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

Reserved on: 24th June, 2020
Pronounced on: 29th June, 2020

+ ARB.P. 203/2020 & I.A. 4156/2020

DSC VENTURES PVT LTD. ... Petitioner
Through: Mr. Amit Sibal, Sr. Adv. with
Mr. Tejas Anand, Adv.

versus

MINISTRY OF ROAD TRANSPORT
AND HIGHWAYS, UOI ... Respondent
Through: Ms. Aakanksha Kaul and
Mr. Manek Singh Adv.

CORAM
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G E M E N T

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29.06.2020

1. A limited issue – though not free from complexity – arises for consideration in the present petition, preferred by the petitioner, M/s DSC Ventures Pvt Ltd, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”).

2. The petitioner and respondent entered into a Concession Agreement, dated 8th May, 2003, whereunder the respondent was to convert an existing 2-lane highway, (NH-6) in the Raipur-Durg stretch in the state of Chhattisgarh, into a 4-lane highway. Disputes arose. Clause 19.2 (a) of the Concession Agreement provided for reference

of disputes to a three member arbitral tribunal, if efforts at resolution, by amicable settlement, were to fail. The Clause reads thus:

“19.2 Arbitration:

(a) Arbitrators:

Any Dispute that is not solved amicably as provided in Article 19.1 (a) shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. A Party requiring arbitration shall appoint an arbitrator in writing, informs the other Party about such appointment and call upon the other Party the other to appoint its arbitrator. If the other Party fails to appoint its arbitrator, the Party appointing arbitrator shall take steps in accordance with Arbitration and Conciliation Act 1996.”

3. Attempts, at amicable settlement of the disputes between the petitioner and respondent, failed. On 23rd March, 2007, the petitioner appointed its nominee arbitrator and, on 18th April, 2007, the respondent did likewise. The disputes were, somehow, referred, even thereafter, to the Steering Group of the respondent, for exploring settlement, but the effort resulted in failure, as reported by the Steering Group on 3rd May, 2010. The petitioner, thereupon, appointed Mr. B.P. Bhattacharya, as its arbitrator, on 18th May, 2010, and the respondent, likewise, appointed Mr. S.C. Sharma as its arbitrator on 22nd April, 2014. The two arbitrators appointed Mr. G. Sharan as the presiding arbitrator on 30th May, 2014. The learned arbitral tribunal, in terms of Clause 19.2 (a) of the Concession

Agreement, thus, stood constituted.

4. The learned arbitral tribunal, so constituted, commenced hearing on 30th June, 2014. Statement of claim was filed, by the petitioner, before the learned arbitral tribunal on 25th August, 2014, statement of defence was filed, by the respondent, on 14th January, 2015 and rejoinder was filed, by the petitioner, on 3rd June, 2015. Thereafter, the petitioner filed an amended statement of claim on 10th March, 2016, in response to which an amended statement of defence was filed, by the respondent, on 25th July, 2016 and an amended rejoinder was filed, by the petitioner, on 27th October, 2016. Recording of evidence commenced, thereafter. Examination, and cross-examination of the petitioner's witnesses, as well as examination of the respondent's witnesses, was concluded.

5. While the cross-examination of the respondent's witnesses was in progress, Mr B.P. Bhattacharya, the petitioner's arbitrator, resigned, on 23rd January, 2018, citing health reasons. The petitioner, thereupon, appointed N.K. Mody, J, a retired Judge of the High Court of Madhya Pradesh, as its substitute nominee arbitrator. The petitioner and respondent agreed, between themselves, that the proceedings could continue, from the stage at which they were, when Mr. B.P. Bhattacharya resigned on 23rd January, 2018.

6. Cross examination of the respondent's witnesses continued, and was concluded on 2nd April, 2018. Thereafter, the learned arbitral tribunal heard arguments, of both the parties, which were concluded on 12th April, 2019. The petitioner and respondent were directed to

file written submissions, setting out their respective points of argument, and award was reserved, by the learned arbitral tribunal on 31st July, 2019.

7. On 24th February, 2020, before the award was announced, unfortunately, Mr. S.C. Sharma, the learned arbitrator appointed by the respondent, expired. From this unfortunate occurrence, emanates the present dispute.

8. On 2nd March, 2020, the two learned surviving arbitrators, Mr. G. Sharan and Justice N.K. Mody, held an internal meeting and directed the respondent to appoint its nominee arbitrator, as per Section 15 of the 1996 Act, forthwith. The minutes of the said meeting read thus:

“1. It has come to the notice that Mr. S.C. Sharma, Nominee Arbitrator of the Respondent has passed away on 24.02.2020.

2. The record reveals that the arguments of the parties were completed on 31.07.2019 and written submissions were also filed by both the parties on that day. Thereafter an internal meeting of the arbitrators took place on 27.08.2019. On this date, it was unanimously decided that on what terms the award has to be prepared and published.

3. The award was under preparation but unfortunately Mr. S. C. Sharma, Nominee Arbitrator of the Respondent has passed away on 24.02.2020.

4. In the circumstances, the Respondent is directed to appoint the nominee arbitrator as per section 15 of the Arbitration and Conciliation Act under intimation to all concerned. It will not be out of place to mention that the matter is pending since last long and is at the stage of publishing of the Award, therefore it is expected from the

Respondent to do the needful forthwith.”

9. On the ground that, reading Section 15 (2), along with Section 11 (4) of the 1996 Act, the time of thirty days, as available with the respondent, for appointing a substitute arbitrator in place of Mr. S.C. Sharma, had expired, the petitioner has moved the present petition, under Section 11 (6) of the 1996 Act, praying that this Court should appoint a substitute arbitrator, in place of Mr. S.C. Sharma.

Relevant Statutory Provisions

10. The relevant sub- sections of Sections 11, 14 and 15 of the 1996 Act may be reproduced, thus:

Sub-sections (2) to (6) of Section 11

“(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and –

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, on an application of the party, by the Supreme Court or, as the case may be, the High Court

or any person or institution designated by such Court;

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties, –

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

Sections 14 and 15

14. Failure or impossibility to act –

- (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if –
 - (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
 - (b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator. –

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) 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.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

11. During the pendency of these proceedings, on 8th June, 2020,

the respondent appointed Mr. Manoj Kumar, retired Director General (Road Development), Ministry of Road Transport and Highways, as its substitute arbitrator, in place of Mr. S.C. Sharma.

Rival Contentions

12. Mr. Amit Sibal, learned Senior Counsel for the petitioner would seek to contend that the appointment of Mr. Manoj Kumar, on 8th June, 2020, is totally illegal. Ms. Kaul, on the other hand, would submit that the petition was, in the first instance, premature, and that, with the appointment of Mr. Manoj Kumar, nothing survives for adjudication.

13. It is obvious, at first glance, that the appointment of the substitute arbitrator, by the respondent in the present case, consequent to the unfortunate demise of Mr. S.C. Sharma, is relatable to Section 15 (2) of the 1996 Act. Section 14 (1)(a) ordains that, on an arbitrator becoming *de jure* or *de facto* unable to perform his functions, his mandate shall terminate. Section 15 (2) provides that, where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed *according to the rules applicable to the appointment of the arbitrator being replaced*.

14. Consequent on his unfortunate demise, Mr. S.C. Sharma became, *de facto*, unable to perform his functions as arbitrator. Section 15 (2) of the 1996 Act, therefore, became applicable, and the respondent was, under the said provision, required to appoint a substitute arbitrator. To this extent, learned counsel are *ad idem*.

15. Significantly, Section 15 (2) does not, either expressly or by necessary implication, make the provisions of Section 11, of the 1996 Act, applicable to the appointment of a substitute arbitrator, in place of the arbitrator who has become unable to perform his functions. The only provision, relating to appointment of arbitrators, which stipulates any time period therefor, in the 1996 Act, is Section 11 (4). Section 11 (4), in its express terms, does not, however, apply to the present case, for two reasons; firstly, because the provision relates to the initial appointment of arbitrators, and not to the appointment of a substitute arbitrator and, secondly, because no request, to appoint a substitute arbitrator, was ever made, by the petitioner to the respondent. Section 11 (4), expressly, applies only to situations in which the appointment procedure in Section 11 (3) is applicable. Section 11 (3), in turn, applies to situations in which there is no agreement, relating to the procedure for appointing arbitrators, between the parties, and the arbitration is to be conducted by three arbitrators. Sub-sections (2), (3) and (4) of Section 11, seen together, ordain that

- (i) the parties are free to agree on a procedure for appointing the arbitrator, or arbitrators,
- (ii) failing any such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators, so appointed, shall appoint a presiding arbitrator and
- (iii) if such a procedure applies, and
 - (a) either party fails to appoint its arbitrator, within thirty days from the receipt of a request, to do so, from the other party, or

(b) the two arbitrators, appointed by the parties, fail to agree on a presiding arbitrator within thirty days of their appointment,
the High Court would appoint the arbitrator, on application by either party.

In the present case, the initial appointment of arbitrators took place in 2014, in accordance with Clause 19.2 (a) of the Concession Agreement, with the petitioner appointing its arbitrator on 18th May, 2010, the respondent appointing its arbitrator on 22nd April, 2014 and the two learned arbitrators appointing the learned presiding arbitrator on 30th May, 2014. No further occasion, for application of Section 11 (2), (3) or (4), of the 1996 Act, therefore, remains.

16. Mr. Amit Sibal, learned Senior Counsel for the petitioner, acknowledged, at the very outset of his submissions, that Section 11 (4) of the 1996 Act, did not apply in the present case. He, rather, pitches his case on Section 11 (6), and seeks to read the said provision in conjunction with Section 15 (2), by, in a way of speaking, dovetailing the former provision into the latter.

17. The precise submission of Mr. Sibal may be formulated thus: By reason of his demise, Mr. S.C. Sharma became *de facto* unable to perform his functions as arbitrator, within the meaning of Section 14 (1)(a). His mandate, therefore, stood terminated, under Section 14 (1). Section 15 (2), therefore, applied, and required a substitute arbitrator to be appointed “according to the rules that were applicable to the appointment of the arbitrator being replaced”, i.e. to the appointment

of Mr. S.C. Sharma. The reference to “rules”, in Section 15 (2) was intended to make the arbitral procedure, stipulated in the agreement between the parties (the Concession Agreement), applicable, *mutatis mutandis*, to the appointment of the substitute arbitrator. The words “shall be substituted by another arbitrator”, as employed in Section 14 (1) indicate, unequivocally, that substitution, of the arbitrator who has become unable to perform his functions, by a substitute arbitrator, has to follow, immediately on the fact of the inability of the arbitrator becoming known to the party. Clause 19.2 (a) of the Concession Agreement made the provisions of the 1996 Act applicable to the appointment of arbitrators, thereunder. When, therefore, the respondent was made aware, by the order dated 2nd March, 2020, of the two learned surviving arbitrators, of the demise of Mr. S.C. Sharma, and was directed to appoint a substitute arbitrator, it was required to do so immediately and, in any case, with all due promptitude. Section 11 (6) would directly apply, in such a case, as it stipulates that, where, under the appointment procedure, for arbitrators, or agreed upon between the parties, a party fails to act as required under such procedure, the appointment of the substitute arbitrator would be made by this Court. Though no time period, within which the arbitrator is required to be appointed, finds place in Section 11 (6), the law declared by the Supreme Court in *Datar Switchgears Ltd v. Tata Finance Ltd*¹, *Punj Lloyd Ltd v. Petronet MHB Ltd*², *U.O.I. v. Bharat Battery Manufacturing Co. (P) Ltd*³ and by this Court in *Zion Promoters & Developers Pvt Ltd v. Ferrous*

¹ (2000) 8 SCC 151

² (2006) 2 SCC 638

³ (2007) 7 SCC 684

*Infrastructure Pvt Ltd*⁴ made it clear that the party, who was required to appoint the substitute arbitrator, had to do so within thirty days from the date on which it was made aware of the necessity of doing so and, in any case, had to do so before the other party approached this Court, under Section 11 (6), for appointment of the substitute arbitrator. Once the opposite party approached this Court, Mr. Sibal would seek to submit that the right, of the party, the mandate of whose arbitrator has expired, to appoint a substitute arbitrator, stood extinguished. Mr. Sibal also places reliance on *A. C. C. Ltd v. Global Cement Ltd*⁵ which, according to him, clarifies that Section 11 (6) also applies to the appointment of a substitute arbitrator under Section 15 (2). Additionally, Mr. Sibal places reliance on *Dakshin Shelters P. Ltd v. Geeta S. Johari*⁶.

18. Ms. Kaul, appearing for the respondent, on the other hand, disputes the applicability, to the present case, of the decisions, on which Mr. Sibal relies, by pointing out that Clause 19.1 (a), of the Concession Agreement between the petitioner and respondent, made the giving of a notice, by one party, to the other, requiring the other party to appoint a substitute arbitrator, mandatory. She emphasises the words “and calls upon the other party”, as contained in the said Clause. Ms. Kaul points out that, in the present case, no notice has ever been issued, by the petitioner, to the respondent, requiring the respondent to appoint a substitute arbitrator, consequent to the demise of Mr. S.C. Sharma. It could not, therefore, be said that the procedure for appointment of arbitrators, as contained in Clause 19.2 (a) of the

⁴ 229 (2016) DLT 209

⁵ (2012) 7 SCC 71

⁶ (2012) 5 SCC 152

Concession Agreement, had failed, so as to justify invocation of Section 11 (6). The petition of the petitioner, in the submission of Ms. Kaul, is premature, as the petitioner has approached this Court without ever issuing a notice, to the respondent, to appoint a substitute arbitrator. Ms. Kaul submits that the order, dated 2nd March, 2020, by the two learned surviving arbitrators, calling on the respondent to appoint a substitute arbitrator, did not amount to a notice, within the meaning of Clause 19.2 (a) of the Concession Agreement. Referring to the decision in *A. C. C. Ltd*⁵, on which Mr. Sibal relies, Ms. Kaul submits that the Supreme Court had clearly held, therein, that Section 11 (6) would apply only where there was a failure, of the procedure prescribed in the agreement, between the parties, relating to appointment of the arbitrator. She reiterates that, in the present case, no such failure had taken place. Ms. Kaul seeks to emphasise the iniquity of the stand of the petitioner, by submitting that, despite the difficult conditions, prevailing consequent to the COVID-2019 pandemic and the manifold restrictions imposed as a consequence thereof, her client had acted with all due promptitude, in appointing a substitute arbitrator. In these circumstances, Ms. Kaul submits that it would be entirely unfair, on the part of the petitioner, to seek to neutralise, and invalidate, the said appointment. The time taken by her client, to appoint a substitute arbitrator, even reckoned from 2nd March, 2020, Ms. Kaul would submit, cannot be regarded as unreasonable, by any stretch of imagination. She also submits that, in the absence of any notice, from the petitioner to the respondent, calling on the respondent to appoint a substitute arbitrator, the contention, of Mr. Sibal, that the date of filing, by the petitioner, of the

present petition before this Court, should be treated as the *terminus ad quem*, for the appointment of a substitute arbitrator to be made by the respondent, does not merit consideration.

19. As a fallback argument, Ms Kaul would seek to submit that, as the period of 30 days, reckoned from 2nd June, 2020, expired after 15th March, 2020, the said period stands extended, by an order, dated 6th May, 2020, passed by the Supreme Court in *In re. Cognizance for Extension of Limitation*⁷, till further orders to be passed by the Supreme Court in the matter and that, therefore, no further orders having been passed by the Supreme Court, the present petition is premature. In any event, the respondent having appointed a substitute arbitrator on 8th June, 2020, it is contended that the petition has become infructuous, as well.

20. With respect to the reliance, by Ms. Kaul, on the order passed by the Supreme Court in *In re. Cognizance for Extension of Limitation*⁷, Mr. Sibal, arguing in rejoinder, would seek to contend that the extension, of periods of limitation, which were yet to expire on 15th March, 2020, by the Supreme Court – in the wake of the COVID-2019 pandemic and the restrictions imposed as a consequence thereof – applied only to filing of petitions, applications, and like documents, before Courts and Tribunals, as it was physically impossible for litigants, or their Counsel, to visit Courts and Tribunals and file documents. Reliance is placed, by Mr. Sibal, for this proposition, on the recent judgement, of the Supreme

⁷ *Suo Motu Writ (Civil) 3/2020*

Court, in *S. Kasi v. State*⁸. Appointment of a substitute arbitrator, by the respondent, Mr. Sibal would seek to point out, did not require the respondents to approach any Court, or Tribunal, as was apparent from the fact that, on 8th June, 2020, the respondent had, in fact, appointed a substitute arbitrator. This exercise, not having been undertaken prior to the present petition having being filed before this Court, Mr. Sibal would submit that the appointment of the substitute arbitrator was illegal.

Analysis

21. The position, in law is, in my view, no longer *res integra*, being squarely covered by the judgement of the Supreme Court in *Yashwith Constructions (P) Ltd v. Simplex Concrete Piles India Ltd.*⁹, not only in law, but even on facts. In that case, the sole arbitrator, who had been appointed by the Managing Director (MD) of the respondent before the Supreme Court (hereinafter referred to as “Simplex”) resigned. Thereupon, the MD of Simplex appointed another arbitrator, in accordance with the procedure for appointment of arbitrator, contained in the agreement between the petitioner before the Supreme Court (hereinafter referred to as “Yashwith”), and Simplex. Yashwith approached the learned Chief Justice of the High Court, under Section 11 (5), read with Section 15 (2) of the 1996 Act, praying that the substitute arbitrator be appointed by the learned Chief Justice. The learned Chief Justice upheld the appointment of the substitute arbitrator, by the MD of Simplex, as being in accordance

⁸ 2020 SCC OnLine SC 529

⁹ (2006) 6 SCC 204

with Section 15 (2) and, consequently, held that no occasion arose, for him to appoint a substitute arbitrator under Section 11 (6). The application of Yashwith was, accordingly, rejected. A challenge, to the decision of the learned Chief Justice, also stood dismissed by the Division Bench of the High Court. The Supreme Court, in appeal, upheld the decision of the Division Bench of the High Court, as well as of the learned Chief Justice, and ruled, in para 4 of the report, thus :

“4. In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section 15 of the Act. When the arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorized originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorizing the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so-called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. *The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing 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. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration*

agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.

5. Since here, the power of the Managing Director of the respondent is saved by Section 15(2) of the Act and he has exercised that power on the terms of the arbitration agreement, we see no infirmity either in the decision of the learned Chief Justice or in that of the Division Bench.”

22. As was the position which obtained in *Yashwith Constructions (P) Ltd*⁹, the appointment of Mr Manoj Kumar, by the respondent, on 8th June, 2020, appears, *ex facie*, to be eminently in accordance with Clause 19.2 (a) of the Concession Agreement, which stipulates no period of time, within which the appointment was required to be made. It cannot, therefore, be said that there was any failure, on the part of the petitioner, to appoint the substitute arbitrator, in accordance with the rules applicable in that regard – meaning the provision for appointment of arbitrator, as contained in the Concession Agreement between the parties – as would justify recourse to Section 11 of the 1996 Act.

23. Another important decision, in the context of the controversy before me, is *National Highways Authority of India v. Bumihway DDB Ltd (JV)*¹⁰ (referred to, hereinafter, as “NHAI”). The arbitration

¹⁰ (2006) 10 SCC 763

clause, in the agreement between NHAI and M/s Bumihiway DDB Ltd (referred to, hereinafter, as “Bumihiway”), contemplated a three member arbitral tribunal, with one member being appointed each by NHAI and Bumihiway, and the third arbitrator being chosen by the two arbitrators so appointed. In the event of the two appointed arbitrators failing to arrive at a consensus, regarding the third arbitrator, the arbitration clause empowered the President, Indian Roads Congress (IRC) to appoint the presiding arbitrator. It further provided that, if either party failed to appoint its arbitrator, within thirty days of the receipt of notice of the appointment of arbitrator by the other party, the President, IRC, would appoint the arbitrator.

24. Disputes arose, between Bumihiway and NHAI. Bumihiway, *vide* letter dated 3rd March, 2005, referred the disputes to arbitration, and also appointed Respondent 3, before the Supreme Court, as its arbitrator. NHAI, too, invoked the arbitration clause, *vide* letter dated 10th March, 2005 and, *vide* letter dated 31st March, 2005, appointed Mr. D.P. Gupta as to its arbitrator.

25. Respondent 3 (before the Supreme Court) suggested certain names, for appointment as the presiding arbitrator, with which Mr. D.P. Gupta disagreed. On 29th April, 2005, NHAI wrote to the President, IRC, seeking clarification as to whether any judicial arbitrator was available, with the IRC, for nomination as the presiding arbitrator. The IRC responded, *vide* letter dated 3rd May, 2005, in the negative. Bumihiway, thereupon, moved the High Court under Section 11 (6) of the 1996 Act, *vide* Arbitration Petition No 23 of 2005, requesting the High Court to appoint the presiding arbitrator.

NHAI contended, before the Supreme Court, that the said Arbitration Petition of Bumihiway, under Section 11 (6), was in violation of the terms of the contract between NHAI and Bumihiway, as it had been filed without making any reference to the President, IRC, for appointment of the presiding arbitrator.

26. NHAI requested the IRC to appoint the presiding arbitrator, vide its letter dated 11th May, 2005. Bumihiway, vide letter dated 2nd June, 2005, requested the IRC, per contra, to await the outcome of Arbitration Petition 23 of 2005, preferred by it, before the High Court, under Section 11 (6).

27. Arbitration Petition 23 of 2005 was, finally, disposed of, by the High Court, vide order dated 1st July, 2005, appointing Justice Y. Bhaskar Rao as the presiding arbitrator.

28. Mr. D.P. Gupta resigned on 11th July, 2005. In his place Mr. L.R. Gupta was appointed as presiding arbitrator, who refused to accept the appointment. On 26th July, 2005, Justice Y. Bhaskar Rao informed the other arbitrators that he had decided not to proceed with the arbitration.

29. NHAI appointed Mr. Surjeet Singh as its substitute arbitrator, in place of Mr. D.P. Gupta. On 30th August, 2005, NHAI requested the IRC to appoint the presiding arbitrator. The High Court, however, vide interim order dated 9th September, 2005, directed the IRC not to appoint any arbitrators, till the next date of hearing. *Vide* final

judgement dated 6th January, 2006, the High Court appointed Justice P. Chenna Kesava Reddy (hereinafter referred to as “Justice Reddy”) as the presiding arbitrator. This judgement was carried to the Supreme Court, by NHAI.

30. It was contended, before the Supreme Court, by NHAI, that the High Court was not justified in appointing the presiding arbitrator, invoking, for the purpose, Section 11 (6) of the 1996 Act, *sans* any default, on the part of the IRC, in doing so. Bumihiway relied, per contra, on its communication, dated 29th April, 2005, to the IRC, inquiring as to whether any judicial arbitrator was available on its panel, for appointment as the presiding arbitrator, and contended that it was only after IRC had responded, in the negative, that Bumihiway had approached the High Court, under Section 11 (6). The Supreme Court, in para 20 of the report, enumerated the issues arising for consideration before it, of which Issues (a) and (b) read as under:

“(a) What is the scope of jurisdiction of the Court on the resignation of an arbitrator considering a specific mandate and mechanism under Section 15 (2) of the Arbitration and Conciliation Act, 1996 and clause 67.3 of the contract?

(b) Whether on resignation of one of the arbitrators, the statutory provision that comes into play is Section 15 (2) or Section 11 (6) of the Arbitration and Conciliation Act, 1996?”

31. The Supreme Court held, in para 30 of the report, that the assumption of jurisdiction, by the High Court, under Section 11 (6) of the 1996 Act, was “wholly erroneous”, as “under Section 11 (6) of the Act, the Court has jurisdiction to make the appointment only when the person including an institution, fails to perform any function entrusted

to it under that procedure”. The Supreme Court held that there was no failure, by the IRC, to appoint the presiding arbitrator, in accordance with the arbitration clause in the agreement between NHAI and Bumihiway. The reliance, by Bumihiway, on the communication, dated 1st July, 2005, was also held, by the Supreme Court, to be misguided, as the said communication merely sought a clarification, from IRC, without referring the dispute, to IRC, for appointment of the presiding arbitrator. Immediately on receiving the response, from IRC, to the request for clarification, the Supreme Court held that Bumihiway was not justified in rushing to the High Court under Section 11 (6) of the 1996 Act, contending, for the purpose, that IRC had failed to make the appointment of the presiding arbitrator within the stipulated time. Invocation of Section 11 (6), held the Supreme Court, necessarily required prior default of a party. The High Court was found to have erred in assuming jurisdiction, under Section 11 (6), without examining, in the first instance, the aspect of default, and identifying the defaulting party. The following findings, as returned in para 44 of the report, by the Supreme Court, are of considerable significance:

“As rightly pointed out by the appellants, the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the presiding arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only was Respondent 2 authorised to make the appointment. *Unless Respondent 2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent 1 has wrongly invoked the jurisdiction of this Court (sic the High Court) without first following the procedure agreed to between the parties. Thus no cause of action had arisen in the facts of the case to seek the*

appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature.”

(Italics and underscoring supplied)

32. Adverting, now, to the decisions cited by Mr. Sibal, *seriatim*.

33. ***Datar Switchgears¹*** is completely distinguishable, on facts as well as with respect to the issue before the Supreme Court and, if anything, would seem to support, to an extent, the case of the respondent, rather than that of the petitioner. The arbitration clause in the agreement between the appellant and the respondent, in that case, read thus (to the extent it is relevant):

“It is agreed by and between the parties that in case of any dispute under the lease the same shall be referred to an arbitrator to be nominated by the lessor and the award of the arbitrator shall be final and binding on all the parties concerned.”

Tata Finance Ltd (hereinafter referred to as “Tata”) – the respondents before the Supreme Court – was, in that case, the lessor. The most significant difference, between the arbitration clause, in ***Datar Switchgears¹***, and the present, is that, in the former, there was no requirement for either party to issue, to the other, a notice, calling on the other party to appoint an arbitrator. Complete and unfettered authority, to appoint the arbitrator, was conferred on the lessor, i.e. Tata.

34. To return to the facts in ***Datar Switchgears¹***, consequent to disputes arising between Datar Switchgears Ltd. (hereinafter referred to as “Datar”) and Tata, Tata sent a notice, dated 5th August, 1999, demanding, from Datar, an amount of ₹ 2,84,58,701/–. The notice

also stated that, in the event of failure, on the part of Datar , to pay the said amount, the notice be treated as one issued under the arbitration clause, in the lease agreement (extracted hereinabove). Despite payment not having been made by Datar, Tata did not appoint an arbitrator but, instead, preferred a petition, on 26th October, 1999, before the High Court, under Section 9 of the 1996 Act, for interim protection. On 25th November, 1999, Tata appointed as Sole arbitrator, invoking the arbitration clause in the lease agreement. The arbitrator issued notice to Datar, requiring its appearance before him. Datar, thereupon, filed an application, before the learned Chief Justice of the High Court of Bombay, praying for the appointment of another arbitrator. The application was opposed by Tata. The learned Chief Justice rejected the application as not maintainable, as an arbitrator had already been appointed by Tata. This order, of the learned Chief Justice of the High Court, was carried in appeal, by Datar, to the Supreme Court.

35. The Supreme Court held that sub-sections (4), (5) or (6) of Section 11, would come into play only if there was failure, by the parties, to appoint the arbitrator in accordance with the procedure agreed upon, between them, in that regard. It is specifically held, in para 6 of the report, that “an application under sub-section (6) of Section 11 can be filed when there is a failure of the procedure for appointment of an arbitrator”. In para 10 of the report, the Supreme Court noted, specifically, the fact that the arbitration clause, in the agreement between Datar and Tata, did not provide for any notice, or for any concurrence or consent, of Datar, being taken in the matter of

choice of an arbitrator. The same para draws pointed reference to the conferment, of unfettered discretion on Tata, to appoint an arbitrator, in the agreement between Datar and Tata.

36. The Supreme Court did not agree with the contention, of Datar, that there had been a failure, to appoint an arbitrator in terms of the arbitration clause in the agreement between Datar and Tata. Datar sought to contend that the appointment, by Tata, of the arbitrator, after an unreasonable lapse of time, amounted to failure of the arbitration clause. Repelling the contention, the Supreme Court held, in paras 14, 18, 19 and 20 of the report, as under:

“14. The above decision has no application to the facts of this case as in the present case, the arbitrator was already appointed before the appellant invoked Section 11 of the Act. The counsel for the appellant contended that the arbitrator was appointed after a long lapse of time and that too without any previous consultation with the appellant and therefore it was argued that the Chief Justice should have appointed a fresh arbitrator. We do not find much force in this contention, especially in view of the specific words used in the arbitration clause in the agreement, which is extracted above. This is not a case where the appellant requested and gave a notice period for appointment of an arbitrator and the latter failed to comply with that request. The 1st respondent asked the appellant to make payment within a stipulated period and indicated that in the event of non-payment of the amount within fourteen days, the said notice itself was to be treated as the notice under the arbitration clause in the agreement. The amount allegedly due from the appellant was substantial and the 1st respondent cannot be said to be at fault for having given a larger period for payment of the amount and settling the dispute. It is pertinent to note that the appellant did not file an application even after the 1st respondent invoked Section 9 of the Act and filed a petition seeking interim relief. Under such circumstances, it cannot be said that there was a failure of the procedure prescribed under the contract.

18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.”

(Underscoring supplied; italics in original)

37. Mr. Sibal would seek to invoke the principles enunciated in the above decision to contend that, on the expiry of 30 days from 2nd

March, 2020 – when the respondent became aware of the demise of Mr. S.C. Sharma, and the necessity to appoint a substitute arbitrator – the respondent ought to have appointed an arbitrator. He submits that, Section 11 (6) being applicable, and not Section 11 (4), the right, of the respondent, to appoint a substitute arbitrator would not stand extinguished on the expiry of the said 30 day-period, but would, nevertheless, stand extinguished on the date when the petitioner moved this Court, by way of the present petition under Section 11 (6) of the 1996 Act.

38. I am unable to agree with the submissions of Mr. Sibal, and equally unable to fathom how Mr. Sibal would seek to rely on ***Datar Switchgears¹***, in support thereof. ***Datar Switchgears¹*** did not involve the applicability of Section 15 (2) of the 1996 Act, at all, as it dealt with the appointment of the arbitrator originally, and not with the appointment of a substitute arbitrator. On this single ground, the reliance of Mr. Sibal, on ***Datar Switchgears¹***, must be regarded as totally misplaced. Further, the Supreme Court held, in the said decision, that, even under Section 11 (6), *if one party were to demand, of the other party*, the appointment of an arbitrator, and the other party were not to appoint the arbitrator till the filing of the petition, under Section 11 (6), by the first party, the right of the other party to appoint the arbitrator would stand forfeited. Unlike the position which obtained in ***Datar Switchgears¹***, in the present case, Clause 19.2(a) of the Concession Agreement, specifically requires issuance of notice, by one party to the other, to appoint an arbitrator. Admittedly, no such notice was issued, by the appellant to the respondent, in the present case. The respondent appointed the substitute arbitrator on 8th June,

2020 which cannot be regarded as unreasonable, by any stretch of imagination, especially given the restrictions imposed, by the Central and State governments, consequent to the COVID-2019 pandemic. The mere fact that, prior thereto, without calling upon the respondents to appoint a substitute arbitrator, the petitioner approached this Court under Section 11 (6), cannot, in my view, invalidate the appointment of the substitute arbitrator by the respondent. It cannot be said that there was any failure to appoint a substitute arbitrator, in accordance with the procedure for appointment of arbitrators, stipulated in Clause 19.2(a) of the Concession Agreement, as the appellant was itself in default, were the said Clause to apply. I see no justification, whatsoever, for the submission, of Mr. Sibal, that the minutes of the meeting, held by the two learned surviving arbitrators on 2nd March, 2020, and the directions issued therein, were sufficient to constitute a notice, to the respondent, *from the petitioner*, for such appointment.

39. Having said that, the appointment of Mr. Manoj Kumar, by the respondent, was in keeping with the direction contained in the minutes of the meeting, dated 2nd March, 2020. The said minutes only required the respondents to appoint the substitute arbitrator “forthwith”. In *Gora v. State of West Bengal*¹¹, it was held that an act, which is to be done forthwith, must be held to have been so done, when it is done with all reasonable dispatch and without avoidable delay. In *Navalshankar Ishwarlal Dave v. State of Gujarat*¹², it was held that the expression ‘forthwith’ would be ‘as soon as may be’, and indicated that the action was required to be performed by the authority

¹¹ AIR 1975 SC 473 : (1975) 2 SCC 14

¹² AIR 1994 SC 1496 : 1993 Supp (3) SCC 754

“with reasonable speed and expedition with a sense of urgency without any avoidable delay”. The petitioner has neither pleaded, nor made out, a case of “avoidable delay”, on the part of the respondent, in appointing the substitute arbitrator. The only contention of the petitioner – as assiduously canvassed by Mr Sibal – is that the right of the respondent, to appoint a substitute arbitrator, stood closed on the day when the petitioner filed the present petition before this Court. As this judgement amply elucidates, I am unable to agree.

40. Be that as it may, the underscored sentences, from the judgement in ***Datar Switchgears¹***, make it abundantly clear that it is only where there is a demand, from one party to the other, to appoint an arbitrator, and the second party fails to do so, till the date when the first party approaches the Court under Section 11 (6), that the right of the second party, to appoint the arbitrator, stands extinguished. In the present case, there is no such demand. Mr. Sibal points out, correctly and with the fairness for which he is known, that there is no provision, in the 1996 Act, which extinguishes the right, of either party, to appoint its arbitrator, on the other party approaching the Court under Section 11 (6). He, however, seeks to draw sustenance, for this proposition, from the enunciation of the law in ***Datar Switchgears¹***. That enunciation has, however, to be read in whole, and not in part. Read thus, it is clear that *it is only when one party issues a notice of demand*, to the other, to appoint an arbitrator, and the other party fails to do so, till the date when the first party approaches the Court under Section 11 (6), that the right of the other party, to appoint an arbitrator, stands extinguished. ***Datar Switchgears¹*** does not hold,

anywhere, that, even without issuing any notice of demand, to the second party, requiring it to appoint an arbitrator, the first party can claim extinguishment, of the right of the second party to do so, merely by filing an application, before the High Court, under Section 11 (6). Mr. Sibal sought to draw my attention to certain passages, from the decision in ***Datar Switchgears¹***, to contend that, in the said case, too, there was no demand, by Tata to Datar, to appoint an arbitrator. This submission is, *stricto sensu*, not correct, as para 14 of the report specifically notes that Tata, in its communication dated 5th August, 1999, specifically stated that, in default of payment, by Datar, to it, as claimed therein, the communication was to be treated as a notice for appointment of an arbitrator. Besides, and that the cost of repetition, there was, in the arbitration clause in ***Datar Switchgears¹***, no requirement, for Tata to serve, on Datar, any notice for appointment of an arbitrator – unlike the present case.

41. In any event, dealing, as it did, with the appointment of an original arbitrator under Section 11, and not with the appointment of a substitute arbitrator under Section 15 (2), of the 1996 Act, the decision in ***Datar Switchgears¹*** cannot apply to the facts of the present case. A conjoint and juxtaposed reading of Sections 11 (6) and 15 (2), of the 1996 Act, in the light of the law laid down in ***Yashwith Constructions (P) Ltd⁹***, discloses that it is only if there is failure to appoint the substitute arbitrator, in accordance with Section 15 (2) – meaning, in accordance with the arbitration provision contained in the agreement between the parties – that recourse could be had, to Section 11 (6), and not otherwise.

42. Mr. Sibal has not been able to point out any principle, emanating either from statute or precedent, to justify his assertion that the period of 30 days, within which, according to him, the respondent had necessarily to appoint a substitute arbitrator, was required to be reckoned from the date when the respondent acquired knowledge of the demise of Mr. S.C. Sharma, and of the necessity, therefore, of appointing a substitute arbitrator. It cannot be forgotten that the 1996 Act, being based on the Model Law on International Commercial Arbitration, as adopted by the United Nation's Commission on International Trade Law (UNCITRAL), is intended to confer maximum autonomy on the parties to the arbitration agreement. Any statutory provision, which results in eviscerating, or even reducing, such autonomy has, therefore, to be accorded a strict interpretation. There can be no deemed failure, on the part of either party, to comply with the procedure, stipulated in the agreement, for appointment of the arbitrator. It is only if the party defaults in doing so, in violation either of the arbitration clause, or of any mandatory statutory prescription – or proscription – in that regard, that the autonomy, of the party, to appoint an arbitrator, becomes imperilled, and not otherwise. The appointment of the substitute arbitrator, by the respondent, on 8th June, 2020 cannot, tested on this anvil, be said, in my view, to be fatally invalidated.

43. *Punj Lloyd*², again, did not involve the appointment of any substitute arbitrator, and did not, therefore, call for application of Section 15 of the 1996 Act. Secondly, as in the case of *Datar Switchgears*¹, the arbitration clause, in the agreement between the

parties, did not require issuance of any notice, by one party to the other, for appointment of an arbitrator. Thirdly, the appellant, before the Supreme Court had, in fact, issued a 30-day notice, to the respondent before the Supreme Court, demanding appointment of an arbitrator, and, on the respondent failing to do so, the appellant had moved the High Court. It was in these circumstances that the Supreme Court, following *Datar Switchgears*¹, held that, as the respondent had failed to appoint his arbitrator, till the date of invocation, by the appellant before it, of Section 11 (6), the right of the respondent, to appoint the arbitrator, stood extinguished. Clearly, any reliance, on the said decision, for adjudicating the controversy in issue in the present case, would be totally misguided

44. Proceeding, now, to *Bharat Battery Manufacturing Co.*³, once again, Section 15 of the 1996 Act did not fall for consideration, as the respondent alleged default, on the part of the appellant before the Supreme Court (the Union of India), in appointing an arbitrator, despite two notices, requiring such appointment to be effected, by the Union of India, within 30 days, having been served, by Bharat Battery, on 9th June, 2005 and 3rd January, 2006. It was in these circumstances that Bharat Battery approached the High Court, under Section 11 (6) of the 1996 Act, on 30th March, 2006 and, having failed before the High Court, appealed to the Supreme Court. Again, as in the case of *Datar Switchgears*¹ and *Punj Lloyd*², the arbitration clause, governing the parties, did not contemplate issuance of notice, by any party to the other, for appointment of an arbitrator and, instead, conferred absolute authority on the Director General of Supplies and Disposals, Government of India, to appoint a sole arbitrator. It was in

these circumstances that, following *Datar Switchgears*¹ and *Punj Lloyd*², the Supreme Court held that, as the Union of India had failed to appoint the arbitrator within 30 days of issuance of notice by Bharat Battery, and till the date of filing, by Bharat Battery, of its petition under Section 11 (6), before the High Court, the right, of the Union of India, to appoint the arbitrator, stood extinguished. The appointment, by the Union of India, of a sole arbitrator, after the date of filing, by Bharat Battery, of the petition under Section 11 (6) was, therefore, held to be invalid.

45. For the reasons cited, hereinbefore, in respect of the decisions in *Datar Switchgears*¹ and *Punj Lloyd*², the judgement in *Bharat Battery Manufacturing Co.*³, too, cannot aid the case of the petitioner.

46. Mr. Sibal also placed reliance on the judgement, of a learned Single Judge of this Court, in *Zion Promoters & Developers Pvt Ltd*⁴. The factual distinctions, applicable to *Datar Switchgears*¹, *Punj Lloyd*², and *Bharat Battery Manufacturing Co.*³, which render the said decisions inapplicable to the facts before me, equally imperil the decision in *Zion Promoters & Developers Pvt Ltd*⁴. There, too, the arbitration clause did not visualise issuance of notice, by one party to the other, for appointment of an arbitrator and, rather, conferred unfettered jurisdiction, on the MD of the respondent M/s Ferrous Infrastructure Pvt Ltd (hereinafter referred to as “FIPL”), to appoint the arbitrator. M/s Zion Promoters & Developers Pvt Ltd (hereinafter referred to as “Zion”) wrote, to FIPL, on 26th June, 2015, requiring FIPL to appoint an arbitrator *within one week*. It was much after the expiry of the said one week-period, contemplated in the notice issued

by Zion to FIPL, that Zion moved this Court, under section 11 (6), for appointment of an arbitrator. Again, the appointment involved was of an arbitrator, and not of a substitute arbitrator, so that Section 15 (2) had no application. In these circumstances, this Court held that the time, provided in the notice, issued by Zion to FIPL, requiring FIPL to appoint an arbitrator, having expired, and FIPL having defaulted in doing so, till the date of filing of the petition, under Section 11 (6), by Zion, the right, of FIPL, to appoint an arbitrator, stood extinguished. As in the case of *Datar Switchgears*¹, *Punj Lloyd*², and *Bharat Battery Manufacturing Co.*³, the facts, in *Zion Promotoers & Developers Pvt Ltd*⁴ differ, materially, from those in the present case, resulting in eviscerating the precedential value of the said decision. It is worthwhile to reiterate that, as this Court was, in *Zion Promotoers & Developers Pvt Ltd*⁴, not concerned with the appointment of a substitute arbitrator, Section 15 (2) of the 1996 Act, and the law enunciated in *Yashwith Constructions (P) Ltd*⁹, never arose for consideration in *Zion Promotoers & Developers Pvt Ltd*⁴.

47. *A. C. C. Ltd*⁵ involved an issue which is far removed from the controversy before me. The opening para of the judgement delineates the question, that fell for consideration before the Supreme Court, in that case, thus:

“... whether on the death of a named arbitrator, the arbitration agreement survives or not?”

48. The arbitration clause, in the agreement between the parties before the Supreme Court, in that case, specifically named Mr. N.A. Palkhivala, and Mr. D.S. Seth, as the arbitrators who would arbitrate,

on any dispute that could arise between them. The contention of A.C.C. Ltd. (hereinafter referred to as “ACC”), before the Supreme Court, was that, consequent on the demise of Mr. Palkhivala and Mr. Seth, the arbitration clause did not survive. The application, preferred by Global Cements Ltd. (the respondent before the Supreme Court and referred to, hereinafter, as “Global”), before the High Court, under Section 11 of the 1996 Act, it was submitted, was not, therefore, maintainable. Global contended, *per contra*, that the arbitration clause, in the agreement between ACC and Global, would survive the unfortunate demise of the learned arbitrators named therein, and that it was open to the parties to approach the High Court for appointment of a substitute arbitrator. The Supreme Court answered the question by holding that the arbitration clause, in the agreement between ACC and Global “would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary”.

49. It is self-evident that the controversy, which arose before the Supreme Court in *A. C. C. Ltd⁵*, is not even remotely similar to that which arises in the present case. Even so, para 17 of the report in *A. C. C. Ltd⁵* is instructive, and merits reproduction:

“Section 15(2) of the Act provides that where a substitute arbitrator has to be appointed due to termination of the mandate of the previous arbitrator, the appointment must be made according to the rules that were applicable to the appointment of the arbitrator being replaced. *No further application for appointment of an independent arbitrator under Section 11 will lie where there has been compliance with the procedure for appointment of a substitute arbitrator. On appointment of the substitute arbitrator in the same*

*manner as the first, no application for appointment of independent arbitrator under Section 11 could be filed. Of course, the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically say so. Reference may be made to the judgment of this Court in **Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.** [(2006) 6 SCC 204].”*

50. The afore-extracted para 17, from **A. C. C. Ltd⁵**, once again underscores the legal position, earlier enunciated in **Yashwith Constructions (P) Ltd⁹**, that, *sans* failure to appoint a substitute arbitrator, in accordance with the procedure stipulated, in the agreement between the parties, for appointment of an arbitrator, Section 11 of the 1996 Act would have no application. It also reiterates the principle that the procedure, outlined in the agreement between the parties, for appointment of an arbitrator, would apply, *mutatis mutandis*, to the appointment of a substitute arbitrator.

51. **Dakshin Shelters P. Ltd⁶**, too, is of no help to the petitioner has, in that case, there was a clear notice, from the respondent to the petitioner, notifying the petitioner that the respondent had appointed its arbitrator, and calling upon the petitioner to do so, in response to which the petitioner unequivocally, and categorically, declined to appoint any arbitrators. This refusal was held, by the Supreme Court, to tantamount to failure, on the part of the petitioner (before the Supreme Court) to appoint its arbitrator, giving rise to a course of action, in favour of the respondent, to approach the High Court under Section 11 (6). Inasmuch as, till the date of filing of the said petition,

by the respondent, before the High Court, the petitioner had not appointed any arbitrator, the Supreme Court held that the High Court was justified in appointing an arbitrator. In the present case, neither has there been any request, by the petitioner, to the respondent, to appoint its substitute arbitrator, nor has there been any refusal, by the respondent, to do so. That apart, *Dakshin Shelters P. Ltd*⁶, was a case which arose under Section 11, in which there was no scope for application of Section 15, of the 1996. The reliance, by Mr. Sibal, on *Dakshin Shelters P. Ltd*⁶ is, therefore, misplaced.

52. The offshoot, of the above discussion, is self-evident. The arbitration clause, in the Concession Agreement between the petitioner and respondent (Clause 19.2(a)) specifically required issuance of a notice, by one party to the other, for appointment of an arbitrator. This procedure would, therefore, apply, equally, to the appointment of a substitute arbitrator, on the mandate of the arbitrator, of any one of the parties, standing terminated, on any of the grounds contemplated in Section 14 of the 1996 Act. Admittedly, no such notice was ever issued, by the petitioner, to the respondent, to appoint a substitute arbitrator, consequent on the demise of Mr. S.C. Sharma. In the absence of any such notice, the petitioner is not entitled to plead confinement of the right, of the respondent, to appoint a substitute arbitrator, to any specific period of time, least of all to a period of 30 days from the date when the respondent came to know of the demise of Mr. S.C. Sharma, and of the requirement of appointing a substitute arbitrator. It cannot, therefore, be said that the right of the respondent, to appoint a substitute arbitrator, stood extinguished, on the date when the petitioner filed the present petition, before this Court, under

Section 11 (6) of the 1996 Act. In fact, there having been no failure, on the part of the petitioner, to appoint a substitute arbitrator, as per the procedure outlined in Clause 19.2 (a) of the Concession Agreement, Section 11 of the 1996 Act did not apply, at all. It cannot be held that, in appointing the substitute arbitrator on 8th June, 2020, the respondent is guilty of any unconscionable delay, especially given the straitened circumstances in which the country finds itself at present, consequent on the COVID-2019 pandemic and the restrictions imposed as a consequence thereof. Rather, the appointment, of the substitute arbitrator, on 8th June, 2020, must be held as having been effected, in the circumstances, with commendable promptitude. The appointment of the substitute arbitrator, by the respondent, on 8th June, 2020 has, therefore, to be regarded as eminently in accordance with the procedure contained in Clause 19.2 (a) of the Concession Agreement and, consequently, in keeping with Section 15 (2) of the 1996 Act, as well. No occasion, therefore, arises, for this Court, to step in, and appoint a substitute arbitrator in place of Mr. S.C. Sharma – invalidating, in the process, the appointment of Mr Manoj Kumar, by the respondent, on 8th June, 2020. There is, therefore, substance, in the contention of Ms. Kaul, that the present petition is premature – in which context one may also refer to para 30 of the report in *NHAI¹⁰*, extracted hereinabove. The appointment of Mr Manoj Kumar as the substitute arbitrator of the respondent, on 8th June, 2020, it is reiterated, is perfectly in order, and is in accordance with Section 15 (2) of the 1996 Act.

53. Mr. Sibal voiced certain misgivings regarding the impartiality of Mr Manoj Kumar. That issue, however, does not arise for consideration, before me, in the present case, and I do not intend, therefore, to venture any opinion thereon. Needless to say, however, Ms. Kaul emphatically disputed the contention of Mr. Sibal.

54. In view of the above findings, I do not deem it necessary to return any observation, regarding the reliance, by Mr. Kaul, on the order passed by the Supreme Court in *In re. Cognizance for Extension of Limitation*⁷.

Conclusion

55. The petition is, accordingly, dismissed, with no orders as to costs.

56. Pending applications, if any, stand disposed of accordingly.

JUNE 29, 2020
HJ

C. HARI SHANKAR, J