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Judgment reserved on 04.12.2024
Date of delivery 12.12.2024

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL
HON'BLE SHRI JUSTICE MANOJ KUMAR TIWARI,
ACTING CHIEF JUSTICE
Arbitration Application No. 7 of 2024

Shri Rajendra Mimani

... Applicant

Versus

Power Transmission Corporation of
Uttarakhand Limited

...Respondent

Present:-

Mr. Sanjeev Sahay & Mr. Harshit Sanwal Advocates for the applicant.

Mr. Amit Anand Tiwari, learned Senior Advocate assisted by Mr. Vinay Kumar, learned counsel for the respondent.

Dated: 12.12.2024

JUDGMENT

(1) This is an application for appointment of Arbitrator under Section 11 r/w Section 15 of Arbitration & Conciliation Act, 1996. The Arbitrator earlier appointed by Coordinate Bench of this Court vide order dated 31.12.2021 had recused, therefore, the applicant has sought appointment of sole Arbitrator, in terms of Clause 45.2 of the agreement dated 05.08.2016. The order dated 31.12.2021 passed by Coordinate Bench in Arbitration Petition No.34 of 2021 is reproduced below:

“In this application, filed under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short the ‘Act’), the applicant has prayed for appointment of one or more independent and impartial persons as Arbitrator(s) to constitute a sole Arbitrator.



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2. Clause 54.2 of the Agreement dated 05.08.2016 is the arbitration clause for resolving the disputes between the parties, which is not disputed by the learned counsel for the respondent.

3. Both the learned counsel submit that the sole Arbitrator may be appointed. Both the learned counsel has made a suggestion before this Court that former Judge of this Court Mr. Justice V.K. Bist, R/o D-37, MDDA Colony, Sahastradhara Enclave, Sahastradhara Road, Dehradun, be appointed as the sole Arbitrator.

5. Hence, this application is disposed of accordingly by appointing Mr. Justice V.K. Bist, R/o D-37, MDDA Colony, Sahastradhara Enclave, Sahastradhara Road, Dehradun, as the sole Arbitrator to resolve the dispute between the parties.

6. Let the Arbitrator be intimated accordingly. The learned Arbitrator shall, in terms of Section 11(8) of the 1996 Act, furnish his disclosure in writing to this Court within 15 days from the date of receipt of a certified copy of this order. He shall, thereafter, fix his remuneration, and charges towards other expenses, in consultation with the parties to the dispute. He shall endeavour to complete the arbitral proceedings, and to pass an award with utmost expedition, preferably within six months from the date on which he enters upon a reference."

(2) Perusal of the aforesaid order reveals that learned counsel for the respondent had conceded that there is an arbitration agreement in the contract and the dispute is arbitrable. Paragraph no.3 of the said order reveals that learned counsel for the respondent had also suggested the name of Mr. Justice V.K. Bist for appointment as Arbitrator, therefore, with the consent of parties, Mr. Justice V.K. Bist was appointed as the sole Arbitrator to resolve the dispute between the parties.

(3) It transpires that respondent moved an application before the sole Arbitrator under Section 12(3)(a) of Arbitration & Conciliation Act, 1996, which was rejected by the Arbitrator, however, the Arbitrator, thereafter, recused from the matter and issued a letter dated 26.09.2023 to this Court, contents of the said letter are reproduced below:



"I was appointed Arbitrator in the above matter by the Hon'ble High Court, with the consent of both the parties. During the pendency of the proceedings PTCUL moved on application U/S 12(3) read with Section 13 of the Arbitration & Conciliation Act, 1996. I rejected the same on merits, but since the allegations levelled against the Arbitrator by PTCUL were personal in nature, I recused myself from the Arbitration proceedings.

I am sending the complete order sheet along with the entire record of the proceedings to the Hon'ble High Court. It is requested that the matter be placed before the Hon'ble Chief Justice for appointment of another Arbitrator at the earliest."

(4) Mr. Amit Anand Tiwari, learned Senior Advocate appearing for the respondent, however, opposed the prayer for appointment of substitute Arbitrator by contending that contract was awarded by Power Transmission Corporation of Uttarakhand Ltd. to a Joint Venture; since applicant is only one of the partner in the Joint Venture, therefore, the application made by him under Section 15(2) of the Act would not be maintainable. He further contends that the consent of his client recorded by Coordinate Bench in the order dated 31.12.2021 was given under a false impression, therefore, the same is not binding upon the respondent.

(5) Learned counsel for the applicant submits that the sole Arbitrator recused from the matter because of personal allegations made against him by the respondent. He submits that respondent cannot be permitted to take benefit of his own wrong, inasmuch as, he compelled the sole Arbitrator to recuse by making baseless allegations and now he is raising frivolous objections against appointment of another Arbitrator. He further submits that, in the facts & circumstances of the case, the substitute Arbitrator has



to be appointed in terms of Section 15(2) of the Act, as mandate of the earlier Arbitrator is terminated because of his refusal. Section 15 of the Arbitration & Conciliation Act, 1996 is reproduced below:

“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.”

(6) Learned counsel for the applicant further submits that it is not open to respondent to now raise the objection that application for appointment of substitute Arbitrator would not be maintainable at the instance of the applicant, as this objection was not raised by him in earlier round of proceedings and earlier application filed by applicant under Section 11(6) of the Act was decided in view of concession recorded by respondent’s counsel. He further submits that, after giving consent for appointment of Arbitrator in earlier application, respondent cannot turn around and question applicant’s competence to move application under Section 15(2) of the Act.

(7) Learned counsel for the applicant submits that similar objection raised by respondent, regarding



maintainability of arbitral proceedings at the instance of the applicant, was rejected by sole Arbitrator vide order dated 27.04.2023 and the order passed by Arbitrator has been challenged by respondent in an Appeal under Section 34 of Arbitration & Conciliation Act, which is pending before Commercial Court; but, no interim order has been passed in the said Appeal. Learned counsel for the applicant thus submits that the present application for appointment of substitute Arbitrator deserves to be allowed and the objection raised by respondent is liable to be rejected.

(8) Section 15(2) of the Act provides that a substitute Arbitrator shall be appointed according to the Rules that were applicable to the appointment of the Arbitrator, where the mandate of an Arbitrator terminates. Section 15(1)(a) of the Act provides that mandate of an Arbitrator shall terminate where he withdraws from office for any reason. Thus, on account of recusal of the sole Arbitrator, a substitute Arbitrator has to be appointed and if the agreement between the parties is silent regarding appointment of Arbitrator, then provision contained in Section 15(2) would be attracted and this Court will have to appoint the Arbitrator.

(9) Hon'ble Supreme Court in the case of ACC Limited Vs. Global Cements Limited, reported in (2012) 7 SCC 71, has considered and discussed the legal position regarding appointment of substitute Arbitrator. Paragraph nos.17, 18, 19, 29, 30 & 31 of the said judgment are reproduced below:-

“17. 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]

18. Sections 14 and 15 provide the grounds for termination of the mandate of the arbitrator on the ground of incapability of the arbitrator to act or if he withdraws from his office or when the parties agree to the termination of the mandate of the arbitrator. Section 15(2) states that a substitute arbitrator shall be appointed as per the rules that were applicable to the appointment of the arbitrator being replaced. Section 15(2), therefore, has to be given a liberal interpretation so as to apply to all possible circumstances under which the mandate may be terminated.

19. The scope of Sections 11(6) and 15 came up for consideration before the learned designate of the Chief Justice of India in *San-A Tradubg Co. Ltd. v. I.C. Textiles Ltd.* [(2012) 7 SCC 192] and the learned Judge held as follows: (Arb LR p. 17, para 12)

“12. ... It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act.”

29. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.



30. We are of the view that Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under Clause 21 of the agreement.

31. The High Court in our view was justified in entertaining such an application and appointing a former Judge of this Court as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties.”

(10) In the case of Tricolor Hotels Limited & others Vs. Dinesh Jain & others, reported in 2022 SCC Online Del 3717, Hon’ble Delhi High Court, after considering the case law on the point, has held as under:-

“28. In the present case, order appointing the arbitrator by this Court was a consent order and on this account, the parties in the present case had given up their right for appointment of an arbitrator. Therefore, petitioner did not have the option to resort to the procedure as envisaged under Section 11(5) of the Act to wait for 30 days for the respondent to appoint an arbitrator after recusal by the arbitrator in order to contend that the limitation period in terms of Article 137 of the Limitation Act commenced only after expiry of 30 days. Such a course of action was not available to the petitioner.

29. Considering the above, substituted arbitrator in the present case is to be appointed by this Court only in terms of Section 15 of the Act in consonance with the Rules applicable to the appointment of the arbitrator being replaced. It was not permissible for the respondents to appoint a substitute arbitrator as the initial appointment itself was made by this Court. Therefore, the contention on behalf of the petitioners that the limitation period of 3 years in terms of Article 137 of the Limitation Act started running only after expiry of 30 days from the date of recusal of the arbitrator, is totally misplaced and is rejected.

32. In the present case, neither party has asserted that the initial appointment by this Court was incorrect. Accordingly, when one of the parties to the arbitration agreement approached this Court for appointment of an arbitrator, the rights of the other party for appointment of an arbitrator stand forfeited. In the case of Sap India Private Limited v. Cox and Kings Limited, 2019 SCC OnLine Bom 722, it has been held as follows:—

“48. It can be thus clearly seen from the common thread which flows from decisions of the Supreme Court in *Yashwith Constructions (P) Ltd. (supra)*¹ and *Shailesh Dhairyawan*² (supra) and the decisions of learned Single Judge of Delhi High Court in *Mithlesh Kumar Aggarwal*³ (supra) and *GMR Ambala Chandigarh Expressways Pvt.*



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Ltd.4 (supra), and the decision of learned Single Judge of Calcutta High Court in “R.B. Rajesh v. The Chief Engineer⁵” (supra), and the decisions of learned Single Judge of this Court in Rajesh K. Shah v. Kamlesh K. Sahani (supra)⁶, and Ignatius Tony Pereira (supra)⁷, that when the initial appointment of an arbitrator is made by the Court by an order passed under Section 11 of the Act, an appointment of a substitute arbitrator would be required to be made in the same manner by the Court, as in terms of Section 15 subsection (2) of the Act the initial procedure and the rule so followed, would be required to be followed in appointing a substitute arbitrator. This is also for the reason that the party whose right to make an appointment of an arbitrator as per the arbitration agreement stands forfeited, in the Court making the appointment as per Section 11 of the Act, would not have any authority to make an appointment of a substitute arbitrator.

49. The following principles of law can be clearly derived from the aforesaid decisions of the Supreme Court and the High Courts:

- (i) Parties to an arbitration agreement at the threshold would have a right to appoint an arbitral tribunal as per the arbitration agreement entered between the parties. In case of non-concurrence, inaction or disagreement to so appoint, if requested by one party, this right if not exercised for a period of 30 days would continue to exist till an application by the other party is filed under Section 11(6) of the Act.
- (ii) Once one of the parties to an arbitration agreement approaches the Court under Section 11(6) of the Act seeking appointment of an arbitrator on failure of the other party to appoint an arbitrator, the rights of the party not appointing an arbitrator stands forfeited and it will be for the Court to then pass an order under Section 11(6) of the Act to appoint an arbitrator.
- (iii) Once the Court appoints an arbitrator by an order passed on an application under Section 11 of the Act, and a vacancy arises on the arbitral tribunal on account of any of the circumstances as set out under Section 14(1) and/or Section 15(1) of the Act, then necessarily Section 15(2) becomes operational for appointment of a substitute arbitrator and it would be the Court which would be required to be approached to fill up the vacancy. The same procedure/rule would be required to be followed by an application under Section 15(2) of the Act to fill up the vacancy of the Court appointed arbitrator.
- (iv) As a sequel to (iii) above, once the Court appoints an arbitrator under Section 11(6) of the Act, it is not open for the party against whom such an order is passed to contend that the right which was so forfeited would



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revive for any purpose including to appoint a substitute arbitrator in case of any vacancy on the arbitral tribunal as postulated by Sections 14 and 15 of the Act.

- (v) In other words a party who suffers an order under Section 11(6) of the Act of the Court appointing an arbitrator, cannot contend that the arbitration agreement has become available to such a party after the very foundation of such right to appoint an arbitrator is taken away by the Court appointing an arbitrator.
- (vi) The above position in law is implicit from the provisions of subsection 2 of Section 15 of the Act when the provision says that when the mandate of an arbitral tribunal terminates, a substitute arbitrator shall be appointed “according to the rules that were applicable to the appointment of an arbitrator being replaced”.

50. As observed by the Supreme Court in ACC Ltd. v. Global Cements Ltd. (supra)¹ Section 15(2) of the Act has to be given a liberal interpretation so as to apply to all possible circumstances in which the mandate of the arbitrator could be terminated. Also considering the clear position in law which would flow from the decisions as referred above, it cannot be conceived that Section 15(2) would not recognize rights of a party being forfeited (to take recourse to the arbitration agreement) to appoint a substitute arbitrator when such right stood extinguished when the Court appointed an arbitrator in an order passed under Section 11(6) of the Act. Thus, necessarily the rule that would be applicable to the appointment of a substitute arbitrator would be the rule/procedure which was applicable for the initial appointment namely the appointment by the Court and not appointment by a party who had already lost and/or forfeited its right to make an appointment of an arbitrator. In other words, once such right to make an appointment of an arbitrator/arbitral tribunal are given up by one of the parties, then necessarily the only rule and procedure of an arbitrator being appointed by the Court is required to be recognized in terms of Section 15(2) and no other procedure. It cannot be accepted that the forfeiture of the right of a party not appointing an arbitrator is only a partial or temporary forfeiture limited to Section 11(6) of the Act and that such a right would resurrect or is reborn when it comes to appointment of substitute arbitrator. Such an interpretation would amount to a complete misreading of the legislative scheme of Sections 11, 14 and 15 of the Act.

51. In addition to the above discussion in my opinion, a rebirth of a right which stood forfeited also cannot be conceived for other two primary reasons, firstly for the reason that this would amount to a clear waiver of right as recognised by Section 4 of the Act, and secondly and most importantly the law would not permit sanctity of



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judicial procedure adopted in the court passing an order under Section 11(6) of the Act to be obliterated, diluted, taken away or being extinguished, merely because there is vacancy on the arbitral tribunal. Once the initial appointment itself is under the orders of the Court, there is no question of waived rights or forfeited rights being revived or resurrected for the purposes of either Section 14 and 15 of the Act. In the present case indubitably the appointment of Mr. Justice D.B. Bhosale (Retd) was made in pursuance of an order dated 30 November 2018 passed by this Court under Section 11(6) of the Act as a nominee arbitrator of the respondent. This order was confirmed by the Supreme Court by its order dated 2 January 2019 passed in a petition of the respondent for Special Leave to Appeal (c) No. 33555 of 2018. Thus the rule and the procedure as followed in appointment of initial arbitrator Mr. Justice D.B. Bhosale (Retd) was the rule and the procedure under Section 11(6) of the Act and not any other procedure. This procedure would be required to be recognised as a rule followed in the appointment of initial arbitrator in terms of Section 15(2) of the Act for the purpose of appointment of a substitute arbitrator."

(11) In the case of Ramjee Power Corporation Ltd. Vs. Damodar Valley Corporation, reported in 2009 SCC OnLine Cal 321, Hon'ble Calcutta High Court has held as under:-

"This application has been moved under Section 11(6) of the 1996 Act, for appointment of a substitute Arbitrator in place of the erstwhile arbitrator, Shri Sohan Lal Saraf, whose mandate had been terminated in the circumstances mentioned above.

Opposing the application on behalf of the respondent, Mr. I. P. Mukherjee submitted, that the substitute Arbitrator was to be appointed in accordance with the arbitration agreement, in view of Section 15(2) of the 1996 Act.

Section 15(2) of the 1996 Act is set out herein below for convenience:

"15(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."

The language and tenor of Section 15(2) is significant. Legislature has, in its wisdom, very carefully used the expression "the substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced" instead of using the expression "the substitute arbitrator shall be appointed in accordance with the procedure for appointment laid down in the arbitration agreement executed between the parties."

If it were the legislative intention that a substitute arbitrator should always be appointed in accordance with



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the procedure agreed upon by the parties, irrespective of whether the arbitrator being replaced was appointed by the Chief Justice or His designate, the legislature would, perhaps, have not used the expression in accordance with the rules that were applicable to the appointment of the arbitrator being replaced.

In this case, the erstwhile arbitrator was appointed in accordance with Section 11(6) of the 1996 Act, read with the Rules framed by the Court and the Rules that have evolved with practice.

In *Datar Switchgears Ltd. v. Tata Finance Ltd.*, reported in (2002) 8 SCC 151, cited by Mr. Samrat Sen appearing on behalf of the petitioner, the Supreme Court held as follows:

“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.”

In *Yashwith Construction P. Ltd. v. Simplex Concrete Piles India Ltd.* reported in AIR 2006 SC 2798 the Supreme Court held as follows:

“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.”

Mr. I.P. Mukherjee emphasized on the use by the Hon'ble Supreme Court of the phrase “provision applicable to the appointment of the arbitrator at the initial stage” and specifically on the use of the words “initial stage” to argue that the Supreme Court had held that the substitute arbitrator was also to be appointed strictly in accordance with the arbitration agreement.

A judgement is a precedent for what it decides and is to be understood in the context of the circumstances in which the judgement is rendered. A phrase from a judgment cannot be read out of context ignoring the rest of the sentence. If the sentence is read as a whole, it would be absolutely clear that the Supreme Court did not construe Section 15(2) as a mandate for appointment of the substitute arbitrator in accordance with the agreement between the parties. The Supreme Court



therefore did not end the sentence with the phrase “according to the original agreement”, but went on to use the words “or provision applicable to the appointment of the arbitrator at the initial stage” meaning thereby a provision other than that contained in the original agreement. The words “or provision applicable” were carefully chosen and not meant to be a redundant superfluity. The expression provision applicable could mean a provision of law or a provision of an agreement. The judgement was rendered in an appeal arising out of an order of the Andhra Pradesh High Court which is clearly distinguishable in facts. In that case the initial appointment of arbitrator was made by the Managing Director and not by the Chief Justice or his designate. On termination of mandate, the substitute arbitrator had also promptly been appointed.”

(12) Per contra, Mr. Amit Anand Tiwari, learned Senior Counsel appearing for the respondent, relied upon a judgment rendered by Hon’ble Supreme Court in the case of San-A Tradubg Company Limited Vs. I.C. Textiles Limited, reported in (2012) 7 SCC 192, has held as under:-

“**16.** Sub-section (2) of Section 11 of the Act provides that in the absence of any agreed procedure for appointment of the arbitrator or arbitrators, sub-section (6) of Section 11 would apply whereunder a party may request the Chief Justice or any person or institution designated by him to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. By virtue of sub-section (12) of Section 11, in international commercial arbitration, the reference to Chief Justice in sub-section (6) shall be construed as a reference to the Chief Justice of India.

18. When the agreement provides for reference of a dispute to a particular individual and such agreed arbitrator refuses to act, the next appointment could be made as agreed by the parties, but where no such procedure is prescribed authorising appointment of another arbitrator then the agreement clause cannot operate. It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the Court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act.”

(13) Learned Senior Counsel for the respondent relied upon a judgment rendered by Hon’ble Bombay



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High Court in the case of Maharashtra State Electricity Distribution Company Limited Vs. Godrej and Boyce Manufacturing Company Limited, reported in 2019 SCC OnLine Bom 3920, in support of his contention that, in case of Joint Venture, an individual partner cannot invoke the arbitration clause. Paragraph nos.68 and 99 of the said judgment, on which heavy reliance has been placed by respondent's counsel, are reproduced below:-

“68. It is thus clear that in the said joint venture agreement also a member and the member in-charge i.e. the said Electropath Services (India) Private Limited and the member in-charge i.e. the respondent herein were fully responsible for the quality of all the equipments/components/manufactured/supplied and erected etc. to the petitioner. The said joint venture agreement does not provide that the respondent alone was entitled to invoke arbitration agreement on behalf of the joint venture or to make any other claim on behalf of the joint venture upon the petitioner in any Court of law.

99. It is thus clear that the express authority of a partner is mandatory for submitting a dispute relating to the business of firm to arbitration. The respondent has not placed reliance on any authority given by the said Electropath Services (India) Private Limited authorizing the respondent to submit the dispute relating to the business of the joint venture against the petitioner to arbitration as contemplated under section 19(2)(a) of the Indian Partnership Act, 1932. The respondent could not invoke any alleged implied authority to sue the petitioner and submit the dispute relating to the joint venture to arbitration. The so called express authority relied upon by the respondent in the joint venture agreement as well as the power of attorney does not empower the respondent to refer the dispute relating to the joint venture to arbitration.”

(14) Learned Senior Counsel for the respondent relied upon another judgment rendered by Hon'ble Bombay High Court in the case of Khorshed Eddie Naragwalla Vs. Daryus Soley Panthakey, reported in 2010 (3) Mh. LJ 858. Paragraph no.6 of the said judgment is reproduced below:-

“6. The next section is 15 for the substitution of arbitrator. As one party is unwilling to appoint new arbitrator. There was no rule or arbitration clause between the parties. The mandate of section 15 therefore, cannot be extended in this case by substitution of any other arbitrator by the Court without consent. This is not the Petition under section 11 of the Act. The basic terms



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of clause the parties consented to appoint named arbitrator. The arbitrator is dead, resulted into automatic termination of the arbitration proceeding. The term “rules” in section 15(2) covers the above terms of the appointment of the arbitrator. Section 14(1) and 15(10), (2) of the Arbitration Act, are reproduced as under:-

- 14(1) The mandate of an arbitrator shall terminate 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.
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” (Emphasis Added).”

(15) Learned Senior Counsel for the respondent also relied upon judgment rendered by Hon’ble Supreme Court in the case of Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. & another, reported in (2006) 6 SCC 204.

(16) Learned counsel for the applicant, however, submits that reliance placed by respondent’s counsel in the case of San-A Tradubug Company Ltd. (Supra), is misplaced, as the said judgment does not support contention made by the respondent. He refers to Paragraph nos.5 & 15 of the said judgment in support of this submission, which are reproduced below:-

“5. Vide letter dated 19-6-2003, the nominated arbitrator Mr Manabu Nonoguchi has expressed his inability to discharge his role as arbitrator and left it for the parties to take steps to fill up the vacancy as and when the need arises. On 20-6-2003, the applicant served a notice of demand under Section 434(1)(a) of the Companies Act for winding up on the respondent. In reply to the said notice of demand, the respondent informed on 10-7-2003 that it had made a reference to the Board for Industrial and Financial Reconstruction (BIFR) and had also taken the stand that the machines were defective. Thereafter, the applicant filed an application dated 4-8-2003 before BIFR for recovery of its unpaid dues and sought impleadment



and interim receivership. The applicant sent a notice of demand and arbitration dated 10-12-2004 to the respondent for return of physical custody and possession of the machines which has not been complied with.

15. Under clause (a) of Section 15(1), when the arbitrator withdraws from office for any reason, a substitute arbitrator can be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. The procedure for filling the vacancy arising out of the arbitrator's withdrawal from office is provided under Section 15. It says that in addition to the grounds covered by Sections 13 and 14, the mandate of an arbitrator shall terminate when he withdraws from his office for any reason or under an agreement of the parties. The section provides that the substitute arbitrator is to be appointed according to the same rules which were applicable to the appointment of the arbitrator who is to be replaced. Sub-section (2) of Section 15 contemplates appointment of the substitute arbitrator in place of the arbitrator who refuses to act as an arbitrator, as per the rules applicable to the appointment of the arbitrator."

(17) Based on the aforesaid two paragraphs, learned counsel for the applicant submits that, in the case of San-A Trabubug Company Ltd, (Supra), the Arbitrator was appointed by the parties themselves, therefore, it was held that it is open to the parties to appoint the substitute Arbitrator. He further submits that, in the present case, Arbitrator was appointed by this Court under Section 11(6) of the Act, therefore, this Court alone can appoint a substitute Arbitrator, therefore, the application for appointment of substitute Arbitrator, deserves to be allowed.

(18) Learned counsel for the applicant further submits that the judgment rendered by Hon'ble Supreme Court in the case of Yashwith Constructions (P) Ltd. (Supra) also do not support the case of the respondent as, in that case, the Managing Director of the respondent-company appointed the Arbitrator and when Arbitrator resigned, the Managing Director appointed another Arbitrator, in view of mandate given in the arbitration agreement. He further submits that



at that stage, petitioner approached the Chief Justice of High Court for appointment of subsequent Arbitrator; the Chief Justice found that appointment of second Arbitrator by the Managing Director was valid in law since it was permissible under the contract and the right to make such appointment was saved by Section 15(2) of the Act. Paragraph nos.4 & 5 of the said judgment are reproduced below:

“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 authorised originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorising 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 party concerned 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 person concerned 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



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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. We do not think it necessary in this case to go into the question whether the writ petition before the High Court was maintainable on the basis that it challenged an order of the Chief Justice rendered on 4-3-2005, prior to the date of the decision in SBP & Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618] rendered on 26-10-2005."

(19) As regards the judgment rendered by Hon'ble Bombay High Court in the case of Khorshed Eddie Naragwalla (Supra), learned counsel for the applicant submits that, in that case, there was no arbitration clause, as is reflected from Paragraph no.6 of the judgment. He further submits that, in the absence of Arbitration Clause, parties consented to the name of the Arbitrator; since the Arbitrator had died, therefore, an application was made to appoint the substitute Arbitrator and Hon'ble Bombay High Court held that, in the absence of an Arbitration Agreement, substitute Arbitrator cannot be appointed.

(20) Admittedly, in the present case, respondent's counsel had also suggested the name of Arbitrator and with the consent of both the parties, Mr. Justice V.K. Bist was appointed as sole Arbitrator. The objection, which respondent is now raising regarding competence of the applicant to move application for appointment of Arbitrator, was not raised by him earlier. In other words, respondent waived the right to raise the objection regarding legal capacity of the applicant to move application for appointment of Arbitrator, therefore, he cannot be permitted to raise this objection at this belated stage, when the Arbitrator earlier appointed recused and applicant has prayed for appointment of substitute Arbitrator. Applicant cannot



be left remediless, and the arbitral proceedings must be brought to a logical conclusion.

(21) In the present case, since the earlier Arbitrator was appointed by this Court under Section 11 of Arbitration & Conciliation Act and, in the Arbitration Agreement, there is no specific provision dealing with appointment of Arbitrator or substitute Arbitrator, therefore, this Court is of the considered opinion that the prayer made by the applicant deserves to be allowed.

(22) Accordingly, the application moved by applicant for appointment of substitute Arbitrator is allowed. Mr. Justice Vipin Sanghi, Former Chief Justice of this Court, R/o B-109, Neeti Bagh, Gulmohar Park, South Delhi, New Delhi, is appointed as sole Arbitrator to adjudicate the dispute between the parties arising out of the aforesaid contract/agreement, subject to his furnishing declaration, in terms of Section 11(8) read with Section 12 of the Arbitration and Conciliation Act, 1996 as regards his independence and impartiality in the matter, to this Court within ten days from the date of receipt of this order. Learned Arbitrator shall fix his fees in consultation with both the parties.

(23). The Registrar General of this Court is hereby directed to forthwith send a copy of this order to the prospective Arbitrator.

(MANOJ KUMAR TIWARI, A.C.J.)