

Shane Duff and Others Vs. Essel Sports Private Limited

Shane Duff and Others Vs. Essel Sports Private Limited

SooperKanoon Citation : sooperkanoon.com/1102969

Court : Mumbai

Decided On : Jan-22-2013

Judge : R.D. Dhanuka

Appeal No. : Arbitration Application (L) Nos. 49 of 2013, 50 of 2013, 51 of 2013, 52 of 2013, 53 of 2013, 54 of 2013, 55 of 2013, 56 of 2013, 57 of 2013, 58 of 2013, 59 of 2013 & 60 of 2013

Appellant : Shane Duff and Others

Respondent : Essel Sports Private Limited

Judgement :

Oral Judgment:

1. By these petitions filed under section 11 and section 15(2) of the Arbitration and Conciliation Act, 1996 (for short hereinafter referred to as Act) the applicants seek an order and direction to substitute the sole arbitrator. The facts of all the aforesaid matters are identical and the issue involved being common, all the above matters were heard together and are being disposed of by a common order.

2. Both the parties have addressed this court on the basis of the facts in Arbitration (L) No. 49 of 2013 and the same are therefore, summarized as under:

(a) The applicant is engaged in providing physiotherapy, physical fitness/health services etc. for sports items in tournaments/camps. etc. On 23rd January, 2008

the parties entered into ICL Professional Services Agreement (for short referred to as Agreement). The agreement was valid for the period of three years. According to applicant, sum of US \$ 26,2904 is outstanding and payable by the respondent to the applicant. On 20th October, 2011, the applicant filed Company Petition (13 of 2012) under section 434 of the Companies Act, 1956 in this court against the respondent for winding up. By an order dated 29th June, 2012, this court disposed of the said Company Petition and other similar Company Petitions filed by the other applicants on similar terms. By consent of parties, this court directed the respondent to deposit an amount of Rs.7,13,475/- in this court within the period of six weeks and referred the disputes between the parties which were subject matter of the said petition to the sole arbitration of Dr. Birendra Saraf and directed the learned arbitrator to make endeavour to pass his award within the period of six months from the date of the said order. Pursuant to the said order, the respondents have deposited the amount as directed in this court.

(b) By letter dated 5th October, 2012, the applicant through his advocate addressed a letter to Dr. Birendra Saraf informing him about the order dated 29th June, 2012 passed by this court and requested him to fix preliminary meeting. By letter dated 21st November, 2012, Dr. Birendra Saraf informed the applicant's advocate that he had represented and continues to represent the respondent company before this court and various other forums and requested the applicant to inform if the applicant would have any objection to his acting as arbitrator in the light of the said disclosure. A copy of the said letter was also forwarded to the respondent's advocate.

(c) By letter dated 29th November, 2012 the applicants through his advocate expressed his objection to Dr. Birendra Saraf acting as an arbitrator and requested to take a note of the same and to inform the applicants accordingly. By letter dated 1st December, 2012, Dr. Birendra Saraf informed the parties through their respective advocates that in view of the objection raised by the applicants, vide letter dated 29th November, 2012, he had resigned as Arbitrator in the matters.

(d) By letter 4th December, 2012 the applicant through his advocate, suggested names of five counsel practicing in this court as arbitrator and requested the

respondent to give its consent for appointing anyone out of the same as arbitrator in place of Dr. Birendra Saraf.

(e) The respondent through its advocate's letter dated 4th December, 2012 to the applicant's advocate, invited attention of the applicant to clause 21 of the agreement and informed that in the light of clause 21 of the said agreement, the respondent has appointed Justice A.D. Mane, Former Judge of this court as sole arbitrator for the proposed arbitration between the applicant and respondent.

(f) The applicant through his advocate's letter dated 5th December, 2012 informed that the applicant did not consent to the unilateral appointment of Justice A.D. Mane as substituted arbitrator and the applicant was in process of taking out appropriate proceedings for appointment of the substituted arbitrator in accordance with the provisions of the Arbitration Act, 1996.

(g) The respondent vide its advocate's letter dated 5th December, 2012 once again informed the applicant that under clause 21 of the agreement, the respondent had appointed Shri Justice A.D. Mane (retired) to act as sole arbitrator and the question of applicant's consent as to the choice of the arbitrator did not arise.

(h) It appears that by letter dated 12th December, 2012, Shri Justice A.D. Mane (retired) the learned arbitrator fixed preliminary meeting on 14th December, 2012 at 2.30 p.m. By advocate's letter dated 12th December, 2012 it is reiterated that the applicant was not in agreement to the appointment of learned arbitrator as substituted arbitrator. The applicant through his advocate's letter dated 13th December, 2012 once again expressed his protest to the appointment of the learned arbitrator and informed that the meeting fixed on 14th December, 2012 by the learned arbitrator would not be attended by the applicant or his advocates.

(i) The respondent through its advocate's letter dated 13th December, 2012 clarified that the fixation of the meeting on 14th December, 2012 was solely the decision of the learned arbitrator and not of the respondent. The respondent invited attention of the applicant to clause 21 of the Agreement which was exercised by the respondent while appointing Justice A.D. Mane as sole arbitrator.

3. Ms. Patil, the learned counsel appearing for the applicant submits that though there was arbitration agreement, under clause 21 of the agreement entered into between the parties, by consent of both the parties, this court in Company petition had appointed Dr. Birendra Saraf as arbitrator. It is submitted that as the learned arbitrator had withdrawn from his office under section 15(1)(a) of the Arbitration Act, in view of section 15(2), substituted arbitrator shall be appointed according to rules that were applicable to appointment of arbitrator being replaced. It is submitted that as Dr. Birendra Saraf was appointed by this court in Company Petition, the learned arbitrator having withdrawn from his office, the substituted arbitrator shall be appointed by the court exercising powers under section 15(2) of the Act. It is submitted that as the respondent did not agree to any of the names suggested by the applicant for appointment of the substituted arbitrator, the applicant has filed the present proceedings under section 11(6) of the Arbitration Act and thus the arbitrator appointed by the respondent by taking shelter under clause 21 of the agreement is totally illegal. It is submitted that it should be thus treated that the vacancy has arisen in view of the withdrawal of Dr. Birendra Saraf from the office as arbitrator and the respondent having failed to agree to appoint substituted arbitrator, this application filed under section 11(6) read with section 15(2) of the Act is maintainable and only Hon'ble Chief Justice or his designate can appoint the arbitrator under section 11(6) of the Act.

4. The learned counsel submits that as the appointment of Dr. Birendra Saraf as sole arbitrator was by consent of both the parties, the respondent could not have unilaterally appointed any other arbitrator in place of the arbitrator appointed by this court by purporting to exercise any rights under clause 21 of the agreement. The learned counsel placed reliance upon Para 13 of the Judgment of the Supreme Court in the case of SBP and Company Vs. Patel Engineering Limited and another (2009) 10 SCC 293) which reads thus :

13. At that stage, respondent No. 1 filed Arbitration Application Nos. 114 of 2002 and 90 of 2002 under Section 11 of the Act for appointment of the third arbitrator by asserting that in view of refusal of Shri S.N. Huddar to act as an arbitrator, it had appointed Shri S.L. Jain as a substitute arbitrator in terms of Section 15(2) of the Act and in that view of the matter respondent No. 2 was not entitled to act as

the Sole Arbitrator. The designated Judge of the Bombay High Court allowed both the applications and appointed Shri Justice M.N. Chandurkar (Retired) as the third arbitrator.

5. By placing reliance upon the judgment of the Supreme Court in SBP and Co. (supra) the learned counsel submits that under section 15(2) even if the appointment of the substituted arbitrator has to be made, it is to be in accordance with the agreement entered into between the parties. It is submitted that once by consent of both the parties, in company proceedings this court appointed the arbitrator which appointment was not in accordance with clause 21, the appointment of the substituted arbitrator also can be only by consent of both the parties and no appointment thus can be made by the respondent exercising rights under clause 21 was given a go-bye in view of the order passed by this court appointing Dr. Birendra Saraf as sole arbitrator.

6. Ms. Patil, the learned counsel also placed reliance upon the judgment of the Division Bench of this court in the case of Khorshed E. Nagarwalla Vs. Dargus Soley Panthakey (2010 (6) Bom.C.R. 462) and more particularly paragraphs, 2 to 5, 8 and 10 which read thus:

2. Arbitration clause reads thus: 1. By consent, the dispute in the suit between the Plaintiff and Defendant is referred to the Arbitration of the Sole Arbitrator Shri. A.B. Palkar (Retired Judge Bombay High Court).

2. Parties shall file all pleadings before the Sole Arbitrator.

3. The order of status quo shall be maintained in respect of the subject property viz., Najoo Villa, standing in Plot No. 643 at Parsi Colony, Dadar, Mumbai as per the Appellate Order dated 6th July 2004 passed in Appeal No. 401 of 2004 and shall continue until final disposal/ termination of the arbitration proceedings and for a period of 8 weeks thereafter.

3. It is thus clear that though initially there was no arbitration agreement, the parties in the suit by signing the minutes of order, which contains an arbitration clause agreed for arbitration and further named Arbitrator. The question for

consideration before us is whether if the named an Arbitrator expires, the arbitration clause itself gets invalidated and/or does not survive and as such the Chief Justice or his designate under Section 11 of the said Act cannot fill the vacancy occasioned by the death of the sole Arbitrator. The issue as to whether, under Section 9 of the said Act, this issue can be gone into is considered in the law declared by the Supreme Court in S.B.P. and Co. v. Patel Engineering Ltd and Anr. MANU/SC/1787/2005 : 2006(1) Bom.C.R. 585 : 2005 GLS (soft) 530 : 2005(8) S.C.C. 618. The scheme of the Arbitration and Conciliation Act, 1996 would require that there be an arbitration agreement providing for appointment or Arbitrator/Arbitrators which will constitute the Arbitral Tribunal, which must be constituted by odd number of Arbitrators. In the instant case we have a sole Arbitrator. Two relevant provisions of the Arbitration and Conciliation Act, 1996 are Sections 14 and 15 read as under:

14. Failure or impossibility to act (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. (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 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 agreed 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 replaced 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.

4. Both the provisions if read would show what is terminated is the mandate of the Arbitrator and not the provision for arbitration. Section 11(2) thereafter provides that in the event of vacancy in the Arbitral Tribunal and the parties not agreeing to appoint an Arbitrator, any aggrieved party can move under Section 11(5) of the said Act requesting the Chief Justice or his designate to fill in the vacancy. Thus, the Act itself contains provisions for reconstitution of the Tribunal even in the case where the named Arbitrator expires.

5. Section 15(2) uses the words "rules that may be applicable to appoint Arbitrator." The interpretation of these words stands concluded in view of the judgment of the Supreme Court in *Yashwith Constructions (P) Ltd. v. Simples Concrete Piles India Ltd and Anr. : ,* where the learned Court observed that the word "rules" occurring in Section 15(2) refers to the provision for appointment contained in the arbitration agreement or any Rules of any institution under which the disputes were referred to arbitration. The word "rules" are not confined to an appointment under any statutory rule or rule framed under 1996 Act or under a scheme. The word "rules" only means that appointment of a substitute Arbitrator must be done according to the original agreement or provision applicable to the appointment of the Arbitrator at the initial stage.

8. A similar view was taken by the High Court of Allahabad in *Dharampal Satyapal Ltd. v. Dinesh Enamelled Wire Industries (P) Ltd.* MANU/UP/0749/2009. There also named Arbitrator refused to enter reference. That arbitration agreement reflected the intention of the parties to refer the matter to the arbitration if there was a dispute. The Court then held that there is a valid clause and the named Arbitrator has declined to act as Arbitrator, the vacancy can be filled in under Section 11(6) of the Act.

10. In our opinion, it is not possible for us to agree with the view taken by the learned Single Judge of the Madras High Court. The power under Section 11 of the Act, as now held, is not administrative power but judicial power. Secondly, the death of Arbitrator ordinarily does not invalidate the arbitration agreement where it

is so manifest. In the instant case it is not so. The clause survives. Therefore, if the named Arbitrator dies or refuses to proceed with the arbitration, the procedure under Section 11(6) of the Act will have to be followed. In our opinion, therefore, the view taken by this Court in Smt. Satya Kailashchandra Sahu and Ors. (supra) and by the Allahabad High Court in Dharmopal Satyapal Ltd. case (supra) will reflect the correct interpretation of the Act

7. The learned counsel also placed reliance upon the judgment of the Calcutta High Court in the case of Ramjee Power Construction Ltd. Vs. Damodar Valley Corporation, decided on 5th February, 2009 in Arbitration Petition No. 606 of 2008 and more particularly paragraphs 18 to 20 which read thus :

18. In Yashwith Construction P. Ltd. Vs. Simplex Concrete Piles India Ltd. and Anr. 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."

19. 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.

20. 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.

8. Ms. Patil, the learned counsel made an attempt to distinguish the judgments of the Supreme Court in the case of National Highway Authority of India and another Vs. Bumihway DDB Ltd. (JV) and others (2006) 10 Supreme Court Cases 763) the judgment of the Supreme Court in the case of SBP and Co. (supra), judgment of the Supreme Court in the case of Yashwith Constructions (P) Ltd. (supra) on the ground that the facts in these cases before the Supreme Court were different.

9. Mr. Hitesh Jain, the learned counsel appearing for the respondent on the other hand submits that section 15(2) of the Arbitration and Conciliation Act, 1996 contemplates that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. The learned counsel submits that the term rules used in section 15(2) is not confined to statutory rules or the rules framed by the competent authority in exercise of the power of delegated legislation but also includes the terms of agreement entered into between the parties. It is submitted that the appointment of the substitute arbitrator must be done according to the original agreement applicable to the appointment of the arbitrator and in this case such agreement is recorded in clause 21 of the ICL Professional Services Agreement which gives exclusive power to the respondent to appoint sole arbitrator. The learned counsel submits that merely because this court appointed

the arbitrator in company petition, and if he has not accepted the office, the respondent does not lose its right to appoint substituted arbitrator in case of vacancy. It is submitted that Dr. Birendra Saraf was not appointed as arbitrator by this court under section 11 of the Act but was appointed in Company Petition. In view of Dr. Saraf refusing to accept to act as arbitrator in view of the objections raised by the applicant, the proper recourse was to follow the procedure as laid down in the arbitration agreement i.e. under clause 21 and only upon failure of the party to do so, the jurisdiction of this court under section 11 can be invoked. It is submitted that as there was no failure on the part of the respondent to appoint substituted arbitrator as per arbitration agreement and there was no vacancy, the present application filed under section 11(6) of the Arbitration Act, 1996 is not maintainable. It is submitted that as on today, there is no vacancy which can be filled in by appointing any other arbitrator by exercising powers under section 11(6) of the Act.

10. The learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of Yashwith Constructions (P) Ltd. (supra) and more particularly paragraphs 2, 4 and 5 which reads as under:

2. On a dispute having arisen, the Managing Director of the respondent company appointed an arbitrator in terms of the arbitration clause. The arbitrator resigned. Thereupon the Managing Director of the respondent company, in view of the mandate in the arbitration agreement promptly appointed another arbitrator. At that stage, the petitioner approached the Chief Justice of the High Court under Section 11 Sub-section 5 read with Section 15(2) of the Arbitration and Conciliation Act, 1996 (for short "the Act"), praying that the Chief Justice may appoint a substitute arbitrator to resolve the disputes between the parties. The Chief Justice found that the appointment of the second arbitrator by the Managing Director, after the resignation of the first arbitrator, was valid in law since it was permissible under the contract and the right to make such an appointment was saved by Section 15(2) of the Act. The argument that Section 15(2) of the Act referred to statutory rules providing for appointment of Arbitrators and not to a contractual provision for such appointment was rejected by the learned Chief Justice. It was held by him that no occasion arose for him to appoint an arbitrator under Section 11(6) of the

Act in the case. Thus, the application was dismissed leaving the parties to pursue their claims before the arbitrator appointed by the Managing Director in terms of arbitration agreement between the parties.

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. 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 and Co. v. Patel Engineering Ltd. and Anr.* (supra) rendered on 26.10.2005.

11. The learned counsel also placed reliance upon the judgment of the Supreme Court in the case of *National Highways Authority of India and Another Vs. Bumihway DDB Ltd. (JV) and Ors* (supra) and more particularly paragraph nos. 30, 34 and 44 which read as under :

30. It is pertinent to state that 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. In the present case, the relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order dated 1.7.2005, the respondents only sought a clarification from IRC and without making a reference to them, immediately filed the petition under Section 11(6) on the purported ground that the Indian Road Congress had failed to make the appointment within the stipulated time. Therefore, the reliance placed by the respondent on the judgment of this Court in the case of *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638 is wholly erroneous and is not applicable to the facts of the present case.

34. In our view, the invocation of Section 11(6) of the Arbitration and Conciliation Act, 1966 is squarely based on a default of a party. The ratio laid down in the case of *Datar Switchgear Ltd. v. MANU/SC/0651/2000 : Tata Finance Ltd. and Anr.* (2000)8SCC151 is the correct proposition and the case of *Punj Lloyds Ltd. v. Petronet MHB Ltd.* (supra) followed *Datar Switchgear*. The question arises for consideration here is who had defaulted and on what basis of default has the Court entered jurisdiction under Section 11(6). This question though raised by the

appellant in the counter affidavit before the High Court has not been answered at all. Hence, the assumption of jurisdiction and adjudication by the High Court, in our opinion, is vitiated.

44. 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 respondent No. 2 was authorized to make the appointment. Unless respondent No. 2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent No. 1 has wrongly invoked the jurisdiction of this 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. The High Court also is not correct in relying on the contention of the respondent No. 1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. It was submitted by learned Solicitor General appearing for the appellants that the said finding of the High Court is self contradictory inasmuch as if the Presiding Arbitrator is a retired Judge of the High Court and one of the arbitrators is a retired Chief Justice of the High Court, the member of hierarchy is upset. Even otherwise, there does not exist any such provision in law which requires that if one of the arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong.

12. The learned counsel for the respondent placed reliance upon the judgment of the Supreme Court in the case of SBP and Co. (supra) and ore particularly Paragraphs 29 to 34, 36, 41 to 49 which reads thus :

29. Sections 14 and 15 enumerate the circumstances in which the mandate of an arbitrator shall terminate. Subsection (1) of Section 14 lays down that the mandate of an arbitrator shall terminate if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay and he withdraws from his office or the parties agree to terminate his mandate. Sub-section (2) lays down that if there is any controversy between the parties in relation to any of the grounds referred to in Clause (a) of Sub-section (1) and there is no other provision in the agreement between the parties, either party can apply to the Court for termination of the mandate of an arbitrator unless the parties agree otherwise. By Sub-section (3) of Section 14 it has been clarified that if an arbitrator withdraws from his office under Sub-section (1) of Section 14 or Sub-section (3) of Section 13 or a party agrees to the termination of the mandate of an arbitrator, same shall not be construed as an acceptance of the validity of any of the grounds referred to in Section 14 or Sub-section (3) of Section 12 which speaks of the grounds of challenge to the appointment of an arbitrator.

30. Section 15 specifies additional circumstances in which the mandate of an arbitrator shall terminate and also provides for substitution of an arbitrator. Sub-section (1) of this section lays down that in addition to the circumstances referred to in Sections 13 and 14, the mandate of an arbitrator shall terminate where he withdraws from office for any reason or pursuant to agreement of the parties. Subsection (2) of Section 15 postulates appointment of a substitute arbitrator in accordance with the rules that were applicable to the appointment of the original arbitrator.

31. What is significant to be noticed in the aforementioned provisions is that the legislature has repeatedly laid emphasis on the necessity of adherence to the terms of agreement between the parties in the matter of appointment of arbitrators and procedure to be followed for such appointment. Even Section 15(2), which regulates appointment of a substitute arbitrator, requires that such an appointment shall be made according to the rules which were applicable to the appointment of an original arbitrator. The term 'rules' used in this Sub-section is not confined to statutory rules or the rules framed by the competent authority in exercise of the power of delegated legislation but also includes the terms of agreement entered

into between the parties.

32. In *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* (supra), this Court was called upon to examine the scope of Section 15 of the Act in the backdrop of the fact that after resignation of the arbitrator appointed by the Managing Director of the respondent-Company, another arbitrator was appointed by him in accordance with the arbitration agreement. At that stage, the petitioner filed an application under Section 11(5) read with Section 15(2) of the Act and prayed that the Chief Justice of the High Court may appoint a substitute arbitrator to resolve the disputes between the parties. The learned Chief Justice dismissed the application and held that Section 15(2) refers not only to statutory rules framed for regulating appointment of arbitrators but also to contractual provisions for such appointment.

33. The Division Bench of the High Court which heard the writ petition filed by the petitioners noted that in view of the judgment of the larger Bench in *S.B.P. and Company v. Patel Engineering Ltd. and Anr.* (supra), a writ petition would not lie against an order made by the Chief Justice under Section 11 of the Act and an appeal could be filed only under Article 136 of the Constitution but proceeded to consider the issue raised by the writ petitioners on merits on the premise that appointments made on or before the judgment of the larger Bench had been saved. The Division Bench then observed that in terms of Section 15(2) of the Act, the Managing Director could, by relying upon the arbitration agreement, appoint another arbitrator because the original arbitrator had resigned. The Division Bench held that Section 15(2) of the Act is applicable not only to the cases of appointments under the statutory rules or rules framed under the Act but also the agreement between the parties for appointment of an arbitrator.

34. While approving the decision of the High Court, this Court held:

...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. 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....

36. In Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd. (supra), a three- Judge Bench considered apparently divergent opinions expressed in Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. (supra) and Union of India v. Bharat Battery Mfg. Co. (P) Ltd. MANU/SC/7792/2007 : (2007) 7 SCC 684 referred to Section 11 of the Act and observed: Sub-sections (3) to (5) refer to cases where there is no agreed procedure. Sub-section (2) provides that subject to Sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when 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. The contingencies contemplated in Sub-section (6) statutorily are (i) a party fails to act as required under agreed procedure or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators. The crucial expression in Sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures"

(underlined for emphasis). This expression has to read alongwith requirement in Sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

41. The learned designated Judge appointed the third arbitrator because he was of the view that in terms of Section 15(2), a substitute arbitrator could be appointed where the mandate of an already appointed arbitrator terminates. In taking that view, the learned designated Judge failed to notice that Section 15(1) provides for termination of the mandate of arbitrator where he withdraws from office for any reason or by or pursuant to agreement of the parties and not where the arbitrator appointed by either party declines to accept the appointment or refuses to act as such and that the term `rules' appearing in Section 15(2) takes within its fold not only the statutory rules, but also the terms of agreement entered into between the parties.

42. The words `refuse' and `withdraw' have not been defined in the Act. Therefore, we may usefully refer to dictionary meanings of these words. As per P. Ramanatha Aiyar's Advanced Law Lexicon (Third Edition 2005), the word `refuse' means to decline positively; to express or show a determination not to do something. As per Century Dictionary, the word `refuse' means to deny, as a request, demand or invitation; to decline to accept; to reject, as to refuse an offer. As per New Oxford Illustrated Dictionary, Volume II, p.1421, the word `refuse' means - say or convey by action that one will not accept, submit to, give, grant, gratify consent.

43. The dictionary meanings of the word `withdraw' are as follows:

1. The Law Lexicon (Third Edition, 2005) - to take back or away something that has been given, allowed, possessed, experienced or enjoyed; to draw away.

2. Black's Law Dictionary (Eighth Edition, p.1632) - the act of taking back or away, removal; the act of retreating from a place, position or situation.

3. New Oxford Illustrated Dictionary (Volume II, p.1894) - pull aside or back, take away, remove, retract; retire from presence or place, go aside or apart.

44. The above extracted meanings of two words bring out sharp distinction between them. While the word `refuse' denotes a situation before acceptance of an invitation, offer, office, position, privilege and the like, the word `withdraw' means to retract, retire or retreat from a place, position or situation after acceptance thereof. Therefore, Section 15(2) of the Act does not per se apply to a case where an arbitrator appointed by a party to the agreement declines to accept the appointment or refuses to arbitrate in the matter. Of course in a given case, refusal to act on the arbitrator's part can be inferred after he has entered upon arbitration by giving consent to the nomination made by either party to the agreement.

45. Insofar as this case is concerned, we find that the arbitrator appointed by respondent No. 1, namely, Shri S.N. Huddar declined to accept the appointment/arbitrate in the matter on the ground that in his capacity as Superintending Engineer and Chief Engineer, he was associated with Koyna Hydel Project implying thereby that he may not be able to objectively examine the claims of the parties or the other party may question his impartiality. To put it differently, Shri S.N. Huddar did not enter upon the arbitration. Therefore, there was no question of his withdrawing from the office of arbitrator so as to enable respondent No. 1 to appoint a substitute arbitrator. In any case, in the absence of a clear stipulation to that effect in the agreements, respondent No. 1 could not have appointed a substitute arbitrator and the learned designated Judge gravely erred in appointing the third arbitrator by presuming that the appointment of Shri S.L. Jain was in accordance with law.

46. The decision in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* (supra) on which reliance has been placed by Shri Dave does not help the cause of respondent No. 1. A careful reading of that judgment shows that immediately after the arbitrator appointed by the Managing Director of the respondent-Company resigned, another arbitrator was appointed in accordance with arbitration agreement. The permissibility of appointment of another arbitrator by the Managing Director of the respondent-Company is clearly evinced from the following extracts of paragraphs 2 and 3 of the judgment:

2. On a dispute having arisen, the Managing Director of the respondent Company appointed an arbitrator in terms of the arbitration clause. The arbitrator resigned. Thereupon, the Managing Director of the respondent Company, in view of the mandate in the arbitration agreement promptly appointed another arbitrator....

3. ...The Division Bench held that the position obtaining under Section 8(1) of the Arbitration Act of 1940 differed from that available under the present Act especially in the context of Section 15 thereof and that in terms of Section 15(2) of the Act, the Managing Director could, on the basis of the arbitration agreement, appoint another arbitrator when the originally appointed arbitrator resigned, thus attracting Section 15(1)(a) of the Act....

47. Although, the language of paragraph 4 of the judgment gives an impression that the Court decided the matter by presuming that the agreement between the parties did not contain a provision for appointment of a substitute arbitrator if the original appointment terminates or if the original arbitrator withdraws from the arbitration and this omission is supplied by Section 15(2) of the Act, if that paragraph is read in conjunction with paragraphs 2 and 3 it becomes clear that the arbitration agreement did provide for appointment of another arbitrator in the event originally appointed arbitrator was to resign and there was no plausible reason for the Court to presume that there is an omission in the agreement on the issue of appointment of a substitute arbitrator. In any case, the judgment cannot be read as laying down a proposition of law that in the absence of a specific provision in the arbitration clause, either party to the agreement can appoint a substitute arbitrator in the event of the originally appointed arbitrator refusing to act.

48. At the cost of repetition, we consider it necessary to observe that the agreements entered into between the appellant and respondent No. 1 do not contain a provision for appointment of a substitute arbitrator in case arbitrator appointed by either party was to decline to accept appointment or refuse to arbitrate in the matter. Therefore, respondent No. 1 cannot draw support from the ratio of the judgment in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* (supra).

49. In the result the appeals are allowed and the orders of the learned designated Judge of the High Court appointing Shri Justice M.N. Chandurkar as the third arbitrator are set aside. Respondent No. 2 shall now proceed with the matter as the Sole Arbitrator and pass appropriate award in accordance with law within a period of three months from the date of receipt/production of copy of this order.

13. Section 11 of the Arbitration and Conciliation Act, 1996 reads as under :

11. Appointment of arbitrators.

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(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 upon request of a party, by the chief justice or any person or institution designated by him.

(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 Chief Justice of any person or institution designated by him.

(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 him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub- section (4) or subsection (5) or sub section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief' Justice or the person or institution designated by him, in appointing arbitrator, shall have due regard to- (a) any qualifications required of the arbitrator by the agreement of the parties and (b) other considerations as are likely to secure the appointment of an independent, and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub- section (4) or sub- section (5) or sub- section (6) to him.

(11) Where more than one request has been made under subsection (4) or subsection (5) or sub- section (6) to the Chief Justices of different High Courts or

their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub- section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub- sections (4), (6), (7), (8) and (10) arise in an international commercial arbitration the reference to" Chief Justice" in those subsections shall be construed as a reference to the" Chief Justice of India."

(b) Where the matters referred to in sub- sections (4), (5), (7), (8), and (10) arise in any other arbitration, the reference to" Chief Justice" in those sub- sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub- section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief justice of that High Court.

14. Clause 21 of the ICL Professional Services Agreement entered into between the parties reads as under :

All disputes/differences relating to the Matches/events/matches of the League and any other events/matches proposed by the ICL Executive Board or a dispute arising under this Agreement shall be referred to and shall be resolved by the ESL Board. In the event the dispute/difference cannot be resolved within 30 days from the date of reference in terms of sub clause (a) above the same shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and shall be referred to a sole Arbitrator to be appointed by the ESL Board. The arbitration shall be conducted in English and the venue of arbitration shall be Mumbai. The arbitrator shall have the power to conduct fast track summary disposal of the dispute and to dispense with rules of evidence and procedural laws. The Award given by the arbitrator shall be final and binding on the Parties.

15. From the submissions made by the parties through their learned counsel, the question that arises for consideration of this court is whether the arbitrator appointed by this court in the company petition having withdrawn from the office, the respondent can appoint substituted arbitrator in accordance with the arbitration clause of the agreement entered into between the parties or said appointment can be done only by consent of the parties.

16. It is common ground that the appointment of Dr. Biredra Saraf made by this court by order dated 29th June, 2012 was not under section 11 of the Arbitration Act, 1996. The said order came to be passed in Company Petition filed by the applicant seeking winding up of the respondent company. Dr. Birendra Saraf was not designated or named arbitrator under the Arbitration Clause forming part of the agreement. In view of the objections raised by the applicant for his acting as arbitrator, he did not accept the said appointment. Though there is no specific provisions authorizing respondent to appoint substitute arbitrator if the original appointment is terminated or in the event original appointed arbitrator withdraws from the arbitration, such power in my view is provided under section 15(2) of the Arbitration Act, 1996. Under section 15(2), the appointment of the substituted arbitrator or replacement of the arbitrator by another has to be done in accordance with the rules that were applicable to the appointment of the original arbitrator who was being replaced. The Hon'ble Supreme Court has already held that it is not confined to appointment in any statutory rules framed under the Act or under the scheme, it would only mean that the appointment of the substitute arbitrator must be done according to original agreement or provisions applicable to the appointment of the arbitrator at the initial stage. In my view, merely because by consent both the parties, Dr. Birendra Saraf was appointed as arbitrator in company petition, right of appointment of arbitrator which vest exclusively in the respondent under clause 21 of the agreement was not waived or given up. In case of any subsequent vacancy, the substituted arbitrator can be appointed only in accordance with the agreement entered into between the parties. The Judgment of the Supreme Court in the case of Yashwith (supra) has been subsequently followed by the Supreme Court in the case of National Highway Authority of India (supra) and also in the case of SBP and Co. (supra).

17. Under section 11(6) of the Arbitration Act, 1996, the Hon'ble the chief Justice or his designate has jurisdiction to make appointment only when a person including an institution, fails to perform any function entrusted to him or it under that procedure. In this case as Dr. Birendra Saraf has recused himself and did not accept the appointment as arbitrator, the respondent exercised its right to appoint arbitrator under clause 21 of the agreement and there was no failure on the part of the respondent to appoint substitute arbitrator and therefore, in my view,

application filed under section 11(6) of the arbitration and Conciliation Act, 1996 itself would not be maintainable. In my view, no default is committed by the respondent in appointing substituted arbitrator. The substituted arbitrator has been appointed by the respondent under section 15(2) of the Act on the basis of the agreement entered into between the parties. In my view, no cause of action had arisen in the facts of this case to seek appointment of the arbitrator from this court under section 11(6) of the Act.

18. Under Section 11(4) of the Act, the Hon'ble Chief Justice or his designate can appoint arbitrator only if the party fails to appoint arbitrator in accordance with the agreed procedure under section 11((2) of the Act. In view of the agreement arrived at under clause 21 of the agreement, the respondent has exercised its right by appointing substitute arbitrator, in my view the proceedings under section 11(4) would not be maintainable. The proceedings under section 11(6) can be filed only if the parties fail to act as required under the agreed procedure and not otherwise. The respondents have already appointed Justice A.D. Mane (retired) as substitute arbitrator. In my view, unless there is vacancy, the application filed under section 11(6) of Arbitration Act, 1996 is not maintainable. I am therefore, of the view that the present application is not maintainable and the same is therefore, rejected. There shall be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com