

(2019) 03 DEL CK 0232

In the Delhi High Court

Case No : Arbitration Petition No. 34 Of 2019

Cbre South Asia Pvt. Ltd

APPELLANT

Vs

Fiitjee

RESPONDENT

Date of Decision : 19-03-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 11(5), 11(6), 11(9), 12, 13(3), 14, 14(1), 14(3), 15, 15(1), 15(1)(a), 15(2)
Code Of Civil Procedure, 1908 — Section 151
Insolvency And Bankruptcy Code, 2016 — Section 8

Citation : (2019) 03 DEL CK 0232

Hon'ble Judges : Sanjeev Narula, J

Bench : Single Bench

Advocate : Vaibhav Mishra, Sandeep Sharma, Hunny Veer Singh

Final Decision : Dismissed

Judgement

Sanjeev Narula, J

1. The present petition has been filed under Section 11 (6) of the Arbitration & Conciliation Act, 1996 ("the Act" for short) with the following prayers:-

"(a) Pass an order under Section 11 (6) of the Arbitration & Conciliation Act, 1996 r/w Section 151 of The Civil Procedure Code, 1908 thereby appointing a Sole Arbitrator from Delhi International Arbitration Centre as per the Delhi International Arbitration Centre (Arbitration Proceedings) Rules 2018 to adjudicate the dispute between the parties on account of the blatant non-payment of the invoices raised by the Petitioner to the Respondent;

(b) To suspend the arbitration proceedings between the parties before the Ld. Arbitrator Ms. Dipti Singh until the disposal of the current petition;

(c) Pass an order, awarding the cost of the proceedings in favour of the Petitioner and against the Respondents and in that behalf;

(d) Pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. At the outset, learned counsel for the Respondent raises an objection with respect to the maintainability of the present petition. On this issue, learned counsel for the Petitioner refers to the order passed in Arbitration Petition No. 844/2018 whereby, this Court while disposing of the petition filed under Section 11 of the Act granted liberty to the Petitioner to file a fresh petition. The above said order reads as under:-

"This petition is disposed of as not pressed with liberty to the petitioner to file a petition, of course in accordance with law, seeking removal of the Arbitrator appointed by the respondent and notice of which is received by the petitioner on 30.11.2018 i.e. after the filing of this petition, and in the fresh petition, the petitioner can also seeks appointment of an Arbitrator in accordance with law under Section 11 of the Arbitration and Conciliation Act, 1996.

2. Petition and application are accordingly disposed of with the aforesaid liberty."

3. Learned counsel for the Petitioner submits that liberty granted by the Court specifically notes that petition under Section 11 of the Act could be filed and hence the present petition is maintainable.

4. Before examining the rival contentions on the question of maintainability, it is essential to note certain relevant facts.

BRIEF FACTUAL BACKGROUND

5. The parties entered into a Project Management Consultant Services Agreement dated 13th February 2017. The existence of this agreement is not in dispute between the parties. The arbitration agreement between the Petitioner and the Respondent is contained in the arbitration clause which reads as under:-

"In case the parties fail to arrive at any amicable resolution or settlement of the dispute, the same shall be referred to the Sole Arbitrator appointed by the Client i.e. FIITJEE Ltd. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and statutory modification thereof & rules made thereunder. The award of Arbitrator shall be final & binding on both the parties. The award of the Arbitrator shall be final & binding on every matter arising hereunder."

6. Petitioner issued a demand notice dated 7th July 2018 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Respondent. The Respondent replied to the said notice on 20th July 2018 and controverted and disputed the allegations made by the petitioner. At the same time the Respondent also invoked the arbitration clause and appointed Ms. Shweta Bharti as the sole Arbitrator. The said Arbitrator entered upon reference and issued a notice dated 27th July 2018 giving declaration under Section 11 (9) and 12 of the Act and directed the parties to appear before the Arbitral Tribunal on 7th August 2018.

7. Petitioner filed an application under Section 12 of the Act and objected to the appointment of the learned Arbitrator. On consideration of the said application, learned Arbitrator via e-mail/order dated 15th September 2018 expressed her resentment to continue with the arbitration and recused herself. The said communication reads as under:-

"On the last date of hearing i.e. 11.09.2018 in the matter of M/s CBRE South Asia Pvt. Ltd. vs. FIITJEE Ltd., the Arbitrator has already discussed regarding the objection raised by the CBRE was already mailed in compliance of the above stated schedule by the undersigned on 27.07.2018 itself to both the Parties (as mentioned in the Order dated 11.09.2018). Since the Advocate for the Claimant has requested for the arguments and hearing of the Application under Section 12 of the Act, thus I am inclined to release the matter and return the file".

8. Later on 5th October 2018, the petitioner received a letter regarding the appointment of Ms. Dipti Singh as the sole Arbitrator. This was followed by another letter dated 16th November 2018 informing the petitioner about the hearing before the Arbitrator on 4th December 2018.

9. In this back drop, the petitioner filed Arbitration Petition no. 844/2018 under section 11(6) of the Arbitration & Conciliation Act, 1996. Though the copy of the said petition has not been filed, the learned counsel for the Petitioner candidly states that the reliefs sought in the present petition were similar, if not identical to those contained in the earlier petition. The challenge in the earlier petition was also in respect of the right of the Respondent to appoint the substitute Arbitrator. The said petition as noted at the outset, was disposed of as withdrawn, vide order dated 3rd December 2018 by this Court with a liberty to the Petitioner to file fresh petition under Section 11 (6) of the Act.

10. In the present petition, considering the nature and relief sought and in view of the objection raised, the learned counsel for the Petitioner urged that this Court has the jurisdiction to terminate the mandate of the Arbitrator so appointed under Section 11 (6) of the Act. He submitted that the power of Section 11 (6) is not confined to the power to make appointment of an Arbitrator. If the said provision is invoked, the Court can also exercise its power and terminate the mandate of the Arbitrator. In support of his submission, learned counsel for the Petitioner has relied upon several decisions of this court as well as the Supreme Court. The main thrust of the arguments of the learned counsel for the Petitioner concerns the right of the Respondent to appoint a substitute Arbitrator. He argues that the right of the appointment with the Respondent is limited and can be exercised only once and if the Arbitrator recuses on account of certain circumstances, then the only option with the Respondent is to approach the Court for appointment of the Arbitrator. To emphasize this point, he submits that since there is no specific provision in the Arbitration Clause bestowing the Respondent with the power to appoint the substitute Arbitrator, it has to be inferred that there is no such power with the Respondent. Reliance is placed by the learned counsel for the Petitioner on the following judgments:-

- (i) SBP and Company v. Patel Engineering Limited, 2009 (10) SCC 293
- (ii) Jagdish Prasad Agarwal v. Cimmco Birla Ltd., 2004 (3) Arb. LR 483 (Delhi).
- (iii) ACC Ltd. v. Global Cements Ltd., 2012 (7) SCC 71.
- (iv) San A Tradubg Company Limited v. I.c. Textiles Limited, (2012) 7 SCC 192

11. Per Contra, learned counsel for the Respondent has submitted that the submission of the learned counsel for the Petitioner is wholly misplaced and the petition is misconceived. Once the Arbitrator has been appointed, the petition under Section 11 (6) of the Act does not lie. He further submits that the liberty granted by the Court for filing the present petition would not render the petition maintainable. There is no provision under Section 11 of the Act which gives the power to the Court to terminate the mandate of the Arbitrator that has been validly appointed.

ANALYSIS AND FINDINGS

12. At this stage, it is imperative to deal with the judgments relied upon by the Petitioner. Learned counsel for the Petitioner has relied upon the judgment of the Supreme Court in SBP and Company v. Patel Engineering Limited 2009 (10) SCC 293 and in particular has referred to the following excerpt:-

"...15. An analysis of the scheme of Section 11 which relates to appointment of Arbitrators shows that in terms of Sub-section (1) thereof, a person of any nationality can be appointed as an Arbitrator unless there is a contra agreement between the parties. Sub-section (2) lays down that the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators. This is subject to the provision contained in Sub-section (6). Sub-section (3) lays down that if there is no agreement between the parties in an arbitration with three Arbitrators, each party shall appoint one Arbitrator, and the two Arbitrators appointed by the parties shall appoint the third Arbitrator who shall act as the Presiding Arbitrator. Sub-section (4) lays down that if a party fails to appoint an Arbitrator within 30 days from the date of receipt of request to do so from the other party or the two Arbitrators fail to agree on the third Arbitrator within 30 days from the date of their appointment, then the Chief Justice or any person or institution designated by him can be approached for appointing an Arbitrator or the third Arbitrator, as the case may be. The procedure prescribed in Sub-section (4) also applies to a case involving appointment of a sole Arbitrator. Sub-section (6) enumerates the contingencies in which a party may request the Chief Justice or any person or institution designated by him to take necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in Sub-section (6) are: (i) if a party fails to act as required under the agreed procedure or, (ii) the parties or the two appointed Arbitrators fail to reach an agreement expected of them under such procedure, or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. Sub-section (8) requires that

in appointing an Arbitrator, the Chief Justice or any person or institution designated by him shall have due regard to any qualification required of the Arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial Arbitrator. Sections 14 and 15 enumerate the circumstances in which the mandate of an Arbitrator shall terminate. Sub-section (1) of Section 14 lays down that the mandate of an Arbitrator shall terminate if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay and he withdraws from his office or the parties agree to terminate his mandate. Sub-section (2) lays down that if there is any controversy between the parties in relation to any of the grounds referred to in Clause (a) of Sub-section (1) and there is no other provision in the agreement between the parties, either party can apply to the Court for termination of the mandate of an Arbitrator unless the parties agree otherwise. By Sub-section (3) of Section 14 it has been clarified that if an Arbitrator withdraws from his office under Sub-section (1) of Section 14 or Sub-section (3) of Section 13 or a party agrees to the termination of the mandate of an Arbitrator, same shall not be construed as an acceptance of the validity of any of the grounds referred to in Section 14 or Sub-section (3) of Section 12 which speaks of the grounds of challenge to the appointment of an Arbitrator. Section 15 specifies additional circumstances in which the mandate of an Arbitrator shall terminate and also provides for substitution of an Arbitrator. Sub-section (1) of this section lays down that in addition to the circumstances referred to in Sections 13 and 14, the mandate of an Arbitrator shall terminate where he withdraws from office for any reason or pursuant to agreement of the parties. Sub-section (2) of Section 15 postulates appointment of a substitute Arbitrator in accordance with the rules that were applicable to the appointment of the original Arbitrator.

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

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

(Emphasis supplied)"

13. In order to appreciate the observations of the Supreme Court in the said judgment it is essential to note the Arbitration Clause that formed the subject matter of the controversy in the said case. The Arbitration Clause has been also noted in the said judgment and for the sake of clarity it is reproduced herein below:

".....The continuance of this piece work agreement / contract or at any time after the termination thereof, any difference or dispute shall arise between the parties hereto in regard to the interpretation of any of the provisions herein contained or act or thing in relation to this agreement / contract, such difference or dispute shall be forthwith referred to two Arbitrators for Arbitration in Bombay one to be appointed by each party with liberty to the Arbitrators in case of differences or their failure to reach an agreement within one month of the appointment, to appoint an umpire residing in Bombay and the award which shall be made by two Arbitrators or umpire as the case may be shall be final, conclusive and binding on the parties hereto.

If either party to the difference or dispute shall fail to appoint an Arbitrator within 30 calendar days after notice in writing having been given by the parties or shall appoint an Arbitrator who shall refuse to act then the Arbitrator appointed by the other party shall be entitled to proceed with the reference as a Sole Arbitrator and to make final decision on such difference or dispute and the award made as a result of such arbitration shall be a condition precedent to any right of action against any two parties hereto in respect of any such difference and dispute."

14. Dispute had arisen with respect to the right of a party to appoint an Arbitrator. The Court specifically took note of the Arbitration Clause and made the following observations in para 20 of the said judgment reproduced as under:-

"....20. We may now advert to the scope of Clause 19 of piece work agreement, which provides for appointment of two Arbitrators, one by each party, with liberty to the Arbitrators to appoint an Umpire, in case of difference or their failure to reach an agreement within one month of their appointment. The award made by two Arbitrators or Umpire, as the case may be, is treated as final, conclusive and binding on the parties. This clause also specifies the consequence of failure of either party to the difference or dispute to appoint an Arbitrator within 30 calendar days counted from the date of notice in writing given by the other side or refusal of the Arbitrator appointed by either party to accept such appointment or act upon the same. In that event, the Arbitrator appointed by the other party becomes entitled to proceed with the reference as the Sole Arbitrator and make an award. There is nothing in Clause 19 from which it can be inferred that in the event of refusal of an Arbitrator to accept the appointment or arbitrate in the matter, the party appointing such Arbitrator has an implicit right to appoint a substitute Arbitrator. Thus, in terms of the agreement entered into between the parties, respondent No. 1 could not appoint Shri S.L. Jain as a substitute

Arbitrator simply because Shri S.N. Huddar declined to accept the appointment as an Arbitrator. The only consequence of Shri S.N. Huddar's refusal to act as an Arbitrator on behalf of respondent No. 1 was that respondent No. 2 who was appointed as an Arbitrator by the appellants became the Sole Arbitrator for deciding the disputes or differences between the parties.(Emphasis supplied)"

15. The observations of the court that a party appointing an Arbitrator does not implicitly have the right to appoint a substitute Arbitrator have been understood, keeping in view the nature of the Arbitration Clause. The said Clause provided that in the event, either of the parties to the dispute, fails to appoint the Arbitrator within 30 calendar days or in the event the Arbitrator who has been appointed refuses to act as one, the Arbitrator appointed by either party shall be appointed as sole Arbitrator and to make final decision on such dispute of differences. In view of this peculiar nature of Arbitration Clause, the Supreme Court decided that there is no implicit right to appoint a substitute Arbitrator.

16. Learned counsel for the petitioner also relied upon para 4 of the judgment passed by this Court in Jagdish Prasad Agarwal v. Cimmco Birla Ltd., 2004 (3) Arb. LR 483 (Delhi) which reads as under:-

"...4.Thirdly, it is well settled that the Court is not bound in any manner whatsoever to exercise powers only under the section invoked by an applicant. Instead it must fulfill the functions expected of the Court by statute. Where a vacancy has arisen, which requires to be filled up under Section 11, a reference to Section 15 is irrelevant. The Court must proceed in consonance with law."

17. This decision also does not come to the aid of the petitioner. In the above noted case, a vacancy had arisen on account of the death of late Justice N. C. Kochhar who had been appointed as an Arbitrator by the Court on account of the failure of the Respondent to appoint a substitute Arbitrator. In that situation, the Court observed in para 3 of the said judgment as under:-

"...3. It has next contended that the power to appoint the Arbitrator, since a vacancy has occurred, rests with the President of the respondent company. So far as this is concerned, in my opinion once the Court has intervened and has appointed an Arbitrator, a jural novation to the Arbitration clause has already taken place. Therefore, a strict compliance with the letter in contradistinction to the spirit of the Arbitration clause is no longer formally required. My attention has been drawn to an order passed by Justice S.K. Mahajan (Retd.) in OMP No. 29/1989 where a procedure similar to the one presently adopted by me, has been followed. Since the appointment of late Justice N.C. Kochhar had been necessitated because of the failure of the respondent to appoint an Arbitrator, the subsequent power to appoint another Arbitrator because of the occurrence of a vacancy would not inure to the President of the respondent/Appointing Authority under the Arbitration clause. (Emphasis supplied)"

18. Learned counsel for the Petitioner then referred to the judgment of the Supreme Court in ACC Ltd. v. Global Cements Ltd. 2012 (7) SCC 71. And relied

upon para 20 of the judgement which reads as under:-

"20. Section 11(6) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the Arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the agreement.

19. This reliance is totally misplaced in view of the nature of the arbitration clause which is reproduced in para 2 of the ACC Ltd.(supra), which reads as under:-

"If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and liabilities of the parties hereto then such question or dispute shall be referred either to Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties." (emphasis added)"

20. In ACC (supra), a situation had arisen due to the demise of the named Arbitrator. The court was thus dealing with the question regarding the survival of the Arbitration clause post such demise. In these circumstances, the Court in para 16 and 17 observed as under:-

".....16. Section 14 of the Arbitration and Conciliation Act, 1996 provides for the circumstances in which the mandate of the Arbitrator is to terminate. It says that the mandate of an Arbitrator will end when it becomes impossible for him to perform his functions de facto or de jure or for some other reasons he fails to act without undue delay or withdraws from office or the parties agree to terminate his mandate.

17. Section 15(2) of the Act provides that where a substitute Arbitrator has to be appointed due to termination of the mandate of the previous Arbitrator, the appointment must be made according to the rules that were applicable to the appointment of the Arbitrator being replaced. No further application for appointment of an independent Arbitrator under Section 11 will lie where there has been compliance with the procedure for appointment of a substitute Arbitrator. On appointment of the substitute Arbitrator in the same manner as the first, no application for appointment of independent Arbitrator under Section 11 could be filed. Of course, the procedure agreed upon by the parties for the appointment of the original Arbitrator is equally applicable to the appointment of a substitute Arbitrator, even if the agreement does not specifically say so. Reference may be made to the judgment of this Court in Yashwith Constructions (P.) Ltd. v. Simplex Concrete Piles India Ltd.,(2006) 6 SCC 204.(Emphasis supplied)"

21. Therefore the above said judgment also does not help the Petitioner. In fact the ratio of the judgment goes against the Petitioner, as discussed later in the order.

22. Lastly, the learned counsel for the petitioner referred to the decision titled as *San ATradubg Company Limited v. I.c. Textiles Limited* (2012) 7 SCC 192 and relied upon the observations made in para 18 of the said judgment.

23. In that case also, the arbitration clause clearly named an Arbitrator. The clause reads as under:-

"...4. Clause 6 of the Deed provides as under:-

In case of any dispute, difference or issues arising under or in any manner concerning or in connect with this Deed, the same shall be resolved by arbitration by Mr.Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, 3rd Floor, Osaka Green Building, 206-26 Kitahama, Chuoku, Osaka 5410041, Japan on principles of equity and good conscience (ex equo et bono), whose award shall be find and binding."

24. The aforesaid named Arbitrator initially expressed his inability to discharge his role as Arbitrator and left it for the parties to take steps to fill up the vacancy as and when the need arises. However, later vide letter dated 21st November 2005, he expressed his availability and willingness to act as Arbitrator. In this background, observations made in para 18&19 of the judgment become relevant and the same are reproduced here under:-

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

19. In the present case, I do not find any such stipulation in the contract entered into between the parties where under the parties have specifically debarred appointment of a fresh Arbitrator. In the absence of any specific condition debarring appointment of a fresh Arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named Arbitrator's refusal to perform his function.(Emphasis supplied)"

25. On the other hand, learned counsel for the Respondent relies upon the judgment of the Supreme Court in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* and another (2006) 6 SCC 204, wherein the fact situation was similar to the present case. In the said case, the Managing Director of the Respondent company was appointed as an Arbitrator in terms of the arbitration clause. The said Arbitrator resigned. In view of the mandate of

appointment of Arbitrator, the Managing Director promptly appointed another Arbitrator. At that stage, the Petitioner approached the Court under Section 11 (5) read with Section 15 (2) of the Act and prayed for substitution of the Arbitrator to resolve the dispute between the parties. Dealing with such petition, the court observed as follows:-

"4...In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section 15 of the Act. When the Arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorized originally by the arbitration agreement, promptly appointed a substitute Arbitrator. It is true that in the arbitration agreement there is no specific provision authorizing the Managing Director to appoint a substitute Arbitrator if the original appointment terminates or if the originally appointed Arbitrator withdraws from the arbitration. But, this so called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an Arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore Section 15(2) would be attracted and a substitute Arbitrator has to be appointed according to the rules that are applicable for the appointment of the Arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted Arbitrator or the replacing of the Arbitrator by another according to the rules that were applicable to the appointment of the original Arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute Arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute Arbitrator can be appointed according to the rules that were applicable for the appointment of the Arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute Arbitrator must be done according to the original 16/27 ARBPL-49.13 group.sxw 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 Engineering Ltd. and Anr. (supra) rendered on 26.10.2005. (Emphasis supplied)"

26. It is manifest from the observation made by the Supreme Court that in case the Arbitrator originally appointed in terms of the arbitration clause withdraws, it does not take away the right of the party to appoint a substitute Arbitrator. The Apex court further held that Section 15 (2) of the Act would be attracted and substitute Arbitrator has to be appointed according to the Rules for the appointment of the Arbitrator in the arbitration agreement. Accordingly, the term "rules" under Section 15 (2) has been interpreted in a manner that the power to appoint the substitute Arbitrator would be examined in terms of the arbitration clause.

27. Similarly, in another case of Huawei Technologies Company Limited v Sterlite Technologies Limited (2016) 1 SCC 721 which affirmed Yashwith (supra), the arbitration clause provided for the appointment of Arbitrator by mutual consent and where the original Arbitrator appointed, recused himself, it was held that the new or substitute Arbitrator is required to be appointed according to the rules that were applicable to the appointment of original Arbitrator, as per the mandate of section 15(2) of the Act. Thus, the cases of SBP and Company (supra), Jagdish Prasad (supra), ACC Limited (supra) and San-A Tradubg (supra), relied on by the Petitioner significantly distinguished on facts. In ACC Ltd. (supra), relied upon by the Petitioner also, it was observed that 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 and 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, unless there is a clear prohibition or debarment that could be read on a true construction of the arbitration agreement. Thus, ACC Ltd. (supra) reaffirms the observations made by the Supreme Court in Yashwith (supra). Even in SBP (supra), the dicta of the Supreme Court in Yashwith (supra) has been noted, though distinguished precisely on the basis of the facts and circumstances in that case being different.

28. Therefore, it appears from an analysis of the above case law that even where an arbitration clause does not expressly provide for a specific procedure for appointment of substitute Arbitrator or does not invest the power in any of the parties, the procedure for appointment prescribed under the agreement for appointment of original Arbitrator has to be followed. The absence of such express provision is supplied by section 15(2) of the Act. It provides that the rules that were applicable to the appointment of the Arbitrator being replaced, have to be followed for appointment of new/substitute Arbitrator, unless there is an express bar in the arbitration clause to such procedure being followed. The arbitration clause in the present case thus does not in any manner provide that the Respondent would not have the right to appoint a substitute Arbitrator in the event the first Arbitrator recuses himself.

29. In view of the aforesaid discussion, I find merit in the submission of the learned counsel for the Respondent. The provision invoked by the petitioner cannot be resorted to in the facts of the present case where the Arbitration Tribunal has already been a validly constituted, as per the procedure provided under the arbitration clause for appointment of original Arbitrator.

30. Therefore, the present petition is misconceived and the same is dismissed with no order as to costs.