, and the vacancy is to be supplied and the parties do not supply, any party may serve the other party with a written notice to concur in supplying the vacancy and that if appointment is not made within 15 clear days of service of the said notice, the party serving notice may apply to the Court to supply the vacancy and the Court on hearing the parties appoint an Arbitrator and such Arbitrator appointed by the Court shall have the powers to act in the reference and to make an award as if he has been appointed by consent of the parties.

10.1.5 Per contra, under Section 12 of the Act, where the Court removed an Arbitrator, the Court may on application of any party to the arbitration agreement, appoint an Arbitrator to supply the vacancy. Under sub-section (2) of Section 12, where the authority of an Arbitrator is revoked by leave of the Court, the Court may on the application of any party to the arbitration agreement appoint a person to act as an Arbitrator in the place of the person displaced. Such Arbitrator appointed by the Court under this Section also shall have the powers to act in the reference and to make an award as if he has been appointed by consent of the parties. If Section 12 is applicable, there is no statutory requirement of a notice.

10.1.6 In the case on hand, it cannot be said that the Arbitrator had neglected or refused to act or is incapable of acting; therefore, it follows that the vacancy did not arise on the above said counts. The vacancy arose on the Arbitrator voluntarily getting himself relieved with the permission of the Court on the grounds of advanced age and ill health. If he wanted to continue, he would have continued. At his request, the Court relieved the Arbitrator and his authority was thus revoked by leave which he had sought from the Court. Viewed thus, this Court finds that the provision of Section 8 is not attracted to the case on hand and that, therefore, the application directly filed before the trial Court for supplying the vacancy without notice to the

revision petitioner as contemplated under Section 8 is perfectly valid and is maintainable. In view of this finding that Section 12 is applicable, it follows that the contentions of the revision petitioner based on the provisions of Section 8 do not advance his case any further. Be it noted that though Section 8 of the Act was mentioned in the interlocutory application filed by the respondent, the law is well settled that mere mentioning of wrong provision of law is not the determinative factor and the question as to which provision would be applicable depends upon the facts of the case. It is also well settled that even if a party mentions an incorrect provision of law, the Court can apply the correct provision and grant the relief if the facts of the case warrant granting of such a relief.

10.1.7 Now that this Court held that Section 8 is inapplicable to the facts of the present case, it is relevant to note that the learned counsel for the revision petitioner had also contended that neither the Arbitrator was removed nor his authority was revoked by leave of the Court and that the Arbitrator was relieved at his request and that, therefore, the provision of Section 12 is inapplicable. Be it noted that when once an Arbitrator was appointed by the orders of the Court, he cannot, without the permission of the Court, claim that he is relieved. Unless the Court grants permission and relieves him and revokes his authority, a vacancy does not arise. In the case on hand, while relieving the Arbitrator at his request, the Court granted permission to him to be relieved and directed him to return the records and thus, it is obvious that his authority is revoked by the Court though at his request. Admittedly, on the relief granted to him, a vacancy had arisen. Therefore, in the well considered view of this Court, there is revocation of the authority of the Arbitrator earlier appointed, though not on the application of the parties, but, at his request.

10.1.8 The learned counsel for the revision petitioner would contend that in view of the language employed in Section 12 of the Act and as the Arbitrator was relieved at his request and that as his authority was not revoked on a leave granted to a party on an application filed by that party, Section 12 of the Act has no application to the facts of the case. If this

contention that Section 12 is also not applicable is to be accepted and if it is to be assumed that Section 12 is not applicable, then it appears that there is no other Section of law under the Act, which can be applied to the facts of the case for supplying the vacancy that had arisen on relieving the Arbitrator at his request. In the well considered view of this Court, the Court appointing an Arbitrator has the inherent power to revoke the authority of the appointed Arbitrator and supply the consequential vacancy, by substitution, even in the absence of a specific provision applicable to the fact situation. This power inheres in the Court as an inherent power. The powers to supersede arbitration also inhere in the Court. When both the Sections 8 and 12 do not apply and when there is no other Section of law applicable to the facts of the case, then as a sequel it must be held that the appointment of the new Arbitrator in the place of the earlier Arbitrator by way of substitution can be done under the inherent powers of the Court, which inhere in the Court. The law is well settled that the power to do an act carries with it the power to do the further act. Therefore, the power to revoke the authority carries with it the power to appoint a new Arbitrator in the place of the Arbitrator, whose authority was revoked. Therefore, this Court holds that in the absence of a specific provision also, the Court, which had revoked the authority of the appointed Arbitrator at his request, has the power to supply the consequential vacancy, by way of substitution. Judged from this angle also, the substitution of the Arbitrator appears to be justified.

10.1.9 In view of the fact that this Court held supra that Section 8 is inapplicable, it must be held as a sequel, that no notice as contemplated under Section 8 need be issued. Therefore, the application filed by the respondent for appointment of a new Arbitrator in the place of the relieved Arbitrator by way of substitution is quite maintainable. Viewed thus, this Court finds that the revision is devoid of merit and is liable to be dismissed.

10.1.10 Be that as it may, since a contention is raised that Section 8 is applicable and that the notice contemplated under Section 8 is mandatory and that the order impugned is not valid for not following the mandatory procedure in regard to notice under Section 8 by the respondent before filing

the application for appointment of a new Arbitrator in the place of the relieved Arbitrator by way of substitution, it is necessary to examine the said contentions by proceeding on the assumption that Section 8 is applicable. In the considered view of this Court, it is necessary to examine the said aspect also, in order to give a quietus to the controversy once and for all at this stage. Therefore, now it is to be examined as to whether the notice contemplated under Section 8 is mandatory or directory in nature. It is to be next examined as to whether such a notice can be waived. It is also to be examined as to whether in the facts and circumstances of the case, it is possible to hold that the revision petitioner by his conduct, direct or implied or otherwise, had waived the requirement of such notice. As already noted, the language employed in the relevant portion of the Section is as follows: 'any party may serve the other party with a written notice to concur in the appointment or in supplying the vacancy'. Going by the language employed in the provision, it appears *ex facie* that the provision in regard to service of written notice is directory in nature. However, it is apt to refer to the ratios in the decisions relied upon by the learned counsel for the revision petitioner.

In the decision in **Milkfood Pvt. Ltd., v. GMC Ice cream Pvt.Ltd.**^[1] the Supreme Court held as follows:

There is no merit in this contention. Section relates to the power of a civil Court to appoint an Arbitrator or umpire. With reference to the facts of this case the power under Section 8 of the Act can be exercised only if the following conditions mentioned in the section are fulfilled:

- (i) the parties did not concur in the appointments of Arbitrators, when differences arose;**
- (ii) one of the parties to the arbitration agreement served on the other party a written notice nominating its Arbitrator and calling upon the other party to make its nomination;**
- (iii) the other party did not appoint its Arbitrator within 15 clear days after the service of such notice; and**
- (iv) an application was made by the party who gave the notice under Section 8 of the Act for appointment of the Arbitrator.**

The order dated 6.5.1997 of the Patna High Court cannot be considered to be an order under Section 8 of the Act, as neither an application was filed under Section 8 of the Act nor the conditions for making an application under Section 8 of the Act existed in this case.

The decision in **M/s.Prabhat General agencies etc., v. Union of**

India.^[2] is relied upon in support of the proposition that Section 8 deals with substantive rights of the parties. In this decision it is held as follows:

The substantive rights of the parties are found in Section 8(1)(b). Before Section 8(1)(b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an Arbitrator or Arbitrators or umpire to resolve their dispute; (3) anyone or more of those Arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the Arbitrators as the case may be had not supplied the vacancy.

In the decision in **M/s. Harbans Singh Tuli and Sons v. Union of India**^[3] it was held that sub-section (1), clause (b) of Section 8 covers cases where vacancy has arisen during the pendency of arbitration in any of the following contingencies: (i) Death; (ii) incapacity; (iii) refusal; (iv) neglect to act; and that two other following conditions are required to be satisfied: (i) the arbitration agreement did not indicate the vacancy was not intended to be filled up; and (ii) the parties could not concur in the choice.

In **S. Krishna Reddy v. Government of AP**^[4] the facts show that the Government of AP filed an application under Sections 8 to 12 of the Act seeking filling up of the vacancy caused due to retirement of an Arbitrator. This Court having held that it is clear from the provision of Section 8 that when the Arbitrator fails to act or neglects to enter the reference, either of the parties has to give fifteen days notice and unless the requirement of the said notice is satisfied, the aggrieved party is not at liberty to move an application before the competent Court to supply the vacancy and that entertaining of such application for supplying the vacancy without examining whether the Government had complied with the requirement under Section 8 of the Act is not proper.

In **Gowthami Solvent Oils Limited, Tanuku v. Oil and Natural Gas Commissioner**^[5] a Division Bench of this Court having referred to Section 8 and other provisions of the Act had held that Section 8 would only apply in the first instance in case the appointed Arbitrator refuses or neglects to act or

incapable of acting or dies and secondly when the arbitration agreement does not show that the vacancy should not be supplied and the parties or the Arbitrator/s as the case may be do not supply the vacancy and that in those conditions the party can serve the other party a written notice to agree for the appointment or in supplying the vacancy. On facts of that case, it was also held that the cited case is not at all a case under Section 8 of the Act before the trial Court.

In **State of A.P. v. V. Krishnaiah Naidu**^[6] also the ingredients of Section 8 are highlighted.

In **Niranjan Swain v. State of Orissa**^[7] it was held as follows:

From the very nature of the provision in Section 8, it must follow that the party who gave notice for appointment of Arbitrator has to be communicated, in case an appointment is made, with due haste that the notice has been complied with; otherwise he would be justified in taking action under Sub-section (2) of Section 8 of the Act. It would, therefore, follow that the notice under Section 8 (1) if complied with has to be communicated with utmost expedition to the notice-giver. If the appointment was not made within the time indicated by law, the petitioner is well within his rights to ask the Court to make the appointment of an Arbitrator and the Chief Engineer would have no jurisdiction to make an appointment and take away the jurisdiction of the Court under Section 8(2) of the Act.

Placing reliance on this decision, it is contended that the applicant would be well within his rights to move the Court under Section 8(2) of the Act for appointment of an Arbitrator and the Court assumes jurisdiction to appoint another Arbitrator on the petition of the applicant if only the opposite party does not appoint an Arbitrator within the statutory period after service of notice.

The decisions in **Chelikani Venkatarao v. C.V. Rao**^[8]; **Walter Bau Ag. Legal Successor of the Original Contractor, Dyckerhoff & Widmam A.G v, Municipal Corporation of Greater Mumbai and another**^[9]; and **Huawei Technologies Company Limited v. Sterlite Technologies Ltd.**^[10]; **ABLE Associates Secunderabad v. K.S. Ramakrishna Rao**^[11];

Thermax Limited v. Arasmeta Captive Power Co.Pvt.Ltd.,^[12] are relied upon to point out the distinction between Section 8 and 11 of the Act and to emphasise that Section 8 envisages cases where the proceedings are pending before the Arbitrator and the Arbitrator dies or incapacitated or refuses to act or neglects to act.

Placing reliance on the above decisions, it is contended that the compliance of the requirement of issuance of notice contemplated under Section 8 before filing an application for supplying the vacancy of an Arbitrator created during the pendency of arbitration is mandatory.

10.1.11 However, the learned counsel for the respondent would contend that the word used in the provision is 'may' and that, therefore, from the plain language of the Section, it is clear that the provision in regard to issuance of notice is not mandatory. He would further contend that the case on hand is not a case in which the Arbitrator had died and that in the case on hand, by the time the application is moved for appointment of a new Arbitrator, the matter is not pending before the Arbitrator and the Arbitrator was relieved at his request but not on the application of a party for leave to revoke the authority of the Arbitrator on the grounds mentioned in Section 8 namely neglect or refusal or incapacity on the part of the Arbitrator. He would also submit that the application is filed only after the Arbitrator is relieved at his request and after his authority was revoked and that, therefore, having regard to the facts of the case, even if Section 8 is applied, the requirement of notice is not mandatory.

10.1.12 Be it noted that the learned counsel for the revision petitioner placed reliance on the following decisions viz (i) **Bachahan Devi and another v. Nagar Nigam, Gorakhpur and another**^[13]; (ii) **Sarala Goel v. Kishan Chand**^[14] in support of the contention that though in a provision of law the word employed is 'may', it shall be construed as 'shall' and that the word 'may' employed is not decisive and that depending upon the facts and circumstances of the case, the Court has to find out whether the provision is

directory or mandatory and that the said power is unimpaired. There is no dispute with this proposition. In **Govindlal Chagganlal Patel v. The Agricultural Produce Market Committee, Godhra and Ors.** [(1976)1SCR451] Hon'ble Sri Chandrachud, C.J. (as His Lordship then was) speaking for the Supreme Court approved the following passage in Crawford on 'Statutory Construction' (Ed. 1940 Article 261, p. 516):

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other.

10.1.13 Without further dilating on the point and accepting for a moment that the requirement of notice under Section 8 of the Act is mandatory, it is to be next examined as to such mandatory requirement of notice can be waived. The learned counsel for the revision petitioner relied upon cases showing instances wherein it was held that a mandatory requirement cannot be waived. *Per contra*, the learned counsel for the respondent relied upon decisions wherein it was held that a mandatory requirement can be waived.

10.1.14 In **General Manager, Sri Siddeshwara Cooperative bank Limited and Anr. v. Ikbai and Ors.** [[MANU/SC/0856/2013](#)] the Supreme Court had held as follows:

There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made.

Therefore, from the ratio in the recent decision, which squarely applies, it is clear that even if a provision is mandatory, it can always be waived by a party for whose benefit such provision has been made. The provision in question is not intended for public benefit and no public interest is involved in the

matter to say that the mandatory provision cannot be waived. While recapitulating that this Court is proceeding on the assumption that Section 8 of the Act is mandatory and that this Court had come to the conclusion that the mandatory requirement of notice can be waived by the party for whose benefit it has been made, it is to be noted that Section 8 can be invoked in a pending arbitration. In the case on hand, the vacancy did not arise on the death of the Arbitrator. Further, the authority of the Arbitrator was not revoked on any of the parties seeking leave by an application on the grounds that the Arbitrator neglected or refused to act or was incapacitated. The Arbitrator was relieved by the Court below at the request of the Arbitrator. An order relieving the earlier Arbitrator was passed on 18.01.2014 after hearing both the parties. Long time thereafter i.e., on 04.04.2014 the respondent filed an application in IA.no.857 of 2014 to appoint a new Arbitrator and supply the vacancy created by the Court orders relieving the earlier Arbitrator at his request and revoking his authority. It is now to be examined incidentally as to whether an opportunity to supply the vacancy which was available to the revision petitioner is lost in this case on account of the respondent not admittedly giving the notice to concur in the appointment or in supplying the vacancy. From the time the Arbitrator was relieved and till the application is filed by the respondent for supplying the vacancy, both the parties had an opportunity to give a notice to concur in the appointment or in supplying the vacancy. Either of the parties did not avail the opportunity to issue a notice as contemplated under Section 8. The revision petitioner filed a counter resisting the application filed by the respondent. He did not raise the objection that the requirement of notice under Section 8 is not complied with. Even after that application was filed, he had an opportunity to supply the vacancy till the application is allowed. Had he requested the Court to give an opportunity to supply the vacancy by following the procedure under Section 8, the Court would have granted such an opportunity and by concurrence of the parties, the vacancy could have been supplied. He did not do so. Therefore, on merits, the Court below had allowed the application of the respondent on 21.01.2015 and appointed a new Arbitrator by way of substitution. Therefore, the opportunity to appoint an Arbitrator to supply the

vacancy is not lost to the petitioner on the respondent not issuing a notice as contemplated under law before filing the application for appointing a new Arbitrator in the place of the relieved Arbitrator and supplying the vacancy by way of substitution. Hence, for non issuance of the notice by the respondent as required under Section 8, no prejudice has been caused to the revision petitioner. Despite the non issuance of notice by the respondent, there was an opportunity to the revision petitioner as well, to issue a notice to concur in supplying the vacancy or in supplying the vacancy. Further, such an opportunity was available to the revision petitioner till the application filed by the respondent was allowed by the trial Court. As the revision petitioner did not take steps to supply the vacancy and had allowed the Court to pass orders appointing an Arbitrator by way of substitution, this Court is satisfied that the requirement of notice can be held to have been waived. Further, this contention in regard to requirement of notice not having been taken in the counter filed before the trial Court and also in the grounds urged before this Court, it follows that the said requirement of notice has been waived.

10.1.15 Be it noted that an Arbitrator was appointed and his appointment was confirmed by this Court and also by the Supreme Court. After his relief at his request and after his authority was revoked, either of the parties had not issued a notice for supplying the vacancy by concurrence. On the failure of the parties to supply the vacancy, one of the parties viz., the respondent had filed an application before the trial Court to supply the vacancy. The trial Court after giving an opportunity to the opposite party viz., the revision petitioner to file a counter and after hearing both the parties had supplied the vacancy by appointing a new Arbitrator by way of substitution. After the new Arbitrator had entered appearance, this revision petition is filed. Going by the purposive rule of interpretation and the facts of the case by which it is possible to hold that the requirement of notice under Section 8 even if it is applicable is waived, this Court is of the considered view that the order of substitution deserves to be upheld.

10.1.16 To sum up, Section 8 is not applicable to the facts of the case.

Even assuming that Section 12 which was sought to be relied upon by the respondent is also not applicable, still the order impugned is sustainable in view of the finding of this Court that in the absence of any statutory provision, the power to appoint a new Arbitrator in the place of the relieved Arbitrator by way of substitution inheres in the Court. Further, even assuming that Section 8 is applicable and that the provision therein in regard to requirement of notice is mandatory, the said aspect is not going to advance the case of the revision petitioner in view of the findings of this Court that the said mandatory requirement can be waived and that the revision petitioner by his conduct had waived the requirement of the said notice and that by non issuance of such notice by the respondent, no prejudice has been shown to have been caused to the revision petitioner. Viewed thus, this Court finds that the revision petition is devoid of merit and that the revision is liable for dismissal.

11. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed.

M. SEETHARAMA MURTI, J

01st June 2016
Vjl

[1] (2011)12 SCC 573
[2] AIR 1971 SC 2298
[3] AIR 1992 SC 1124
[4] AIR 1994 AP 292
[5] 2004 (6) ALD 659 (DB)
[6] 1989 (1) ALT 680
[7] AIR 1980 Orissa 142
[8] AIR 1958 AP 740
[9] 2015 (6) ALT 28 (SC)

[\[10\]](#) (2016) 1 SCC 721

[\[11\]](#) 2007(5) ALT 317

[\[12\]](#) 2008(1) ALT 788

[\[13\]](#) 2008(2) SCJ 203

[\[14\]](#) (2009) 7 SCC 658