IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NO.4168 OF 2003**

M/s. S.B.P. and Company … Appellant

Versus

M/s. Patel Engineering Ltd. and another … Respondents

With

**CIVIL APPEAL NO.4169 OF 2003**

B.T. Patil and Sons Belgaum Construction Ltd. … Appellant

Versus

M/s. Patel Engineering Ltd. and another … Respondents

**J U D G M E N T**

**G.S. Singhvi, J.**

1. In compliance of the direction given by seven-Judge Bench in **S.B.P. & Company v. Patel Engineering Ltd. and another** (2005) 8 SCC 618, these appeals have been listed for disposal in the light of the principles laid down in that judgment.

2. In the special leave petitions, out of which these appeals arise, the appellants had challenged orders dated 3.2.2003 passed by the Division

Bench of the Bombay High Court whereby it held that the writ petitions filed against the orders passed by the learned designated Judge of that Court appointing Shri Justice M.N. Chandurkar (Retired) as the third arbitrator for resolution of the disputes between the appellants and respondent No.1 are not maintainable. For this purpose, the Division Bench relied upon the judgment of this Court in **Konkan Railway Corporation Ltd. and others v. Mehul Construction Company** (2000) 7 SCC 201, which was subsequently approved by a Constitution Bench in **Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd.** (2002) 2 SCC 388. The ratio of the Constitution Bench judgment was that the power exercised by the Chief Justice or any person or institution designated by him under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') is purely administrative and the measures taken under that section are not open to be challenged by the aggrieved party by resorting to intermediary proceedings. The judgment of the Constitution Bench was overruled by the seven-Judge Bench in **S.B.P. & Company v. Patel Engineering Ltd. and another** (supra) and it was held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is a judicial power and not an administrative power and further that an order passed by the Chief Justice of the High Court or by

the designated Judge of that Court can be challenged only under Article 136 of the Constitution.

3. After the judgment of the larger Bench, the appellants filed I.A. Nos. 1 and 2 of 2006 for leave to amend the memorandums of appeal so as to enable them to make a prayer for setting aside orders dated 18.11.2002 passed by the learned designated Judge of the High Court in Arbitration Application Nos. 114 of 2002 and 90 of 2002. At the commencement of hearing of the appeals on 6.10.2009, the prayer of the appellants was granted.

4. In the light of the above, we shall now consider whether orders dated 18.11.2002 passed by the learned designated Judge of the Bombay High Court under Section 11(6) of the Act appointing Shri Justice M.N. Chandurkar (Retired) as third arbitrator is legally correct.

**Background facts**

5. In March, 1992, the Government of Maharashtra awarded contract to respondent No.1 for execution of works relating to Stage IV of the Koyna Hydroelectric Project. Respondent No.1 sub-contracted a portion of that work i.e., construction of civil works from Lake Intake to Emergency Valve Tunnel – K.H.E.P. Stage IV – I.C.B. No.1 to the appellant and M/s. B.T. Patil & Sons (Construction) Ltd., Belgaum (herein after described as

"B.T. Patil & Sons"). For this purpose, the parties entered into two agreements on 15.10.1992 viz., sub-contract agreement and piece work agreement. Both the agreements contained identical clauses for resolution of disputes and differences between the parties by arbitration. For the sake of convenient reference, Clause 19 of the piece work agreement is reproduced 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."
>
> (emphasis added)

6. In October 1996, some disputes and differences arose between the Government of Maharashtra and respondent No.1 with regard to contract

dated 10.3.1992. The panel of three arbitrators appointed by the parties passed unanimous awards on 11.2.2000 requiring the State Government to pay Rs.24,09,25,965/- to respondent No.1. The State Government challenged those awards but, later on, withdrew its challenge and paid the amount to respondent No.1.

7. On 3.7.2001, the appellants through their power of attorney holder, Balasaheb B. Patil served a notice upon respondent No.1 requiring it to pay the amount allegedly due to them, but the latter did not comply with their demand. After three months, the appellants invoked the arbitration clauses enshrined in the sub-contract agreement and piece work agreement and issued letter dated 3.10.2001 appointing Shri T.G. Radhakrishna (retired Chief Engineer) (respondent No.2 herein) as an arbitrator on their behalf. In its response dated 1.11.2001, respondent No.1 denied the claim of the appellants and, at the same time, appointed Shri S.N. Huddar, Joint Secretary, Irrigation Department, Government of Maharashtra as an arbitrator on its behalf. However, vide letter dated 1.2.2002, Shri Huddar declined to arbitrate in the matter by stating that he had remained associated with Kyona Project as Superintending Engineer and Chief Engineer. Thereafter, respondent No.1 sent letter dated 26.2.2002 to Shri S.L. Jain of S & S Consultants, Bhopal with the request to act as an arbitrator on its behalf. Shri Jain communicated his consent

vide letter dated 27.2.2002. On the same day, respondent No.1 informed respondent No.2 that in terms of Section 15(2) of the Act, it was entitled to appoint a substitute in place of Shri S.N. Huddar and had, in fact, appointed Shri S.L. Jain as an arbitrator and the latter had consented to such an appointment. On 7.3.2002, the power of attorney holder of the appellants informed respondent No.1 that appointment of Shri S.L. Jain as replacement arbitrator is contrary to the terms of sub-contract agreement and piece work agreement.

8. In the meanwhile, power of attorney holder of the appellants sent letter dated 22.1.2002 to respondent No.2 and Shri S.N. Huddar requesting them to appoint the third arbitrator. On his part, respondent No.2 suo motu sent letter dated 21.2.2002 informing the parties that in view of Shri Huddar's refusal to act as an arbitrator on behalf of respondent No.1, he had become the Sole Arbitrator and asked them to appear at Mumbai for a preliminary meeting.

9. After his appointment as an arbitrator on behalf of respondent No.1, Shri S.L. Jain sent letter dated 11.3.2002 to respondent No.2 and suggested the names of three retired Bombay High Court judges for appointment as Presiding Arbitrator. In his reply dated 25.3.2002, respondent No.2 claimed that Section 15(2) of the Act has no application

in the case and that in terms of Clause 18 of the sub-contract agreement and Clause 19 of the piece work agreement, he was entitled to act as the Sole Arbitrator.

10. At that stage, respondent No.1 filed Arbitration Application Nos.114 of 2002 and 90 of 2002 under Section 11 of the Act for appointment of the third arbitrator by asserting that in view of refusal of Shri S.N. Huddar to act as an arbitrator, it had appointed Shri S.L. Jain as a substitute arbitrator in terms of Section 15(2) of the Act and in that view of the matter respondent No.2 was not entitled to act as the Sole Arbitrator. The designated Judge of the Bombay High Court allowed both the applications and appointed Shri Justice M.N. Chandurkar (Retired) as the third arbitrator. The learned designated Judge noticed the arguments made on behalf of the parties, the provisions of Section 15 of the Act and observed:-

> "Section 15 is a new provision. Sub-section (1) and (2) thereof correspond to Article 155 of the UNCITRAL model Law. Sub-section (2) of section 15 provides that where the mandate of arbitrator is terminated, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Thus the Legislature clearly intended that upon termination of the mandate of an arbitrator, a substitute arbitrator shall be appointed in accordance with the same rules as were applicable to the appointment of the original arbitrator. Therefore the arbitrator appointed by the other party is not entitled to act as the sole arbitrator in view of this clear language of section 15(2). This can be compared to the old

provision of section 9 of the 1940 Act providing that unless a different intention is expressed in the agreement the court has power to appoint a new arbitrator. The words used in sub-section (2) of section 15 do not admit of any such exception.

The decisions relied upon by Dr. Tulzapurkar have no application to the facts of the present case. In Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. while construing section 11(6) of the 1996 Act, the court held that if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of demand being made by the other party, the right to make the appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under section 11, that would be sufficient. Only then the right of the opposite party ceases. It is in this context that the court observed in para 23 that "when parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure even though rigor of the doctrine of `Freedom of contract' has been whittled down by various labour and special welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause". This case has no bearing on the issue involved in the instant case.

The other case cited by Dr. Tulzapurkar in Open Sea Maritimes Inc. v. R. Pyarelal International Pvt. Ltd. is distinguishable on facts. In that case respondents had failed to make appointment of an arbitrator even after the notice period. The court held that if the party fails to appoint an arbitrator even after the notice then the Arbitrator appointed by the other party can act a sole arbitrator and pass the award. The court referred to clause 24 of the agreement between the parties which provide that if the other party fails to appoint an arbitrator in spite of the notice, the arbitrator appointed shall be entitled to act as the sole arbitrator as such procedure was agreed upon between the parties. The case before Patankar J. was under Part II of the Act. In the instant

> case, in view of the provisions contained in section 15(2) of the Act, upon withdrawal of the arbitrator Shri Huddar the petitioners had right to appoint a new arbitrator as per the Rules that were applicable to appointment of arbitrator."

11. The appellants challenged the orders of the learned designated Judge in two separate writ petitions, but could not persuade the Division Bench of the High Court to entertain their prayer for nullifying the appointment of Shri Justice M.N. Chandurkar as the third arbitrator. The Division Bench referred to the judgments of this Court in **Konkan Railway Corporation Ltd. and others v. Mehul Construction Company** (supra) and **Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd.** (supra), and held that the writ petitions are not maintainable against the orders passed by the designated Judge, which were administrative in nature. However, liberty was given to the appellants to raise the issue relating to appointment of the third arbitrator before the Arbitral Tribunal.

12. The Constitution Bench, which heard the special leave petitions filed by the appellants against the orders of the High Court, opined that the judgment rendered by an earlier Constitution Bench in **Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd.** (supra), may require reconsideration and directed that the matter be placed before a larger Bench. Thereafter, the cases were heard by a

seven-Judge Bench. By majority judgment, the larger Bench overruled the Constitution Bench judgment in **Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.** (supra), and held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is a judicial power and not an administrative power and that an order passed by the Chief Justice of the High Court or by the designated Judge of that High Court is appealable under Article 136 of the Constitution. The conclusions of the majority are contained in paragraph 47 of the judgment, the relevant portions of which are extracted below:

> **"47.** We, therefore, sum up our conclusions as follows:
>
> (*i*) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
>
> (*ii*) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.
>
> (*iii*) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.
>
> (*iv*) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief

Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(*v*) xxx xxxx xxxx

(*vi*) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(*vii*) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(*viii*) xxxx xxxx xxxx

(*ix*) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(*x*) xxxx xxxx xxxx

(*xi*) xxxx xxxx xxxx

(*xii*) The decision in *Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.* is overruled."

**Arguments**

13. Shri K.K. Venugopal, learned senior counsel appearing for the appellants argued that the arbitration clauses contained in the two

agreements are binding on the parties and in view of refusal of Shri S.N. Huddar to act as an arbitrator on behalf of respondent No.1, the arbitrator appointed by the appellants i.e., respondent No.2 became the Sole Arbitrator and as such the learned designated Judge did not have the jurisdiction, power or authority to appoint the third arbitrator. Shri Venugopal emphasized that the appointment of Shri S.L. Jain as a substitute arbitrator was legally impermissible because there is no provision in the arbitration clauses for appointment of a substitute arbitrator. Learned senior counsel argued that the provision contained in Section 15(2) of the Act can be invoked for appointment of a substitute arbitrator only if the mandate of an arbitrator gets terminated on account of his withdrawal from office or by or pursuant to an agreement of the parties and not in a case where the arbitrator appointed by either party refuses to act as such and, in any case, the provision contained in that section cannot be invoked for nullifying the agreement between the parties which does not provide for appointment of a substitute arbitrator. In support of his arguments, Shri Venugopal relied upon the judgments in **S.B.P. & Company v. Patel Engineering Limited and another** (supra), **ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.** (2007) 5 SCC 304, **Northern Railway Admn., Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.** 2008 (11) SCALE 500 and **Union of India v. M/s. Singh Builders Syndicate**

2009(4) SCALE 491.

14. Shri Dushyant Dave, learned senior counsel appearing for respondent No.1, invited our attention to letter dated 1.2.2002 written by Shri S.N. Huddar expressing his inability to act as an arbitrator and argued that his client did not commit any illegality by appointing Shri S.L. Jain as a substitute arbitrator. Shri Dave submitted that the appointment of an arbitrator becomes effective only after he consents for the same and if he refuses to accept the appointment, the party appointing such person as an arbitrator has the freedom to appoint another arbitrator, even though there may not be any express provision to that effect in the agreement. In support of this argument, Shri Dave relied upon the judgment of this Court in **Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.** (2006) 6 SCC 204. Shri Dave further argued that in view of the plain language of Section 15, respondent No.1 had the right to appoint a substitute arbitrator and respondent No.2 could not act as the Sole Arbitrator merely because Shri S.N. Huddar who was originally appointed as an arbitrator on behalf of respondent No.1 refused to accept the appointment. Shri Dave submitted that learned designated Judge of the High Court did not commit any error by appointing the third arbitrator because respondent No.2 did not agree to the suggestion of Shri S.L. Jain

to appoint third arbitrator from the panel of three retired Judges of the High Court.

**Relevant provisions of the Act and their analysis**

> 11. **Appointment of arbitrators.**— (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (4) If the appointment procedure in sub-section (3) applies and—
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
>
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,
>
> the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach

an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

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

(7) xxx xxx xxx

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) to (12) xxx xxx xxx

12. **Grounds for challenge.**—

(1) and (2) xxx xxx xxx

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) xxx xxx xxx

13. **Challenge procedure.**—

(1) and (2) xxx xxx xxx

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the

challenge, the arbitral tribunal shall decide on the challenge.

(4) to (6) xxx xxx xxx

14. **Failure or impossibility to act.**— (1) The mandate of an arbitrator shall terminate if—

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remain concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. **Termination of mandate and substitution of arbitrator.** — (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

*(a)* where he withdraws from office for any reason; or

*(b)* by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

> (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
>
> (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

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.

16. What is significant to be noticed in the aforementioned provisions is that the legislature has repeatedly laid emphasis on the necessity of adherence to the terms of agreement between the parties in the matter of

appointment of arbitrators and procedure to be followed for such appointment. Even Section 15(2), which regulates appointment of a substitute arbitrator, requires that such an appointment shall be made according to the rules which were applicable to the appointment of an original arbitrator. The term 'rules' used in this sub-section is not confined to statutory rules or the rules framed by the competent authority in exercise of the power of delegated legislation but also includes the terms of agreement entered into between the parties. In **Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.** (supra), this Court was called upon to examine the scope of Section 15 of the Act in the backdrop of the fact that after resignation of the arbitrator appointed by the Managing Director of the respondent-Company, another arbitrator was appointed by him in accordance with the arbitration agreement. At that stage, the petitioner filed an application under Section 11(5) read with Section 15(2) of the Act and prayed that the Chief Justice of the High Court may appoint a substitute arbitrator to resolve the disputes between the parties. The learned Chief Justice dismissed the application and held that Section 15(2) refers not only to statutory rules framed for regulating appointment of arbitrators but also to contractual provisions for such appointment. The Division Bench of the High Court which heard the writ petition filed by the petitioners noted that in view of the judgment of the larger Bench in **S.B.P. & Company v. Patel**

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

> "……..The term "rules" in Section 15(2) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the party concerned as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement

> or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.
>
> Since here, the power of the Managing Director of the respondent is saved by Section 15(2) of the Act and he has exercised that power on the terms of the arbitration agreement, we see no infirmity either in the decision of the learned Chief Justice or in that of the Division Bench….."

17. The need for adherence to the terms of agreement which provide for resolution of differences or disputes by arbitration was highlighted in **Datar Switchgears Ltd. v. Tata Finance Ltd. and another** (2000) 8 SCC 151. In that case the appellant had filed an application under Section 11 of the Act for appointment of an arbitrator by contending that despite clear 30 days notice, the first respondent failed to appoint an arbitrator in accordance with the terms of lease agreement. The Chief Justice of the High Court rejected the appellant's prayer by observing that respondent No.1 had appointed an arbitrator before filing of the application. In the appeal, it was argued that in view of the respondent's failure to appoint an arbitrator within 30 days, the Chief Justice of the High Court was bound to exercise power under Section 11(6) of the Act and appoint an arbitrator. This Court referred to the arbitration clause contained in the agreement entered into between the parties, some of the judicial precedents on the subject and held that failure of respondent No.1 to appoint an arbitrator within 30 days of the receipt of the notice did not have the effect of

forfeiting his right to do so and that the said right could be exercised till the filing of an application under Section 11 by the other side. The Court then proceeded to observe:

> "When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause."
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> (emphasis supplied)

18. In **Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.** (supra), a three-Judge Bench considered apparently divergent opinions expressed in **Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.** (supra) and **Union of India v. Bharat Battery Mfg. Co. (P) Ltd.** (2007) 7 SCC 684, referred to Section 11 of the Act and observed:

> "Sub-sections (3) to (5) refer to cases where there is no agreed procedure. Sub-section (2) provides that subject to sub-section (6) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) sets out the contingencies when party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. The contingencies contemplated in sub-section (6) statutorily are (i) a party fails to act as required under

> agreed procedure or (ii) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (iii) a person including an institution fails to perform any function entrusted to him or it under the procedure. In other words, the third contingency does not relate to the parties to the agreement or the appointed arbitrators.
>
> The crucial expression in sub-section (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures" (underlined for emphasis). This expression has to read alongwith requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
>
> A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations."
>
> (emphasis supplied)

19. The aforementioned judgment was followed in **Union of India v. M/s. Singh Builders Syndicate** (supra). In that case it was found that the Arbitral Tribunal constituted in accordance with Clause 64 of the agreement, could not function due to frequent transfer of the incumbent of the post of General Manager who was appointed as one of the members of the Tribunal and, therefore, on a petition filed by the respondent, the

High Court appointed a retired Judge as an arbitrator. This Court noted that the dispute was pending for nearly 10 years from the date when the demand for arbitration was first made and declined to interfere with the order of the High Court. Paragraphs 14 and 15 of the judgment which have bearing on this case are extracted below:-

> 14. It was further held in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.* that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section (8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.
>
> 15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders.

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.

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.

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

dictionary meanings of the word 'withdraw' are as follows:

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

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

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

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

24. Insofar as this case is concerned, we find that the arbitrator appointed by respondent No.1, namely, Shri S.N. Huddar declined to accept the appointment/arbitrate in the matter on the ground that in his

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

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

> "2. On a dispute having arisen, the Managing Director of the respondent Company appointed an arbitrator in terms of the arbitration clause. The arbitrator resigned. Thereupon, the Managing Director of the respondent Company, in view of the mandate in the arbitration agreement promptly appointed another arbitrator…….
>
> 3……The Division Bench held that the position obtaining under Section 8(1) of the Arbitration Act of 1940 differed from that available under the present Act especially in the context of Section 15 thereof and that in terms of Section 15(2) of the Act, the Managing Director could, on the basis of the arbitration agreement, appoint another arbitrator when the originally appointed arbitrator resigned, thus attracting Section 15(1)(*a*) of the Act……"

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

the originally appointed arbitrator refusing to act.

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).

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

**.....J.**
**[ G.S. Singhvi ]**

New Delhi
October 21, 2009

**.....J.**
**[ Dr. B.S. Chauhan ]**