

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Arbitration Application No.14 of 2019

M/s Central Coalfields Limited, a Company incorporated under the Companies Act, having its registered Office at Darbhanga House, PO-GPO, PS-Kotwali, District-Ranchi (Jharkhand), through its Managing Director (Administration) Sri Bimlendu Kumar

..... **Applicant**

Versus

Eastern India Powertech Ltd. (previously Known as DLF Power Company Limited), having its office at DLF Galleria, 12th floor, DLF City, Phase-IV, P.O. P.S. Gurgaon, Dist. Gurgaon, (Haryana)

..... **Respondent**

CORAM : HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

For the Applicant	: Mr. Amit Kumar Das, Advocate
	: Mr. Shivam Utkarsh Sahay, Advocate
For the Respondent	: Mr. Rohitashya Roy, Advocate
	: Mr. Hemant Jain, Advocate
	: Mr. Akchansh Kishore, Advocate
	: Mr. Divjot Singh Bhati, Advocate

20/24.11.2022 The instant application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the Act, 1996) for appointment of an Arbitrator (substitute) for redressal of dispute in relation to an agreement dated 08.02.1993 executed between the petitioner and the respondent.

2. The brief facts of the case, as per the pleading made in the application, which required to be enumerated reads as under:-

The Board of Coal India Limited (hereinafter referred as 'CIL') has taken a decision for taking an attempt to meet shortage

of power through Captive Power Plants (CPP) using washery rejects. These power plants were to be based on Fluidized Bed Combustion (FBC) technology and through contracts entrepreneurs and as such, the entrepreneurs were invited to establish 5 CPPs.

In furtherance of such decision, an agreement was executed on 08.02.1993 between Coal India Limited and the respondent who at the relevant time was known as D.L.F. Power Company Ltd. with respect to setting up of 10 MW Power Stations on a 'built own and operate principle at Rajrappa and Gidi in Hazaribagh area of M/s Central Coalfields Limited'.

The agreement contains a provision as under Clause 2.6 of the Power Agreement dated 8th February, 1993, which reads as under:-

"2.6 In the event of any dispute arising out of or in relation to this agreement the same shall be referred to the sole arbitration of an arbitrator mutually acceptable to the CIL and DPCL as per the provisions of Arbitration Act, 1940."

The dispute having been arose in between the parties but having not been settled and as such, request for appointment of Arbitrator has been made in view of Clause 2.6 of the Agreement but the same having not been acted, an application was filed before this Court under Section 11(6) of the Act, 1996 for

appointment of Arbitrator. The Arbitrator was appointed by this Court vide order dated 07.04.2017 passed in Arbitration Application No.05 of 2016 by appointing Hon'ble Mr. Justice S.B. Sinha, (now deceased) a retired Judge of the Hon'ble Supreme Court as an Arbitrator to resolve the dispute between the parties.

The arbitration proceeding commenced and was continued where the parties had appeared and filed their respective pleadings but due to death of Hon'ble Mr. Justice S.B. Sinha, an occasion has arisen for appointment of a new Arbitrator (substituted) for adjudicating the dispute between the parties.

Therefore, the instant application has been filed for a direction to appoint an independent Arbitrator to resolve the dispute arisen between the petitioner/applicant and the respondent.

3. Mr. Amit Kumar Das, learned counsel appearing for the petitioner/applicant has submitted that since the arbitrator already appointed, namely, S.B. Sinha, has died in course of pendency of the arbitration proceeding and as such, in view of the provision as contained under Section 15(2) of the Act, 1996, a substitute Arbitrator is required to be appointed so as to resolve the dispute and therefore, the instant application has been filed.

Learned counsel for the petitioner/applicant in order to buttress his argument has relied upon the following judgments, i.e.,

- (i) *ACC Limited Vs. Global Cements Limited, [(2012) 7 SCC 71]*
- (ii) *Global Cements Ltd. Vs. Associated Cement Companies Ltd., [2012 SCC Online Bom. 712]*
- (iii) *Ramjee Power Construction Ltd. Vs. Damodar Valley Corporation, [2009 SCC Online Cal 321]*
- (iv) *M/s. Tirath Ram Sumer Kumar Vs. Rakesh Kumar Mishra and Another, [2017 0 Supreme (All) 15]*
- (v) *Mohan Balkrishna Lulla Adult Vs. Shailesh Dharyavan, [2015 SCC Online Bom. 5772]*
- (vi) *Ignatius Tony Pereira Vs. Pifran Sanjivan Fernandes, [2016 SCC Online Bom. 5470]*
- (vii) *San-A Tradubg Co. Ltd. Vs. I.C. Textiles Ltd., [(2012) 7 SCC 192]*

4. Plea *inter-alia* in the counter affidavit has been taken by raising the issue of maintainability of the instant application on the ground of being in contravention of Section 15(2) of the Act, 1996.

It has been stated therein that on the demise of sole arbitrator on 19.03.2019, the mandate of sole arbitrator got terminated under Section 14 of the Act, 1996, therefore, there must be a substitution of the earlier arbitrator by appointing a new arbitrator under Section 15(2) of the Act, 1996.

Under Section 15(2) of the Act, 1996 provides that when the mandate of arbitrator gets terminated, a substitute arbitrator shall

be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

The petitioner/applicant ought to have taken endeavour to appoint substitute arbitrator in terms of the Arbitration clause of the Power Purchase Agreement (PPA) dated 8th February, 1993 which contains a clause as under Clause 2.6, wherein, it has been stipulated that the sole Arbitrator shall be mutually acceptable to the parties. The petitioner/applicant has not suggested any name to the respondent for appointment of sole Arbitrator before preferring the present application, as such, the instant application is nothing but filed in contravention of the provision as contained under Section 15(2) of the Act, 1996 and hence, premature and not maintainable.

5. Mr. Rohitashya Roy, learned counsel appearing for the respondent has submitted that although, the pleadings have been made on merit but the same at this stage is now being referred, since, this Court at the referral stage for appointment of substitute Arbitrator and as such, the issue of maintainability is being raised holding the instant application to be immature and as such, it is fit to be dismissed.

Learned counsel for the respondent to buttress his argument has relied upon the following judgments, i.e.,

- (i) *Shyam Telecom Ltd. Vs. ARM Ltd., 2004 SCC Online Del. 754*

- (ii) *Shailesh Dhairyawan Vs. Mohan Balkrishna Lulla, (2016) 3 SCC 619*
- (iii) *Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. & Anr., (2006) 6 SCC 204*
- (iv) *SBP & Co. (2) Vs. Patel Engg. Ltd. & Anr., (2009) 10 SCC 293*
- (v) *National Highways Authority of India & Anr. Vs. Bumihway DDB Ltd. (JV) & Ors., (2006) 10 SCC 763*
- (vi) *Huawei Technologies Co. Ltd. Vs. Sterlite Technologies Ltd., (2016) 1 SCC 721*
- (vii) *Rajasthan Small Industries Corpn. Ltd. Vs. Ganesh Containers Movers Syndicate, (2019) 3 SCC 282*

6. Mr. Amit Kumar Das, learned counsel for the petitioner/applicant has raised serious objection to the aforesaid submission by taking the ground that once the Arbitrator has been appointed by this Court in view of the provision of Section 11(6) of the Act, 1996 and if the mandate of arbitrator is being terminated due to death of sole Arbitrator, in that circumstances, there is no requirement to again follow the rules, as provided in the Arbitration Clause, rather, the application is straightaway to be filed before this Court invoking the jurisdiction conferred under Section 11(6) of the Act, 1996 and as such, it is a fit case where substitute Arbitrator may be appointed.

7. This Court has heard the learned counsel for the parties and perused the documents available on record more particularly the

agreement which contains arbitration clause as under Clause 2.6 thereof.

8. This Court has gathered from the pleadings made on behalf of the parties and arguments which have been advanced on behalf of the learned counsel for the respective parties that the claim of the petitioner/applicant for appointment of substitute Arbitrator by filing instant application under Section 11(6) of the Act, 1996 is being seriously disputed by raising the issue of maintainability by the respondent on the ground that even at the stage of appointment of substitute Arbitrator, the process which was followed in course of appointment of first Arbitrator, is required to be followed as provided in the Arbitrator Clause.

9. This Court, therefore, is required to answer the issue, i.e.,

“As to whether on the death of sole Arbitrator in course of pendency of the arbitration proceeding, the subsequent application under Section 11(6) of the Act, 1996 is straightaway maintainable before this Court or not?”

“Or the petitioner/applicant is required to follow the mandate of agreement which was followed at the time of appointment of Arbitrator at the initial stage?”

10. This Court, in order to answer the aforesaid issue requires to consider the statutory provision as conferred under Sections 11(6) and 15 of the Arbitration and Conciliation Act, 1996 along

with the judicial pronouncements of the Hon'ble Apex Court and the other High Courts.

11. Section 11 of the Act, 1996 provides for appointment of Arbitrator. Sub-section 4 thereof, provides that if the appointment procedure in sub-section (3) applies and a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or the two appointed arbitrators fails to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

Sub-section 5 thereof provides that 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 on an application of the party in accordance with the provisions contained in sub-section (4)].

Sub-section 6 thereof provides that where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure; or the parties, or the two

appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

It is, thus, evident that if the provision as contained under Section 11 provides for appointment of arbitrators depending upon different situation on the basis of the request to be made for settlement of dispute before resorting to the mechanism for appointment of Arbitrator as provided under Section 11(6), i.e., if on being requested by the party concerned for amicable settlement as per the mechanism available under the Arbitration Clause and even if the dispute is not being resolved thereafter the occasion left to the concerned party is to make request for appointment of Arbitrator as per the provision as contained under Section 21 of the Act, 1996 if the party fails to appoint arbitrator within the statutory period then such party will have a right to make an application under Section 11(6) before the High Court for appointment of Arbitrator.

Section 15 of the Act, 1996 is also having bearing in the instant case which provides to deal with the cases of termination of mandate and substitution of arbitrator. The aforesaid provision provides that in addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate where he withdraws from office for any reason; or by or pursuant to agreement of the parties.

Sub-section (2) of Section 15 provides 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.

Sub-section (3) of Section 15 provides that 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.

Sub-section 4 of Section 15 provides that 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.

The aforesaid provision, therefore, refers about termination of mandate in a situation where the arbitrator withdraws from office for any reason or by or pursuant to agreement of the parties. But the aforesaid provision does not contain any

stipulation that what to be done in case of death of arbitrator in course of pendency of arbitral proceedings, but, taking into consideration the object and intent of Section 15 of the Act, 1996 which has been carved out to deal with a situation where the mandate of arbitrator has been terminated. Even, such eventualities had not been referred either under Section 13 or Section 14 of the Act, 1996.

The purport and object of the provision of Section 15 which contains a provision more particularly sub-section 2 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, meaning thereby, the legislation has taken care of a situation as to what to be done if the mandate of an arbitrator terminates, although, the eventuality has been referred under Sections 13, 14 and even under Section 15(1) of the Act, 1996. But the mandate of an arbitrator if terminated on the death of sole arbitrator, even though, is not provided under the Act, 1996, but even in that circumstances, since the mandate of arbitrator will be said to be terminated due to inconclusiveness of the adjudication which is required to be done by the sole arbitrator appointed in terms of the Arbitration Clause, therefore, according to the considered view of this Court by taking into consideration of the judgment of the Hon'ble Apex Court passed in *ACC Limited Vs. Global*

Cements Limited (supra), wherein, it has been held that the arbitration clause will survive so long as dispute or difference between the parties exists and as such, even in case of death, provision as contained under Section 15(2) of the Act, 1996 will also be attracted so as to substitute arbitrator may be appointed for the purpose for which the mechanism has been carved out for settlement of dispute in pursuant to arbitration clause contained in the contract.

12. Herein in the instant case, the dispute in between the parties has arisen which led the petitioner/applicant to invoke the Arbitration Clause when the alternative mechanism of resolution of dispute as provided under Clause 2.6 of the PPA has not been arrived at and in that circumstances, an application has been filed before this Court by taking recourse of the provision of Section 11(6) for appointment of Arbitrator being Arbitration Application No.05 of 2016. An appropriate order was passed in the aforesaid Arbitration Application on 07.04.2017, by which, Hon'ble Mr. Justice S.B. Sinha (now deceased), a retired Judge of the Hon'ble Supreme Court, was appointed as sole Arbitrator. The proceeding commenced. Parties had appeared and filed their respective pleadings but unfortunately, the sole Arbitrator died. As such, the arbitration proceeding which had been initiated by appointment of Arbitrator by virtue of order dated 07.04.2017 passed in Arbitration Application No.05 of 2016

remains inconclusive and in that view of the matter, the mandate of an arbitrator has been terminated which has occasioned the petitioner/applicant to file instant application for appointment of an arbitrator in view of the provision as provided under Section 15(2) of the Act, 1996.

Section 15(2) of the Act provides 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 an arbitrator being replaced.

13. Mr. Rohitashya Roy, learned counsel appearing for the respondent has raised serious objection by raising the issue of maintainability by taking aid of the provision as contained under Section 15(2) of the Act, 1996, where according to him, the provision has been made that a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of arbitrator being replaced.

It has been submitted by him that as per the aforesaid statutory provision even for appointment of substitute arbitrator, the same is only to be appointed as per the rules which were applicable to the appointment of arbitrator being replaced, meaning thereby, as per the condition, stipulation under the contract as provided under Clause 2.6 of the agreement, wherein, it has been agreed between the parties that a request is to be made first by the petitioner/applicant for appointment of

arbitrator before the respondent and only in case of failure on the part of the respondent, then only second application under Section 11(6) of the Act, 1996 is maintainable, but, the petitioner/applicant since has not made any request for appointment of substitute arbitrator, rather, straightaway filed instant application under Section 11(6) of the Act, 1996, therefore, it is not maintainable.

14. This Court, therefore, deems it fit and proper to consider the judicial pronouncements in order to reach to the conclusion by answering the contention/objection raised on behalf of the parties.

15. This Court has considered the judgments rendered by the Hon'ble Apex Court in *Yashwith Constructions (P) Ltd. (supra)* and has found therefrom the factual aspects that on a dispute having arisen, the Managing Director of the respondent Company appointed an arbitrator in terms of the arbitration clause. The arbitrator resigned. The Managing Director, thereupon, in view of the mandate of the arbitration agreement 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, praying that the Chief Justice may appoint 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 which was advanced before the High Court that under Section 15(2) of the Act referred to the statutory rules providing for appointment of arbitrators and not to a contractual provision for such appointment was rejected by the learned Chief Justice of the High Court by holding no occasion 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 the arbitration agreement between the parties.

The aforesaid decision was challenged by way of a writ petition in the High Court. The Division Bench noticed the decision of this Court in the case of *SBP & Co. Vs. Patel Engg. Ltd., (supra)* by holding that the order passed by the Chief Justice is a judicial order and no writ petition would lie in the High Court challenging such an order and only an appeal could be filed in the Hon'ble Supreme Court invoking Article 136 of the Constitution of India. But the Division Bench thought that since that decision saved appointments made on or before the date that decision was rendered by this Court, the writ petition filed by the petitioner would also be saved and the writ petition could be

decided on merits, thereby the issue decided on merit by holding that the learned Chief Justice was right in rejecting the application made by the petitioner and thus, the writ petition was dismissed which was challenged before the Hon'ble Apex Court.

The Hon'ble Apex Court has come to the conclusive finding by affirming the view taken by the learned Chief Justice and the Division Bench by making an observation that 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 has further been observed that even 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. It has been held therein 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.

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 and thereby the Hon'ble Apex Court was not agreed with the contrary view taken by some of the High Courts. Thereafter, it has been observed in the order that since the power of the Managing Director of the respondent is saved by Section 15(2) of the Act and he has exercised the power in terms of the arbitration agreement, as such, no infirmity either in the decision of the learned Chief Justice or in that of the Division Bench has been found therein, for ready reference, the relevant paragraphs, i.e., paragraph nos. 4 & 5 are required to be referred as under:-

“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 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."*

The aforesaid judgment, thus, reflects in the facts that in a case where the Managing Director in terms of the Arbitration agreement since has appointed an arbitrator at the initial stage but due to mandate of the arbitrator having been terminated, the Managing Director has promptly appointed another arbitrator

and it is only thereafter, application under Section 11(6) has been filed for appointment of substitute arbitrator and the said application has been dismissed by the Hon'ble Chief Justice of the concerned High Court holding therein that the Managing Director since has appointed an arbitrator, there is no occasion for the High Court to again exercise the said power conferred under Section 11(6) of the Act, 1996.

The Hon'ble Apex Court has further considered the meaning of 'rule' as provided under Section 15(2) of the Act, 1996 as per the judgment which rules means terms and conditions of the agreement under which the Arbitrator is to be appointed in absence of any statutory rules.

The Hon'ble Apex Court in the case of *National Highways Authority of India (supra)*, wherein, the parties have been entered into an agreement, which contained a mechanism for resolution of dispute between the parties, as contained in sub clause 67.3. It was provided therein that in case the parties' nominated arbitrators failed to agree on a presiding arbitrator within 30 days, the same would be appointed by the President, IRC. Disputes having arisen between the parties, respondent no.1 nominated its arbitrator as respondent 3. The appellants also invoked the arbitration clause. Thereafter, the appellants nominated Mr. D.P. Gupta, as their arbitrator.

In view of the disagreement between the two nominated arbitrators to agree upon the presiding arbitrator, respondent 1 sought a clarification from Indian Roads Congress (IRC) by asking respondent 2 for availability of any judicial arbitrator for the purpose of nomination as presiding arbitrator. IRC informed that there did not exist any judicial arbitrator in its panel and in that pretext, an application was filed by the concerned respondent being Arbitration Petition No.23 of 2005 before the High Court requesting for appointment of the presiding arbitrator.

The High Court vide its judgment dated 06.01.2006, appointed Mr. Justice P. Chenna Keshava Reddy, former Chief Justice of the Andhra Pradesh and the Gauhati High Courts as the presiding arbitrator, which according to the appellants, was in clear and express violation of the contract agreement entered into between the parties.

The matter travelled to the Hon'ble Supreme Court, wherein, the following issues have been considered, i.e.,

- (a) What is the scope of jurisdiction of the Court on the resignation of an arbitrator considering a specific mandate and mechanism under Section 15(2) of the Act and clause 67.3 of the conditions of the contract, the operative part of which was to the effect that in case of failure of the two arbitrators, appointed by the parties to

reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator would be appointed by the President, Indian Roads Congress.

- (b) Whether on resignation of one of the arbitrators, the statutory provision that comes into play in Section 15(2) or Section 11(6) of the Act?
- (c) Whether an arbitration clause, which is a sacrosanct clause, can be rewritten by appointment of a judicial arbitrator when no qualification therefor is provided in the agreement?
- (d) Whether the consent given by one of the parties (if treated to be so on assumption) is enough for the clause to be rewritten?

The Hon'ble Supreme Court by taking into consideration the factual aspect involved therein has been pleased to come to conclusion that the High Court has failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the presiding arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only was IRC authorised to make the appointment. Unless IRC failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act and as such, the concerned respondent has wrongly

invoked the jurisdiction of the Court without first following the procedure agreed to between the parties.

Thus, the factual aspects involved in the case of National Highways Authority of India that application filed under Section 11(6) for appointment of substitute arbitrator has been held to be premature in the background of the facts that in pursuant to arbitration clause in a case of termination of mandate of presiding arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at consensus only IRC was authorised to make the appointment. But the concerned respondent without approaching before the IRC has straightaway filed application under Section 11(6) and in that pretext, it has been held by the Hon'ble Apex Court that the aforesaid application is premature, since the jurisdiction conferred to IRC under the contract was not invoked.

The Hon'ble Apex Court in the case of *Huawei Technologies Co. Ltd. (supra)*, wherein, judgment has been pronounced by the Hon'ble Apex Court in a given fact of the case that when the dispute has arisen Mr. Justice S.K. Dubey, a former Judge of the High Court of Madhya Pradesh was appointed as sole arbitrator. The aforesaid appointment appointing Mr. Justice S.K. Dubey, to be an arbitrator has been objected by the respondent of the aforesaid case and in the aforesaid background, learned sole arbitrator Mr. Justice S.K. Dubey, recused himself

from the proceedings. It is in the aforesaid circumstances that the present application/arbitration petition has been filed under Section 11(6) of the Act for appointment of a sole arbitrator.

The Hon'ble Apex Court in that pretext has been pleased to hold by considering the mandate of Section 15(2) of the Act that it was incumbent on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof the present application under Section 11(6) of the Act could/should have been filed.

The Hon'ble Apex Court in the case of *ACC Limited Vrs. Global Cements Limited (supra)*, has considered the fact in case of death of named arbitrator where the issue was whether, on the death of a named arbitrator, the arbitration agreement survives or not?

The Hon'ble Apex Court has been pleased to hold as under paragraph-28 of the said judgment that the arbitration clause would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary.

The Hon'ble Apex Court has further been pleased to hold as under paragraph-17 of the judgment that Section 15(2) of the Act 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. 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.

The Hon'ble Apex Court while coming to such conclusion has been pleased to refer the judgment rendered in the case of *Yashwith Constructions (P) Ltd.(supra)*.

The Hon'ble Apex Court in the case of *Rajasthan Small Industries Corporation Limited (supra)*, has come to the conclusion by considering the judgment rendered in the case of *Yashwith Constructions (P) Ltd. (supra)* that Section 11(6) of the Act would come into play only when there was failure on the part of the party concerned to appoint an arbitrator in terms of the arbitration agreement. Such finding has been given the facts leading to the said case, wherein, one application was filed for appointment of independent arbitrator but the arbitrator on the basis of the available materials hurriedly passed the award.

In a given situation where the parties have entered into an agreement which contains arbitration clause to be done by the Managing Director himself or his or her nominee for the sole arbitration. The respondent Contractor has requested for appointment of the arbitrator. The sole arbitrator was appointed. But, since the progress of the arbitration proceeding before the said arbitrator was not satisfactory as such, the arbitrator was withdrawn. A request was made for appointment of Additional Chief Secretary to be the sole arbitrator. However, subsequently by the consent of both the parties, Chairman-cum-Managing Director of the Corporation was appointed as the sole arbitrator. But for one reason or the other, the arbitration proceeding could not be concluded and in that pretext, the contractor has filed an application under Section 11(6) and Section 15 of the Arbitration and Conciliation Act, 1996 seeking for appointment of an arbitrator for adjudication of dispute between the parties.

It is in the light of the aforesaid fact, the Hon'ble Apex Court has come to finding by holding the view of the High Court not to be correct in appointing an independent arbitrator without keeping in view the terms of the agreement between the parties which contains a condition for appointment of arbitrator and accordingly, with the consent of the parties, the Chairman-cum-Managing Director was appointed to arbitrate the dispute and while the proceeding was pending before him, the respondent

Contractor have submitted relevant claims and mutually agreed to settle the claim after deduction of some amount and that the amount was finalized and settled for Rs.3,90,81,602/- and in spite of the fact that settled amount was agreed between the parties, no award was passed by the arbitrator.

The respondent sent another legal notice reiterating the claim for Rs.3,90,81,602/- along with statutory interest. The appellant Corporation has sent a detailed reply denying any settlement and also denying that the amount was finalized for a sum of Rs.3,90,81,602/- and in such a background, the application was filed under Section 11 and Section 15 of the Arbitration and Conciliation Act, 1996.

It is, thus, evident by taking into consideration the factual aspect involved in the said case that the parties having agreed for appointment of Chairman-cum-Managing Director to arbitrate the dispute, wherein, some difference arose and in that pretext, an application has been filed under Section 11(6) read with Section 15(2) of the Arbitration and Conciliation Act, 1996 and then in that circumstances, the Hon'ble Apex Court has come to conclusion that the process as referred in the contract is required to be followed before taking recourse of the provision of Section 11(6) of the Act, 1996.

The Hon'ble Apex Court in the case of *Shailesh Dhairyawan Vs. Mohan Balkrishna Lulla (supra)*, wherein, the

issue fell for consideration before the Hon'ble Apex Court in a case where there was no arbitration clause in the agreement. As such, the respondent has filed a suit for appointment of substitute arbitrator. But the said suit was dismissed stating that an appointment can only be made for a substitute arbitrator under Section 11(5) of the Act, 1996 and not by a notice of motion in a disposed of suit.

The concerned party moved to the Bombay High Court under Section 11 by an application for appointment of a substitute arbitrator. The Bombay High Court has appointed a retired Judge of the said High Court, namely, Mrs. Justice Sujata Manohar, as arbitrator. But on her resignation, the Bombay High Court has appointed a retired Judge of the said High Court, namely, Dr. Justice S. Radharkrishnan, as substitute arbitrator. The said appointment fell for consideration before the Hon'ble Apex Court in the said case.

The Hon'ble Apex Court has been pleased to hold that since the sole arbitrator was appointed with the consent of the parties to resolve the dispute and when the situation again arose to appoint sole arbitrator, the said appointing authority has been approached by the respondent for appointment of substitute arbitrator which has been held according to the rules that were applicable to the appointment of the arbitrator being replaced.

This Court has also considered the judgment rendered by the Allahabad High Court in the case of *M/s. Tirath Ram Sumer Kumar Vs. Rakesh Kumar Mishra & Anr. (supra)* wherein, as per the arbitration clause, the named arbitrator is to be appointed, accordingly, the named arbitrator was appointed. But the named arbitrators failed to perform their functions entrusted to them under the arbitration clause, accordingly, an application was filed by the applicant herein under Section 11(6) of the Act, 1996.

The Allahabad High Court has appointed Justice A.N. Gupta (Retired) as an arbitrator in the matter. But Justice A.N. Gupta left for his heavenly abode while he was proceeding with the arbitration. In these circumstances, the applicant has filed this application for appointment of a substitute arbitrator in terms of Section 15(2) of the Act, 1996.

The Allahabad High Court has considered the judgments rendered by the Hon'ble Apex Court in the case of *Yashwith Constructions (supra)*, *ACC Limited (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *San-A Tradubg Co. Ltd. (supra)* has come to conclusion that the earlier arbitrator having been appointed by the High Court after notice to the respondents under Section 11, an application for appointment of a substitute arbitrator under Section 11(6) read with Section 15(2), is maintainable and as the dispute arising out of the contract subsists, therefore, the arbitrator was appointed.

The Bombay High Court in the case of *Mohan Balkrishna Lulla Adult. Vs. Shailesh Dhairyavan (supra)* has taken the view that since the parties had entered into an agreement, the vacancy having arisen will have to be filled in and the arbitrator will have to be substituted by appointing an arbitrator under section 15(2) read with section 11 of the Arbitration and Conciliation Act by relying upon the judgment rendered by the Hon'ble Apex Court in the case of *Yashwith Constructions (P) Ltd. (supra)*.

The Bombay High Court yet in another case, i.e., in the case of *Ignatius Tony Pereira Vs. Pifran Sanjivan Fernandes (supra)* has held the application filed under Section 11(6) of the Act, 1996 to be maintainable for appointment of substitute arbitrator by making observation that the expression "rules" that were applicable to the appointment of the arbitrator being replaced" in Section 15, have carefully been chosen. If the arbitrator being replaced was appointed by the Hon'ble Chief Justice and/or his designate in accordance with Section 11 of the 1996 Act read with applicable rules, the substitute arbitrator would also have to be appointed by the Hon'ble Chief Justice and/or his designate in the same manner. It is immaterial that the respondent has appointed an arbitrator in the meanwhile. The appointment of the arbitrator by the respondent, after filing of this application, is of no consequence.

The Andhra Pradesh High Court in the case of *Hemant B. Prasad & Anr. Vs. M/s. Perfect Solutions, rep. by its Prop. Sri*

Praful S. Shah, Hyderabad, 2018 SCC Online Hyd. 2099 has taken the view that the application filed requesting for appointment of substitute arbitrator in place of the deceased arbitrator will not be maintainable unless under Section 11(5) read with Section 15(2) of the Act, 1996 without requesting the respondent to agree to the appointment of a substitute arbitrator in the place of the deceased arbitrator. But while reaching to such conclusion, the fact fell for consideration before the Andhra Pradesh High Court was that the sole arbitrator was appointed, the parties appeared and filed claimed statements before the sole arbitrator and the concerned respondent had filed their objection/ counter thereto. But being aggrieved with the order of the Andhra Pradesh High Court in Arbitration Application No.20 of 2010 dated 23.08.2010, appointing an arbitrator, the concerned respondent had approached the Hon'ble Apex Court by filing S.L.P. (C) No.32581 of 2010, while stay of the order in Arbitration Application No.20 of 2010 dated 23.08.2010 was initially granted, the SLP was subsequently dismissed on 16.02.2016 and the earlier interim order was vacated. But in the meanwhile, the sole arbitrator appointed by the Andhra Pradesh High Court passed away. Accordingly, an application was filed under Section 15(2) of the Act, 1996 seeking appointment of another arbitrator in place of, and on the demise of the sole arbitrator.

The question which necessitates examination is whether the applicants can straightaway invoke the jurisdiction of this Court, under Section 15(2) read with Section 11(5) of the Act, 1996, or whether they are required to comply with the procedural requirements of issuing a notice afresh to the respondent seeking their consent to the appointment of a substitute arbitrator, before approaching this Court under Section 15(2) read with Section 11 of the 1996 Act. It has been held that no straightway application be made under Section 11(6) of the Act, 1996.

The Calcutta High Court in the case of *Ramjee Power Construction Ltd. (supra)*, has considered the issue by considering the judgment pronounced by the Hon'ble Apex Court in the case of *Yashwith Construction P. Ltd. (supra)* and has come to finding that once an application under Section 11 is made, the right of the other party to appoint an arbitrator, in accordance with the agreement, gets extinguished. The right under the agreement, of a party, to appoint an arbitrator, which stands extinguished once an application under Section 11(6) is made, does not revive, if the arbitrator appointed by the Chief Justice resigns and/or his mandate is terminated.

It has further been observed therein that the expression "rules" that were applicable to the appointment of the arbitrator being replaced" in Section 15, have carefully been chosen. If the arbitrator being replaced was appointed by the Chief Justice

and/or his designate in accordance with Section 11 of the 1996 Act read with the applicable rules, the substitute arbitrator would also have to be appointed by the Chief Justice and/or his designate in the same manner. It is immaterial that the respondent has appointed an arbitrator in the meanwhile.

16. Learned counsel for the respondent has given emphasis upon the judgments rendered in the case of *Yashwith Construction (P) Ltd. (supra)*, *National Highways Authority of India (supra)*, *ACC Limited (supra)*, *Shailesh Dhairyawan (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *Rajasthan Small Industries Corpn. Ltd. (supra)* and the judgment of the Andhra Pradesh High Court rendered in the case of *Hemant B. Prasad & Anr. (supra)*.

17. While, Mr. Amit Kumar Das, learned counsel appearing for the petitioner/applicant has submitted that the judgment rendered in the case of *Yashwith Construction (P) Ltd. (supra)*, *National Highways Authority of India (supra)*, *ACC Limited (supra)*, *Shailesh Dhairyawan (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *Rajasthan Small Industries Corpn. Ltd. (supra)* and the judgment of the Andhra Pradesh High Court rendered in the case of *Hemant B. Prasad & Anr. (supra)* are not applicable in the facts of the case, since, in *Yashwith Construction (P) Ltd. (supra)*, the factual aspect is quite different, wherein, the judicial pronouncements of the Hon'ble Apex Court is based upon the facts, wherein, at the initial stage, the Managing Director of the

respondent Company has appointed an arbitrator whose mandate has been terminated and in that pretext and taking into consideration the state of the termination of arbitral proceeding, the Hon'ble Apex Court has taken view that the concerned party is required to approach before the Managing Director itself as per the condition stipulated in the contract.

It has further been submitted that the judgment rendered in the case of *National Highways Authority of India (supra)*, is also not applicable in the facts of the case since therein the parties have entered into an agreement, which contained a mechanism for resolution of dispute between the parties, as contained in sub clause 67.3. It was provided therein that in case the parties' nominated arbitrators failed to agree on a presiding arbitrator within 30 days, the same would be appointed by the President, IRC. Disputes having arisen between the parties, respondent no.1 nominated its arbitrator as respondent 3. The appellants also invoked the arbitration clause. Thereafter, the appellants nominated Mr. D.P. Gupta, as their arbitrator. In view of the disagreement between the two nominated arbitrators to agree upon the presiding arbitrator, respondent 1 sought a clarification from Indian Roads Congress (IRC) by asking respondent 2 for availability of any judicial arbitrator for the purpose of nomination as presiding arbitrator. IRC informed that there did not exist any judicial arbitrator in its panel and in that pretext, an

application was filed by the concerned respondent being Arbitration Petition No.23 of 2005 before the High Court requesting for appointment of the presiding arbitrator.

The High Court vide its judgment dated 06.01.2006, appointed Mr. Justice P. Chenna Keshava Reddy, former Chief Justice of the Andhra Pradesh and the Gauhati High Courts as the presiding arbitrator, which according to the appellants, was in clear and express violation of the contract agreement entered into between the parties.

It has been submitted that judgment rendered in the case of *ACC Limited (supra)*, *Shailesh Dhairyawan (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *Rajasthan Small Industries Corpn. Ltd. (supra)* is also not applicable in the facts of the given case.

It has been submitted that even the judgment passed by the Andhra Pradesh High Court is also not applicable in the facts of the given case, since, what has been laid down by the Hon'ble Apex Court either in the case of *Yashwith Constructions (P) Ltd. (supra)* or *Shailesh Dhairyawan (supra)*, Andhra Pradesh High Court has not taken into consideration the pretext upon which, ratio has been laid down by the Hon'ble Apex Court in these cases.

According to Mr. Das, the order passed by the Bombay High Court in the case of *Global Cements Ltd. (supra)* and Calcutta High Court in the case of *Ramjee Power Construction Ltd. (supra)* is well applicable in the facts of the instant case.

18. The legal position is not in dispute that a judgment is to be tested about its applicability depending upon the facts and circumstances of each and every case, as has been laid down by the Hon'ble Apex Court in the case of *Dr. Subramanian Swamy Vs. State of Tamil Nadu & Ors., (2014) 5 SCC 75*, wherein, at paragraph 47, it has been held as under:-

"47. It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. "The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed."

19. There is no dispute after the issue having been settled by the Hon'ble Apex Court in the case of *ACC Limited Vrs. Global Cements Limited (supra)* that the substitute arbitrator is to be appointed even in case of death.

It has also been settled in the case of *Yashwith Constructions (P) Ltd. (supra)* that interpretation of the term 'rule' referred in Section 15(2) of the Act, 1996.

20. There is no dispute about the fact that the application under Section 11(6) is required to be filed only after exhausting the arbitration mechanism, as has been held by the Hon'ble Apex

Court in the case of *Datar Switchhears Ltd. Vs. Tata Finance Ltd. & Anr.*, (2000) 8 SCC 151. Since, the Hon'ble Apex Court has decided the term 'rule' as referred under Section 15(2) of the Act, 1996 which does mean that the terms and conditions stipulated in the agreement.

Since, the Arbitration and Conciliation Act, 1996, so far as appointment of Arbitrator is concerned, is strictly to be governed in pursuant to the terms and conditions of the contract.

21. This Court, on consideration of the judgment rendered by the Hon'ble Apex Court in the case of *Yashwith Constructions (P) Ltd. (supra)*, is of the view that the ratio has been laid down therein to the extent that the appointment of substitute arbitrator must be done according to the original agreement or provision applicable for appointment of arbitrator at initial stage. Such ratio has been laid down in the given facts of the case as was in the case of *Yashwith Construction*, wherein, the Managing Director of the respondent Company appointed an arbitrator in terms of the arbitration clause. The arbitrator resigned. The Managing Director, thereupon, 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, 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.

Likewise, the observation made by the Hon'ble Apex Court in the case of *National Highways Authority of India (supra)*, wherein, it has been observed as under paragraph-44 by holding therein that the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the presiding arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only was respondent 2 authorised to make the appointment. Unless respondent 2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act.

Such finding has been arrived at on the basis of the condition of contract, as under sub-clause 67.3, which provides that the Arbitral Tribunal shall consist of three arbitrators, one each to be appointed by the employer and the contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the parties and shall act as presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the

appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the President, Indian Roads Congress.

Thus, it is evident that in case of failure of appointment of arbitrator, the presiding arbitrator is to be appointed by the President, Indian Roads Congress and as such, an application ought to have been filed before the President, Indian Roads Congress and not before the High Court under Section 11(6) at its inception and in that pretext, such ratio has been laid down.

In the case of *Huawei Technologies Co. Ltd. (supra)*, the Hon'ble Apex Court has been pleased to hold as under paragraph-8 that the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof the present application under Section 11(6) of the Act could/should have been filed.

Such finding has been arrived at in the background of the fact that application under Section 11(6) of the Act, 1996 was filed, in pursuant thereto, Shri Justice S.K. Dubey, a former Judge of the High Court of Madhya Pradesh, was appointed as Arbitrator but recused himself from proceeding and in that pretext, an application under Section 11(6) of the Act, 1996 was filed.

But the contract containing arbitration clause provides as under clause 22.3 that the appointment of sole arbitrator is to be

done by the parties by mutual consent and in a situation where the original arbitrator, i.e., Shri Justice S.K. Dubey, had recused himself, the substitute or new arbitrator is required to be appointed, according to the rules that were applicable to the appointment of the original arbitrator, meaning thereby, in the aforesaid case, since, Shri Justice S.K. Dubey, was appointed with the mutual consent of the parties but he recused himself to act as arbitrator, therefore, the requirement as per the condition of contract was again to have a mutual consent for appointment of arbitrator and only on its failure, an application under Section 11(6) could have been filed, but having not done so, as such, the Hon'ble Apex Court has held in the judgment to explore the possibility of naming an arbitrator by mutual consent.

In the case of *Rajasthan Small Industries Corpn. Ltd.* (*supra*), wherein, the Hon'ble Apex Court has taken the contrary view as was taken by the High Court, by which, the independent arbitrator was appointed and according to the Hon'ble Apex Court, the same was without keeping in view the terms of agreement between the parties. The agreement between the parties, as was in the aforesaid case that the Managing Director himself or his or her nominee to act as sole arbitrator, as per the terms of the clause 4.20.1. But for one reason or the other, the arbitration proceeding could not be concluded and as such, the Chairman-cum-Managing Director has taken up the arbitration to

resolve the dispute between the parties. But the Chairman-cum-Managing Director since was transferred and as such, a notice was given by the contractor showing concern that award could not be passed and in that pretext, an application under Section 11(6) and Section 15 of the Act, 1996 was filed.

The Hon'ble Apex Court, in the aforesaid background, has come to the conclusive finding that the steps for appointment of arbitrator ought to have been taken in terms of the contract.

22. The fact of the given case herein is that the sole arbitrator was appointed by a proceeding initiated under Section 11(6) of the Act, 1996 in an Arbitration Application No.05 of 2016 vide order dated 07.04.2017, by appointing Hon'ble Mr. Justice S.B. Sinha, (now deceased) a retired Judge of the Hon'ble Supreme Court, to act as sole arbitrator.

The parties had appeared and pleadings have been filed but unfortunately, the sole arbitrator has died.

In this pretext, the applicability of the judgments rendered by the Hon'ble Apex Court either in the case of *Yashwith Construction (P) Ltd. (supra)*, *National Highways Authority of India (supra)*, *ACC Limited (supra)*, *Shailesh Dhairyawan (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *Rajasthan Small Industries Corpn. Ltd. (supra)* or the judgment of the Andhra Pradesh High Court rendered in the case of *Hemant B. Prasad & Anr. (supra)* are applicable in the facts of the given case or not?

23. This Court has also discussed the factual aspects pertaining to case of *Yashwith Construction (P) Ltd. (supra)*, *National Highways Authority of India (supra)*, *ACC Limited (supra)*, *Shailesh Dhairyawan (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *Rajasthan Small Industries Corpn. Ltd. (supra)* and the judgment of the Andhra Pradesh High Court rendered in the case of *Hemant B. Prasad & Anr. (supra)* and in all the cases, the Hon'ble Apex Court has come to the conclusive view that the terms of the contract are required to be followed for appointment of sole arbitrator by considering the application under Section 11(6) of the Act, 1996.

24. It cannot be a case herein that at the initial stage, petitioner/applicant has not followed the terms and conditions of the contract for resolution of dispute before making application under Section 11(6) of the Act, otherwise, the initial application filed under Section 11(6) would not have allowed and the sole arbitrator would not have been appointed.

25. The petitioner/applicant was forced to file application under Section 11(6) of the Act, 1996 after exhausting the remedy available under the dispute redressal mechanism contained in the contract. Therefore, the alternative mechanism available under the contract before taking recourse of the application to be filed under Section 11(6) of the Act, 1996, has already been taken recourse thereof by the petitioner/applicant. But, now, due to demise of the sole arbitrator, when this application has been filed,

the respondent is taking the plea to follow the same mechanism which has already been exhausted by the petitioner/applicant before filing Arbitration Application No.05 of 2016.

26. The objection which is being raised on behalf of the respondent to that extent, according to the considered view of this Court is not at all sustainable taking into consideration the very object and intent of the redressal of commercial dispute and as per the mandate, the same is to be adjudicated at an early date. But the respondent has not cared for resorting to the settlement of dispute, as per the alternative mechanism available under the arbitration agreement which resulted into filing of Arbitration Application No.05 of 2016. But, the plea is now being taken to take recourse thereof, which has already been taken by the petitioner/applicant, while taking objection about the maintainability of the instant application.

27. This Court has now to consider on the given facts of the case, since, the rules which have been laid by the Hon'ble Apex Court in the judicial pronouncements rendered in the case of *Yashwith Construction (P) Ltd. (supra)*, *National Highways Authority of India (supra)*, *ACC Limited (supra)*, *Shailesh Dhairyawan (supra)*, *Huawei Technologies Co. Ltd. (supra)*, *Rajasthan Small Industries Corpn. Ltd. (supra)*, are not applicable in the facts of the given case, as per the discussion made hereinabove.

However, the High Courts have given their different views. The Andhra Pradesh High Court, has come out with its view putting reliance upon the judgments rendered by the Hon'ble Apex Court in the case of *Yashwith Constructions (P) Ltd. (supra)*, *ACC Limited (supra)* & *Shailesh Dhairyawan (supra)* by coming to conclusion that while requesting to appoint substitute arbitrator in the place of deceased arbitrator, first request is to be made for the same then only 11(6) application should have been filed.

28. But, this Court is in respectful disagreement with the finding arrived at by the Andhra Pradesh High Court due to the reason that the judgment upon which the reliance has been placed by the Andhra Pradesh High Court either in the case of *Yashwith Constructions (P) Ltd. (supra)*, *ACC Limited (supra)* & *Shailesh Dhairyawan (supra)*, ought to have been tested on the given facts of the case and thereafter, the conclusion ought to have been arrived at but by not doing so and applying the judgment rendered by the Hon'ble Apex Court in the case of *Yashwith Constructions (P) Ltd. (supra)*, *ACC Limited (supra)* & *Shailesh Dhairyawan (supra)* in the given facts of those cases, cannot be accepted.

29. It is not in dispute that the judgments passed by the other High Courts are having no binding precedence but the same has got persuasive value. But, while taking different view, it is incumbent upon the High Court to assign reason of taking

different view, as has been held by the Hon'ble Apex Court in the case of *Pradip J. Mehta Vs. Commissioner of Income Tax, Ahmedabad, (2008) 14 SCC 283*, wherein, at paragraph-23, it has been held which reads as under:-

"23. Although, the judgments referred to above were cited at the Bar in the High Court, which were taken note of by the learned Judges of the Bench of the High Court, but without either recording its agreement or dissent, it answered the two questions referred to it in favour of the Revenue. Judicial decorum, propriety and discipline required that the High Court should, especially in the event of its contra view or dissent, have discussed the aforesaid judgments of the different High Courts and recorded its own reasons for its contra view. We quite see the fact that the judgments given by a High Court are not binding on the other High Court(s), but all the same, they have persuasive value. Another High Court would be within its right to differ with the view taken by the other High Courts but, in all fairness, the High Court should record its dissent with reasons therefor. The judgment of the other High Courts, though not binding, have persuasive value which should be taken note of and dissented from by recording its own reasons."

30. This Court, therefore, on the basis of the aforesaid reasoning, i.e., coming to the view to again take recourse of the mechanism available under the contract by making request under Section 21 of the Act, 1996 without considering the factual aspect

involved therein, is in respectful disagreement with the view taken by the Andhra Pradesh High Court in the case of *Hemant B. Prasad and Anr. (supra)*.

31. This Court has considered the judgment rendered by the Allahabad High Court in the case of *M/s. Tirath Ram Sumer Kumar (supra)*, wherein, the judgments rendered by the Hon'ble Apex Court in the case of *Yashwith Constructions (P) Ltd. (supra)*, *ACC Limited (supra)*, *National Highways Authority of India (supra)*, *Huawei Technologies Co. Ltd. (supra)* and *San-A Tradubg Co. Ltd. (supra)* have been taken into consideration and while, considering so, the factual aspect of the given case has also been considered. Thereafter, a view has been taken as under paragraph-23 that the earlier arbitrator since having been appointed by the High Court after notice to the respondents under Section 11(b), an application for appointment of a substitute arbitrator under Section 11(6) read with Section 15(2), is maintainable.

This Court has also considered the judgment rendered in the case of *Ignatius Tony Pereira (supra)*, wherein, it has been observed that expression "rules" that were applicable to the appointment of the arbitrator being replaced" in Section 15, have carefully be chosen. If the arbitrator being replaced was appointed by the Hon'ble Chief Justice and/or his designate in accordance with Section 11 of the 1996 Act read with applicable rules, the substitute arbitrator would also have to be appointed

by the Hon'ble Chief Justice and/or his designate in the same manner. It is immaterial that the respondent has appointed an arbitrator in the meanwhile. The appointment of the arbitrator by the respondent, after filing of this application, is of no consequence.

The Calcutta High Court in the case of *Ramjee Power Construction Ltd. (supra)* has considered the fact and has arrived at finding that the expression "rules" that were applicable to the appointment of the arbitrator being replaced" in Section 15, is to be read out by taking into consideration the legal position that if the arbitrator being replaced was appointed by the Chief Justice and/or his designate in accordance with Section 11 of the 1996 Act read with the applicable rules, the substitute arbitrator would also have to be appointed by the Chief Justice and/or his designate in the same manner.

32. This Court, after taking into consideration the view expressed by the Hon'ble Apex Court in the case of *Ignatius Tony Pereira (supra) and Ramjee Power Construction Ltd. (supra)*, is of the view that what has been laid down by the Hon'ble Apex Court in the case of *Yashwith Constructions (P) Ltd. (supra)* about the interpretation of the term 'rules' in Section 15(2) which 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 and since, such rules have already been resorted to, as provided in such rules in

terms of the condition stipulated in the contract since has been followed at the initial stage, as such, there is no reason again to ask the party to request the respondent making request under Section 21 of the Act, 1996 for appointment of an arbitrator.

It is in this context, Section 21 is also required to be considered by which the commencement of arbitral proceeding will be said to have commenced, unless otherwise aggrieved by the parties, the arbitral proceeding in respect of a particular dispute commenced on the date on which, a request for that dispute to be referred to arbitration is received by the respondent.

Thus, the mandate of Section 21 of the Act, 1996 warrants that in case of no agreement in between the parties for resolving the dispute, if the request is being made for appointment of an arbitrator, the arbitral proceeding will be said to have commenced.

33. The law is well settled that so long as the request which has been made under Section 21 for appointment of sole arbitrator, is not being acted upon within the statutory period and once the application is being filed by taking recourse of the provision of Section 11(6) of the Act, 1996, the party will be seized to have exercised the jurisdiction to appoint arbitrator.

34. Herein, in the instant case, it is admitted fact that the petitioner/applicant has filed an application making request for

appointment of arbitrator in view of the provision of Section 21 of the Act, 1996 and only on failure on the part of the respondent, since the arbitrator has not been appointed within the stipulated period, an application under Section 11(6) of the Act, 1996 has been filed but the arbitral proceeding stands terminated due to demise of learned sole arbitrator and if again, the petitioner/applicant will be relegated before the respondent for making a fresh request for appointment of arbitrator, the same will not be permissible, since, the remedy available to the claimant as per the contract since has been exhausted at the initial stage for resolution of dispute and only on its failure, an application under Section 11(6) has been filed, therefore, all the measures provided under the contract since have been taken recourse thereof, therefore, the same will be extinguished and only a fresh application is to be filed before the High Court under Section 11(6) for appointment of substitute arbitrator, since there is nothing contrary in the contract thereto.

35. If the objection of the learned counsel for the respondent will be accepted, then the power for appointment of arbitrator which has been seized the moment application under Section 11(6) has been filed, then again, the same will be revived which according to the considered view of this Court is not permissible.

36. This Court, in view of the aforesaid discussions on fact and on consideration of the legal position as above, is of the view that

the objection which is being raised on behalf of the respondent is not sustainable in the eye of law, accordingly, such objection is overruled.

37. In the result, this Court is of the view that it is a fit case where this application is held to be maintainable.

38. Accordingly, the instant application is held to be maintainable.

39. In view thereof, the instant application deserves to be allowed.

40. Accordingly, the instant application stands allowed.

41. This Court has asked the suggestion from the learned counsel for the parties for disclosing the name for appointment of Arbitrator, so as to resolve the dispute.

42. Learned counsel for the parties, however, has submitted that this Court may appoint any Former Judge of the Hon'ble Supreme Court to act as Arbitrator.

43. Considering the aforesaid submission, this Court, therefore, appoints Hon'ble Mr. Justice (Retd.) Kurian Joseph, Former Judge of the Hon'ble Supreme Court, presently residing at No.50, Poorvi Marg, Vasant Vihar, New Delhi-110057, Email:- *justicekurianjoseph@gmail.com*, to act as Arbitrator for resolution of dispute between the parties.

44. The proposed learned Arbitrator is required to submit a declaration in terms of Section 12 of Arbitration and Conciliation Act, 1996.

45. Let photocopy of the entire pleadings along with copy of the entire order sheet be sent to the learned Arbitrator by the Registry.

46. Pending Interlocutory Application(s), if any, stands disposed of.

(Sujit Narayan Prasad, J.)

Rohit/-
A.F.R.