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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P.(T) 4/2017**

MITHLESH KUMAR AGGARWAL Petitioner
Through Mr R.K. Saini and Ms Minal Sehgal,
Advocates.

versus

ATHENA INFRASTRUCTURE LTD. Respondent
Through Mr Sachin Datta, Senior Advocate with
Mr Pallav Pandey, Advocate with Mr Manmohan
Singh, AR,

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

23.03.2017

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VIBHU BAKHRU,J

IA No. 3669/2017

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

O.M.P.(T) 4/2017 & IA No.3670/2017 (stay)

3. This is a petition filed under Section 15 (2) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for appointment of an arbitrator in place of Justice S.K. Mahajan (Retired) who has since expired on 23.09.2016.

4. Justice S.K. Mahajan (Retired) was appointed by this Court by an order dated 30.04.2014 in the arbitration petition (ARB. P. No. 137/2014)

filed by the petitioner under Section 11 of the Act. The learned counsel for the parties state that the pleadings before the arbitrator have been completed and evidence is yet to be recorded.

5. Mr Datta, learned Senior Counsel appearing for the respondent does not dispute that an arbitrator is to be appointed in place of late Justice S.K. Mahajan (Retired). He, however, submits that as per the agreement, the respondent must be given an opportunity to re-appoint an arbitrator in place of late Justice S.K. Mahajan. This Court is unable to accede to the aforesaid submission principally for the reason that late Justice S.K. Mahajan (Retired) was appointed by this Court in a petition under Section 11 of the Act, since the respondent had forfeited its right to appoint an arbitrator.

6. The Supreme Court in **Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Anr.**: (2006) 6 SCC 204 had interpreted Section 15(2) of the Act liberally and had explained that the provision applicable for appointment of the substitute arbitrator would be the same as "*at the initial stage*". Thus, the expression "*rules*" in Section 15(2) of the Act, was read to imply that the same procedure which was applicable for appointment of an arbitrator, who is sought to be substituted, would be applicable for appointment of the substitute arbitrator.

7. In **The Chhotanagpur Regional Handloom v. Association of Corporation and Apex**: **Manu/DE/2600/2008**, a Coordinate Bench of this Court while considering the applicability of the provisions of Section 15(2) of the Act in context of the petition filed under Section 14 of the Act, rejected the contention that after the mandate of the arbitral tribunal was

declared as terminated under Section 14 of the Act, the parties were to be relegated to start the process under the original agreement and this Court ought not to proceed to appoint a substitute arbitrator. The Court referred to the decision of the Supreme Court in *Yashwith Constructions* (*supra*) and held that Section 15(2) of the Act has to be viewed as a part of a broader effort to strengthen the alternative dispute resolution mechanism rather than undermine it. Relegating the parties to commence the process once again may lead to confusion and may in certain circumstances compel one of the parties to again approach the Court under Section 11(6) of the Act which could not be the legislative intent. The Court held that Section 15(2) required the Court to appoint an arbitrator as a logical sequitur to Section 14 of the Act.

8. In *Ramjee Power Construction Ltd. v. Damodar Valley Corporation*: (2009) 2 Arb LR 625, the Calcutta High Court considered the decision of the Supreme Court in *Yashwith Construction* (*supra*) and observed as under:-

"As observed above, the expression "rules that were applicable to the appointment of the arbitrator being replaced" in section 15, have carefully been chosen. If the arbitrator being replaced was appointed by the Chief Justice and/or his designate in accordance with section 11 of the 1996 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."

9. The Calcutta High Court following the decision of the Supreme Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.*: (2002) 8 SCC 151, held that once an application under Section 11 was made, the right of

either party to appoint an arbitrator stood extinguished. In view of the aforesaid, the Court reasoned that if the arbitrator is appointed in accordance with Section 11 of the Act, the substitute arbitrator would also have to be appointed in the same manner. This Court respectfully concurs with the aforesaid view.

10. In the circumstances, Justice Nisar Ahmad Kakru, (Retired), former Chief Justice of the Andhra Pradesh High Court (Mobile No. +91 7382603046 and +91 9419000938) is appointed as the sole arbitrator to adjudicate the disputes between the parties. The arbitrator shall proceed from the same stage as left by late Justice S.K. Mahajan (Retired). This is subject to the arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act.

11. The petition and the pending application are disposed of.

MARCH 23, 2017
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VIBHU BAKHRU, J