IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

IA No: GA 8 of 2020

(Old No. GA 683 of 2020)

In CS 81 of 2002

Bharat Vanijya Eastern Private Limited

Versus

State of West Bengal

Mr. Anindya Kumar Mitra, Sr. Adv.
Mr. Dhruba Ghosh, Adv.
Mr. Reetobroto Mitra, Adv.
Mr. Sarajit Mitra, Adv.
Mr. Altamash Alim, Adv.

...for the Petitioner

Mr. Tilak Kr. Bose, Sr. Adv.
Mr. Paritosh Sinha, Adv.
Mr. Anupam Das Adhikari, Adv.
Mr. Ratul Das, Adv.
Mr. Sounak Banerjee, Adv.
Mr. Arindam Mondal, Adv.
Mr. Subhabrata Datta, Adv.
Mr. Debashis Sarkar, Adv.
Mr. Paritosh Sinha, Adv.

...for the Respondent/State

Hearing concluded on : 08.02.2023

Judgment on : 17.03.2023

Krishna Rao, J.:

The petitioner has filed the instant application for appointment of new Arbitrator to proceed with the arbitration proceeding from the stage, it was left by the previous arbitrator and to make and publish an Award within six months or in the alternative the suit be reviewed and be transferred to Commercial Division of this Court and to proceed with from the stage suit was left at the time of passing of the order dt. 11th September, 2008.

Initially the petitioner had filed a Civil Suit No. 81 of 2002 against the respondent praying for following reliefs :

"a) Leave under order 2 Rule 2 of the Code of Civil Procedure, 1908;

b) Decree for Rs. 20,72,36,568/-

c) Alternatively, an enquiry into the damages suffered by the plaintiff and decree for the amount found on such enquiry

d) Interest;

e) Costs;

f) Further and other reliefs;."

During pendency of the suit, the Learned Advocate for the petitioner had forwarded a letter together with a draft application under Section 89 of the Code of Civil Procedure, 1908 for referring the dispute pertaining to the suit before the Learned Arbitrator to the Learned Advocate for the respondent on 28th July, 2008. In reply to the abovementioned letter, the Chief Engineer (NH), Government of West Bengal, Public Works (Roads) Directorate, Audit Branch vide his Memo No. 1C-2007/645-R/ADT dt. 26th

August, 2008 had forwarded approval for appointment of Arbitrator to the Learned Advocate for the respondent and the Learned Advocate for the respondent had forwarded the same to the Learned Counsel for the petitioner with the request to move the said application after notice to the respondent. After approval of the proposal for appointment of Arbitrator, the petitioner has filed an application in C.S. No. 81of 2008 being G.A. No. 3037 of 2008 and on 11th September, 2008, this Court had passed the following order :

> *"The Court: The parties are agreed that the entire subject matter of the present suit including the issues as framed by this Court be referred to arbitration and that Justice Baboolal Jain (Retired) be appointed as Arbitrator.*
>
> *In view of such agreement, this application made under Section 89 of the Code, of Civil Procedure, 1908 is disposed of. There will be an order in terms of prayers (a), (b) and (c) by agreement of parties.*
>
> *GA No.3037 of 2008 is disposed of and the suit being CS No. 81 of 2002 should also be treated as disposed of."*

In terms of order dt. 11th September, 2008, the Learned Arbitrator had initiated Arbitration proceedings and on 26th August, 2011 had published an Award. Being aggrieved and dissatisfied with the Award, the respondent had preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 before this Court being AP No. 1087 of 2011 for setting aside the Award dt. 26th August, 2011. By a judgment dt. 4th January, 2017, this Court had set aside the Award with respect of the claim nos. 2, 4, 9 and 10 and the application under Section 34 of the Act of 1996 was allowed in part.

Both petitioner as well as the respondent have preferred an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 against the Judgment dt 28th August, 2011 before the Hon'ble Division Bench of this Court being APO No. 398 of 2017 (State of West Bengal & Ors. -versus- Bharat Vanijya Eastern Private Limited) and APO No. 419 of 2017 (Bharat Vanijya Eastern Private Limited -versus- The State of West Bengal). The Hon'ble Division Bench had disposed of the said appeals on 7th November, 2019 by passing the following order :

> *"44. Clearly, the arbitral award in this case falls well short of what was required of it by the governing statute as and by way of reasons. The bases of the claims under the individual heads are not alluded to in any discussion, whether as to the issues or as to the heads of claim. In a few cases the subjective satisfaction of the arbitrator is revealed in the use of the expression "fair estimate" without any objective grounds indicated for such subjective satisfaction. The reasons that the governing statute mandates to be furnished are the objective bases on which the subjective formation of opinion is founded: the subjective opinion matters little and counts for nothing if there is no objective basis thereto.*
>
> *In fine, it need not be speculated as to whether this was a procured award or whether anyone involved or connected with the arbitral reference had acted in a manner unbecoming of such person or whether any corruption was involved in the process. The award cannot stand on the ground that it does not provide any reasons in support of any head of claim. Such a ground also amounts to the award being opposed to public policy within the meaning of the relevant expression in Section 34 of the Act.*
>
> *46. As a consequence, the judgment and order impugned dated January 4, 2017 is set aside. The entirety of the arbitral award dated August 26, 2011 is set aside. The contractor is left free to pursue the claim afresh by reviving its suit, if that is possible, or by any other means that may be available to the contractor in accordance with law. The contractor will pay and bear the expenses of the proceedings before the arbitrator and in the court of the*

first instance and this appeal assessed at Rs.5 lakh. Such costs, if not tendered within a month from date, will carry simple interest at the rate of 6 per cent per annum and will be adjusted first out of any amount that may be awarded in favour of the contractor if it seeks to pursue its claim and is successful therein. At any rate, the award of costs would be executable by the State after a month from today.

47. Accordingly, APO 398 of 2017 is allowed and APO 419 of 2017 is dismissed. In the light of this order, APO 349 of 2017 loses all meaning and stands disposed of along with GA 2806 of 2017, GA 2988 of 2017 and GA 2170 of 2017. Since the contractor has obtained payment of a substantial amount covered by the award, to the tune of Rs.17 crore, inclusive of interest, the contractor should refund the entire amount received together with interest thereon at the simple rate of 6 per cent per annum from the date of receipt of the payment till the date of refund, within four weeks from date, failing which the State will be entitled to recover the entire amount in accordance with law together with interest at the simple rate of 9 per cent per annum from the date of payment till recovery."

The petitioner being aggrieved with the order dt. 27th November, 2019 had preferred Special Leave and the Hon'ble Supreme Court had dismissed the Special Leave Petitions and passed the following order :

"The special leave petitions are dismissed.

It is open for the petitioner to seek appropriate interim orders for from the civil court including for retention of the amount already received by it."

Mr. Anindya Kr. Mitra, Learned Senior Advocate, representing the petitioner submits that the Hon'ble Divison Bench has set aside the Award on the ground that the award does not contain reason and other deficiencies without considering merit of the claim of the petitioner. The Hon'ble Division Bench given liberty to the petitioner to pursue the claim a fresh as the merit

of the claim of the petitioner has not been rejected and also not considered by the arbitration Court.

Mr. Anindya Kumar Mitra submits that the Dispute Resolution Mechanism as adopted by this Court under Section 89 of the Code of Civil Procedure, 1908 has failed but the disputes remain alive and the merit of the claim is still to be decided. He submits that the consent order passed by this Court under Section 89 of the Code of Civil Procedure have two parts: *"one is substantive, namely, the agreement for settlement of all disputes between the parties through the arbitration and secondly the machinery part is selection of arbitrator for resolution of all disputes involved in the suit and the machinery part of consent order has failed"*.

Mr. Anindya Kumar Mitra Submits that Section 89 of the Code of Civil Procedure, 1908 has provided four Alternative Dispute Redressal methods, one of which is arbitration. The Dispute Redressal methods adopted by this Court has not failed and the merit of the claim of the petitioner is still undecided. The Arbitrator appointed by this Court had decided the claim on merit by passing award but this Court as well as the Appellate Court had set aside the award on the ground for which the petitioner is neither responsible nor at fault. Merits of the claim have not been decided by the Hon'ble Arbitration Court while setting aside the award.

Mr. Anindya Kumar Mitra submits that admittedly as per the contract awarded to the petitioner, the petitioner has executed the work but only the dispute with regard to the payment and thus petitioner should not be made to suffer and forgo meritorious claim because of no fault on the part of the

petitioner. He submits that the petitioner has agreed to the order under Section 89 of the Code of Civil Procedure, 1908 in the bona fide belief and on the basis of the effective and enforceable adjudication of the merits of the petitioner's claim by the Alternative Dispute Redressal method prescribed under Section 89 of the Code of Civil Procedure would be made, but the basis on which the petitioner had agreed to the Order under Section 89 of the Code of Civil Procedure, 1908 has been frustrated. He submits that the claim of the petitioner on merit is to be adjudicated by appointing another arbitrator as the earlier arbitrator who has passed the award has passed away.

Mr. Anindya Kumar Mitra submits that while setting aside the judgment and order dated 04.01.2017 and the award dated 26.08.2011, the Hon'ble Division Bench has left the petitioner free to pursue the claim a fresh by reviving the suit, if that is possible or by any other means that may be available to the contractor in accordance with law. Mr. Anindya Kumar Mitra submits that as per the order passed by the Hon'ble Division Bench, this Court is empowered to appoint another arbitrator to decide the claim of the petitioner a fresh.

Mr. Anindya Kumar Mitra submits that relied upon the Judgment reported in ***(2006) 11 SCC 181 (McDermott International INC vs. Burn Standard Co Limited)*** and submits that the 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural

justice etc. The Court cannot correct errors of the arbitrators. It can only quash the award leaving the parties to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

Mr. Mitra had relied upon the judgment reported in ***(2021) 9 SCC 1 (Project Director, National Highway No. 45E and 220 National Highway Authority of India –vs- M. Hakeem & Anr.)*** and submits that there can be no doubt that the law laid down by the Supreme Court, Section 34 of the Arbitration and Conciliation Act, 1996 cannot be held to include within it a power to modify an award and it is open for the parties to proceed as per law.

Mr. Mitra relied upon the Judgment reported ***in (2008) 1 Gauhati Law Reports 324 (B. K. Gupta vs. Union of India & Ors.)*** and submits that even in the case where the arbitrator publishes an award which is eventually found to be illegal by the competent Civil Court, the authority has to refer the matter for fresh arbitration.

Per contra, Mr. Tilak Bose, Learned Senior Advocate representing the respondent submits that the application filed by the petitioner is not maintainable under law and the same is barred by limitation. He submits that the petitioner has not issued any notice for invocation for a second reference as mandated under the Act of 1996.

Mr. Bose submits that the consent that earlier had been given under Section 89 of the CPC albeit against the then extended provisions, had been against the particular reference and the particular arbitrator alone and thus the life of the said provision has expired. He submits that the State is no more according consent to refer the selfsame or other disputes in relation to the subject contract, if any, to arbitration, whether before any arbitrator or otherwise or at all.

Mr. Bose submits that usual clause being Clause 25 in standard 2911 (ii) agreement form has been deleted 8 years before. He submits that the policy of the State is to have all disputes and claims by or against the State be adjudicated in the civil court set up by the Sovereign and not by arbitration. He submits that Civil Suit No. 81 of 2022 had been disposed of by an order dated 11.09.2008 and thus the instant application is not maintainable as the same has been made after twelve (12) years from the date of disposal.

Mr. Bose submits that second reference cannot be made on identical dispute since such reference will be without jurisdiction. He submits that no reference can be made before a new arbitrator without following the procedure laid down in Section 21 and 11 of the Arbitration and Conciliation Act, 1996. He submits that no notice has been issued by the petitioner as contemplated under Section 14 or 15 of the Act of 1996. He submits that the earlier reference was made in terms of an arbitration agreement, which contemplated reference before a named arbitrator and the said arbitrator passed away and thus the arbitration agreement stood extinguished.

Mr. Bose submits that the State of West Bengal is an agent of Central Government for executing work of highways and is to be paid only an agency charge from Central Government through Ministry of Road, Transport and Highways upon completion of Contract. He submits that the entirety of the expenditure upto the amount for which the financial sanction has been accorded by the Central Government would be borne exclusively and absolutely by the Central Government.

Mr. Bose submits that the dispute that had cropped up regarding the subject project is related to National Highway Project issued by Under Secretary of to the Government, Ministry of Shipping, Road, Transport and Highways. Presently, the State Public Works Department executes various Central Government National Highway Schemes and bears the responsibilities of contractual liabilities. In respect of the National Highway, the State Government is mere Custodian of the Government of India's property i.e. the stretch of National Highways in West Bengal which have been entrusted to the State Public Works Department, being only an executing agency, in the event of an arbitration reference, the cost/expenditure, incidental to the arbitration including Constitution of Arbitral Tribunal, conducting arbitration, fees/remuneration of the arbitration/state advocates, clerkage and finally the cost of the award and any court case related to National Highway works have to be borne by Ministry of Road, Transport and Highways, Government of India through its Regional Authority/Officer.

Mr. Bose submits that in the contract between the parties there was no arbitration agreement. It was only in Section 89 of the Code of Civil Procedure, that the application preferred by the petitioner such consent for arbitration being construed between the parties through exchange of communication, dehors the extent provision therein. The matter is referred to the arbitration and the proceedings too already reached finality. He submits that no power has been invested in this Court to remand the matter to the Arbitral Tribunal except to adjourn the proceeding for a limited purpose mentioned in Section (4) of Section 34 of the Arbitration and Conciliation Act.

Mr. Tilak Bose relied upon the Judgment reported in ***(2010) 8 SCC 24 (Afcon Infrastructure Limited & Anr. Vs. Cherian Varkey Construction Company Private Limited)*** and submits that once there is such an agreement signed by parties, the matter can be referred to arbitration under Section 89 of the Code of Civil Procedure, 1908 and on such reference, the provisions of Arbitration and Conciliation Act will apply to the arbitration, and the case will go outside the stream of the Court permanently and will not come back to the Court.

Mr. Bose relied upon the Judgment reported in ***(2018) 4 SCC 793 (Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil & Anr.)*** and submits that after as the reference of dispute to the arbitration under Section 89 is concern, the same can be done only when the parties agree for settlement of their disputes through arbitration in contradistinction to other method of Alternative Dispute Resolution Mechanism stipulated in Section

89 of the CPC. Since referring the parties to arbitration has serious consequences of taking them away from the stream of Civil Court and subjects them to rivals of arbitration proceeding, in the absence of arbitration agreement, the Court can refer them to arbitration only with the consent of the parties by way of joint memo or joint application when Government or Statutory Body is involved.

Mr. Bose relied upon the Judgment reported in ***AIR 1979 MP 89 (Jugal Kishore vs. State of M.P)*** and submits that since under the arbitration clause, the Board of Revenue was alone to arbitrate in the matter and it having refused to arbitrate, the Court has no power to appoint another arbitrator.

Mr. Bose relied upon the Judgment reported in ***AIR 1981 All 362 (The State of U.P & Anr. Vs. Singhal & Co.)*** and submits that the arbitration proceeding was decided on 27.11.2019 and the agreement entered between the parties has no force and thus arbitrator cannot be appointed.

Heard the Learned Counsel for the respective parties, perused the materials on record and the judgments relied by the parties.

The Hon'ble Division Bench of this Court by an order dated 27.11.2019 has disposed of the appeals by setting aside the arbitral award dated 26.08.2011 in its entirety and liberty was given to the petitioner to pursue the claim a fresh by reviving its suit, if that is possible or by any other means that may be available to the petitioner in accordance with law.

Now the petitioner has prayed for appointment of Arbitrator to proceed with the arbitration proceeding or in the alternative the suit be revived and to transfer to the Commercial Division of this Court for disposal.

Pursuant to and in terms of the letter of the Learned Advocate for the petitioner dt. 28th July, 2008, the Learned Advocate for the respondent vide his letter dt. 29th August, 2008 intimated to the counsel for the petitioner that the respondent has agreed to refer the pending Civil Suit No. 81 of 2002 to the ADR in the form of arbitration to settle the dispute by and between the parties at an early date. On receipt of the confirmation from the respondent, the petitioner had filed an application before this Court in CS No. 81 of 2002 stating that :

> *"11. Your petitioner humbly submits that in order to bring about an amicable settlement to resolve dispute the entire subject matter of the suit, as per issues framed by this Hon'ble Court as mentioned in paragraph 3 herein above being annexure 'A' be referred before a learned sole arbitrator in term of the provisions of the Arbitration and Conciliation Act, 1996. By the aforesaid exercise it will save the time of the court and money of the litigating parties and would ensure to the benefit of the parties herein but neither the plaintiff or the defendant would be prejudiced by this process.*
>
> *12. In the circumstances your petitioner submits that the entire subject matter of the suit, be referred to the arbitration of a sole learned arbitrator as both the plaintiff and the defendant has agreed to settle the disputes/claims through the Arbitration to be appointed by this Hon'ble Court."*

In the said application, the following prayers were made and the respondent had not objected for grant of such prayer and accordingly by an order dt. 11th September, 2008, Arbitrator was appointed:

"a) The entire subject matter of the suit including the issues framed by this Hon'ble Court as mentioned in paragraph 3 of the petition be referred to a Sole arbitrator within such time the Hon'ble Court deem fit and proper.

B Necessary direction be given to the Learned Registrar, Original Side High Court- Calcutta to submit/transit all pleadings, Judges brief of document, Affidavits of documents, papers, records, documents evidence, dispositions of the plaintiff's 1st and 2nd witness, reports of the Commissioner all orders passed from time to time by this Hon'ble Court on various interlocutory applications and all relating papers in the instant suit being C. Suit No. 81 of 2002 before the Learned Arbitrators to be appointed herein within a fortnight from the date of communication of the order to be made herein.

c) Learned Arbitrator/Arbitrators so appointed be directed to make and publish an award within six months from the date of Communication of this order.

d) Ad-interim order in terms of prayers above.

e) Costs of an incidentals to this applications and cost of suit be cost in the arbitration proceedings.

f) All such further and other order or orders be as to this Hon'ble Court deem fit and proper."

The award passed by the learned sole Arbitrator is set aside and now the petitioner intent to appoint new arbitrator to proceed with the arbitration proceeding and to pass Award on the basis of the materials available on record.

Section 15 of the Arbitration and Conciliation Act, 1996 reads as follows :

"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."*

In the case of ***S.B.P. & Company -vs- Patel Engineering Limited & Another reported in (2009) 10 SCC 293,*** the Hon'ble Supreme Court held that:

> *"... 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."*

In the case of ***Yashwith Constructions (P) Ltd. -vs- Simplex Concrete Piles India Ltd and Another reported in (2006) 6 SCC 204,*** the Hon'ble Court held that :

> *"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."*

In the case of ***B.K. Gupta -vs- Union of India reported in AIR 2008 Gauhati 60 (supra),*** the Hon'ble Court held that:

> ***"10.*** *As already noticed, both the parties agreed to have a dispute, if any, resolved through the process of arbitration. Admittedly, during the course of execution of the work under the contract dated 18.11.1992, certain dispute arose between the parties, details of which are not necessary for the present purpose. Both the parties referred the dispute for arbitration and the arbitrators passed an award which could not be sustained in law and had to be set aside by the civil court. In the result, there is no resolution of the dispute between the parties. The award, which is set aside by the competent court, is 'non est'. On other words, there is no award in the eye of law. The object and purpose of the Arbitration and Conciliation Act, 1996, is to provide for a mechanism for settlement of the dispute, between the parties and the parties agreed to have the dispute resolved by way of arbitration. Therefore, in our view, until the dispute is resolved, the arbitration agreement subsists and the authority to refer the dispute to arbitration is not exhausted until the dispute is resolved. We, therefore, reject the submission made by the learned counsel for the respondent.*

> ***11.*** *Given under the scheme of the Arbitration and Conciliation Act, 1996, under section 12, the appointment of an Arbitrator can be challenged on any one of the grounds indicated under sub-section (3) when the requirement of sub-section (3) are satisfied. The appointed arbitrator cannot continue if he falls with in the clutches of any one of the disqualifications indicated in section 12. In such a situation, to hold that a fresh arbitrator cannot be appointed to resolve the dispute between the parties, the very scheme of the Arbitration and Conciliation Act, 1996 would be reduced to futility. For the same logic, we are of the opinion that even in the case where the arbitrator publishes an award which is eventually found to be illegal by the competent civil court, the authority to refer the matter to the fresh arbitration, in our view, must necessarily subsists."*

In the present case, admittedly there was no agreement of contract between the parties but during pendency of the suit, the parties have entered into an agreement for appointment of arbitrator to settle the claims of the suit. Arbitrator appointed by this Court had passed an award but the same was set aside by the Hon'ble Division bench. As the Hon'ble Court had set aside the award thus, there is no resolution of dispute between the parties. The suit which the petitioner had filed was disposed of by an order by appointing an arbitrator with the written consent of both the parties. Thus this court is of the view, until the dispute between the parties is not resolved, the agreement entered between the parties subsists.

As regard to the appointment of arbitrator, it is find from record the Hon'ble Division Bench while setting aside award, had given liberty to the petitioner to pursue the claim afresh by reviving its suit, if that is possible or by any other means that may available to the petitioner in accordance with law. The petitioner had filed this application with the principle prayer for appointment of arbitrator or in the alternative to revive the suit. Petitioner

has not made any request to the respondent for appointment of arbitrator to resolve the dispute in terms of the agreement entered between before filing of the instant application.

In the case of ***Sailesh Dhairyawan -vs- Mohan Balakrishna Lulla reported in (2016) 3 SCC 619,*** the Hon'ble Supreme Court held that :

> ***"21.*** *In fact, as has correctly been pointed out by the learned counsel for the respondent, Section 89 CPC specifically provides that a court hearing a suit may formulate terms of settlement between the parties and may either settle the same or refer the same for settlement by conciliation, judicial settlement, mediation or arbitration. On the facts in the present case, it is clear that following the mandate of Section 89, the Bombay High Court disposed of the suit between the parties by recording the settlement between the parties in Clauses 1 to 7 of the consent terms and by referring the remaining disputes to arbitration. In the present case therefore it is clear that it is the Bombay High Court that was the appointing authority which had in fact appointed Mrs Justice Sujata Manohar as arbitrator in terms of Clause 8 of the consent terms. We must remember, as was held in C.F. Angadi v. Y.S. Hirannayya [C.F. Angadi v. Y.S. Hirannayya, (1972) 2 SCR 515 at p. 523 : (1972) 1 SCC 191 at pp. 197-199] , that an order by consent is not a mere contract between the parties but is something more because there is superadded to it the command of a Judge. On the facts of the present case, it is clear that the Bombay High Court applied its mind to the consent terms as a whole and appointed Mrs Justice Sujata Manohar as arbitrator for the disputes that were left to be resolved by the parties. The said appointing authority has been approached by the respondent for appointment of a substitute arbitrator, which was then done by the impugned judgment. This would therefore be "according to the rules that were applicable to the appointment of the arbitrator being replaced" in accordance with Section 15(2) of the Act. We, therefore, find that the High Court correctly appointed another independent retired Judge as substitute arbitrator in terms of Section 15(2) of the Arbitration Act, 1996. The appeal is, therefore, dismissed."*

As regard to the alternative prayer made by the counsel for the petitioner to revive the Civil Suit, the petitioner in the pending suit had filed an application on the basis of the agreement entered between the parties and this Court had passed an order in terms of Section 89 of the Code of Civil Procedure referring the matter to the arbitration. In the case of ***Shailesh Dhairyawan (supra),*** the Hon'ble Court held that once an agreement was entered between the parties, that too in appending suit, the intention of the parties was to settle the matter through-arbitration and not to come back to the court again for the decision of the same dispute by the court adjudicatory process. In this view, the suit also cannot be revived.

As explained by the Supreme Court in the above case, 'rules' in Section 15 (2) means 'provisions' or 'produce' for appointment of arbitrator made by the parties or applicable to the dispute. In this case, the sole Arbitrator was appointed with the consent of both the parties. The consent terms do not contain any 'provisions' or 'procedure' for appointment of arbitrator. Under Section 11(5) of the Act, failing an agreement between the parties on a procedure for appointing the arbitrator, in an arbitration with a Sole Arbitrator, a party desirous of appointing the arbitrator must make a request to the other party to agree to an appointment within thirty days from receipt of the request, failing which the appointment shall be made by the Chief Justice or his designate. The petitioner has not made any request to the respondent for appointment of an Arbitrator. The application by way of this Notice of Motion in the disposed of Suit in which the original Arbitrator

was appointed under consent terms, is clearly misconceived and not maintainable.

However, this order will not preclude the petitioner for taking appropriate steps for appointment of arbitrator in accordance with law.

G.A. No. 8 of 2020 is thus **dismissed.**

(Krishna Rao, J.)