Shailesh Dhairyawan vs Mohan Balkrishna Lulla on 16 October, 2015

Equivalent citations: 2016 (1) ABR 63, 2016 (3) SCC 619, (2015) 7 MAD LJ 876, (2016) 3 MAD LW 107, (2016) 3 PUN LR 441, (2016) 1 RECCIVR 928, (2015) 156 ALLINDCAS 65 (SC), (2016) 6 MAH LJ 13, (2016) 4 MPLJ 258, (2015) 4 CURCC 281, (2015) 6 ARBILR 79, (2016) 1 CAL HN 45, (2016) 1 WLC(SC)CVL 172, (2015) 11 SCALE 684, (2016) 1 CLR 172 (SC), (2016) 1 CIVLJ 909, 2016 (3) KCCR SN 299 (SC), (2015) 6 BOM CR 734

Author: R.F. Nariman

Bench: A.K. Sikri, Rohinton Fali Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 8731 OF 2015
(Arising out of S.L.P. (Civil) No.19617 of 2015)

SHAILESH DHAIRYAWAN …APPELLANT

VERSUS

MOHAN BALKRISHNA LULLA ...RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The respondent had filed a suit in the Bombay High Court, being Suit No.1927 of 2007, against the appellant and some others seeking a declaration that a development agreement dated 27.12.2004 together with a Power of Attorney of even date had stood terminated, and for certain other reliefs.

3. On 3.10.2008, the parties to the suit entered into consent terms largely settling the disputes between them. However, with regard to two specific differences, the plaintiff and defendant No.1 agreed to refer the said differences to the arbitration of a retired Supreme Court Judge as follows:-

"8). The Plaintiff and the Defendant No.1 agree to and hereby do refer to Arbitration of Mrs. Justice Sujata Manohar (Retd.) the dispute as to (i) the difference in carpet area of the 5 flats agreed to be allotted as per the Development Agreement dated 27-12-2004 being Exhibit-B to the Plaint by Defendant No.1 to the Plaintiff and his family members (i.e. 800 sq. ft. area) as provided in the said Development Agreement dated 27-12-2004 and the actual carpet area of the said 5 flats hereby allotted and handed over and (ii) the valuation of the deficient area if any, and the damages for the same. The Learned Arbitrator to make an award with regard to the compensation and the damages to be paid by Defendant No.1 to the plaintiff for the deficient area, if any, Defendant No.1 shall not raise any dispute as to the jurisdiction of the arbitrator. The Arbitrator shall decide the same as expeditiously as possible in accordance with law and under the provisions of the Arbitration & Conciliation Act, 1996." The said consent terms were taken on record by a Single Judge of the Bombay High Court who passed an order dated 8.10.2008 disposing of the suit in the following terms:

"1. Pursuant to the suggestion given by this Court, parties were exploring the possibility of settlement and therefore the matter was kept part heard.

2. Today, the parties are tendering Consent terms. Consent terms are taken on record and marked "X" for the purpose of identification. Consent Terms are signed by the Plaintiff, Defendant No.1, Defendant No.3 and their respective Advocates. Undertakings, if any, given in the Consent terms by any of the parties is accepted. Decree is passed in terms of the consent terms.

3. In respect of the dispute regarding compensation, the matter by consent is referred to Mrs. Justice Sujata Manohar (Retd.) for arbitration.

The issue regarding the allotment of parking spaces or plaintiffs returning the promissory note can also be decided by the learned arbitrator. Plaintiff is permitted to withdraw the amount which is deposited by Defendant No.1 and which is lying in the suspense account of Oriental Bank of Commerce, Khar Branch, Mumbai.

1. Plaintiff and Defendants are present in court.

2. Suit is disposed off in the aforesaid terms.

3. Refund of court fees be paid in accordance with the rules.

4. Since the suit itself is disposed of, Notice of motion if any, does not survive and the same is also disposed of."

4. Nothing much seems to have materialised in the arbitration, and despite several meetings held by the named arbitrator, the arbitration proceedings continued to drag on, until by a letter dated

22.01.2011, the Arbitrator resigned as arbitrator in the aforesaid matter.

5. The plaintiff-respondent then applied vide Notice of Motion No.2245 of 2012 in the disposed of suit No.1927 of 2007 for appointment of a substitute arbitrator. This Notice of Motion was dismissed by order dated 20.9.2013 stating that an appointment can only be made for a substitute arbitrator under Section 11(5) of the Arbitration Act and not by a Notice of Motion in a disposed of suit.

6. Pursuant to the dismissal of the said Notice of Motion, the plaintiff moved the Bombay High Court under Section 11 by an application of January, 2014 for appointment of a substitute arbitrator. By the impugned judgment dated 12.6.2015, the Bombay High Court appointed a retired Judge of the said High Court, namely Dr. Justice S. Radhakrishnan, as substitute arbitrator.

7. Shri T.R. Andhyarujina, learned senior advocate appearing on behalf of the appellant, has argued before us that as this was the case of a named arbitrator, the arbitration agreement contained in the consent terms in the Suit No.1927 of 2007 spent its force when the named arbitrator resigned, it being clear that the said clause would only apply to the named arbitrator and nobody else, parties having faith only in the named arbitrator. He cited three decisions of this Court to buttress his submission and further argued that under Section 15(2) of the Arbitration and Conciliation Act, 1996, where the mandate of a named arbitrator terminates, there being no rules that would apply to the appointment of the arbitrator being replaced, the said Section would, therefore, not apply and the High Court having missed this vital fact is, therefore, wrong in appointing a substitute arbitrator.

8. Shri Santosh Paul, learned advocate appearing on behalf of the respondent has, however, supported the judgment of the Bombay High Court and has argued that the mandate of Section 89 of the Code of Civil Procedure (in short “CPC”) requires a Court to attempt to either settle disputes raised in a suit by the means outlined by the Section or refer them to arbitration, in which case the arbitration shall be deemed as if it is an arbitration commenced under the Arbitration and Conciliation Act, 1996. He further argued that it is not correct to say that no rules were applicable to the appointment of the arbitrator in the present case as the appointment was made by the High Court and, therefore, when his client went back to the self same High Court to appoint a substitute arbitrator, that High Court would necessarily have jurisdiction to appoint another person in the place of the named arbitrator.

9. The Arbitration and Conciliation Act, 1996, replaced three other Acts dealing with arbitration: the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961.

10. Since we are concerned with a domestic arbitration clause, it would be useful to extract Section 8(1)(b) and Section 20 of the old repealed 1940 Act to show what was the position in law under the 1940 Act on supplying vacancies created by arbitrators neglecting, refusing or being incapable of acting, or dying before or in the proceedings referred to arbitration. These Sections read as under:-

> "Section 8. Power of Court to appoint arbitrator or umpire.
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> (1) In any of the following cases-
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> (b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy;

any party may serve the other parties or the arbitrators, as the case may be, with the written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he is or they had been appointed by consent of all parties. Section 20. Application to file in Court arbitration agreement. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter 11, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties 5 interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

11. The law under the aforesaid repealed Sections was laid down in a judgment of this Court which has since then been followed repeatedly. In Parbhat General Agencies v. Union of India, (1971) 1 SCC 79, the arbitration clause in that case was set out as follows:-

> "If any question, difference or objection whatsoever shall arise in any way connected with or arising out of this or the meaning or operation of any part thereof or the rights, dues or liabilities of either party, then save in so far as the decision of any such matter is hereinbefore provided for and has been so decided, every such matter including whether its decision has been otherwise provided for and whether it has been finally decided accordingly or whether the contract should be terminated or has been rightly terminated and as regards the rights and obligations of the parties as the result of such termination shall be referred for arbitration to the Judicial Commissioner, Himachal Pradesh and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any, awarded in such arbitration shall be recoverable in respect of the matter so referred." [at para 1]" After referring to Section 8(1)(b) and Section 20, this Court held:
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> "Section 20 is merely a machinery provision. The substantive rights of the parties are found in Section 8(1)(b). Before Section 8(1)(b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy.

In the cases before us it is admitted that there is an agreement to refer the dispute to arbitration. It is also admitted that the parties had designated the Judicial Commissioner of Himachal Pradesh as the arbitrator for resolving any dispute that may arise between them in respect of the agreement. The Judicial Commissioner had refused to act as the arbitrator. The parties have not supplied that vacancy. Therefore the only question is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not "that the parties intended to supply the vacancy" but on the other hand it is that "the parties did not intend to supply the vacancy". In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. We have now to see whether the agreements before us indicate such an intention.

As mentioned earlier, the only relevant provision in the agreements before us is the provision relating to arbitration. The other provisions in the agreements do not throw any light as regards the intention of the parties. We have earlier mentioned that the Judicial Commissioner, Himachal Pradesh, could not have been appointed as the arbitrator for any specialised knowledge possessed by him relating to any dispute that may arise under the agreement. What the Judicial Commissioner could have competently done if he had acted as an arbitrator could certainly be done by an independent and impartial person possessing adequate knowledge of law. In our opinion the language of Section 8(1)(b) is plain and unambiguous and the terms of the agreement before us do

not in the least show that the parties intended not to supply the vacancy." [at paras 3, 4 & 5].

12. This was the state of the law in India until the 1996 Act repealed inter alia the 1940 Act. Since we are concerned with the correct interpretation of Section 15 of this Act, it is set out hereinbelow:-

> "Section 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----
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> (a) where he withdraws from office for any reason; or
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> (b) by or pursuant to agreement of the parties.
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> (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.
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> (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.
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> (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." The reason for the change in law under the 1996 Act is because it was modeled on the Uncitral Model Law on International Commercial Arbitration.

The Statement of Objects and Reasons for the 1996 Act makes this clear as follows:

> "2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

> 3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules." Article 15 of the Model Law, on which Section 15(2) is based, reads as follows:
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> "Where the mandate of an arbitrator terminates under article 13 of 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."

13. Three judgments of this Court have thrown considerable light on the correct construction of Section 15(2) of the Act. In Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd., (2006) 6 SCC 204, the arbitration clause stated that the Managing Director of the respondent company was to appoint an arbitrator in terms of the said clause. The appointed arbitrator resigned, after which the Managing Director of the respondent company promptly appointed another arbitrator. The correctness of the second appointment was challenged in an application made by one of the parties under Section 11(5) of the Act read with section 15(2) praying that the Chief Justice of the High Court may appoint a substitute arbitrator to resolve the disputes between the parties. This application under Section 11 was dismissed, which dismissal was upheld by a Division Bench of the High Court. This Court agreeing with the Division Bench judgment held as under:-

> "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." [at para 4]

14. In SBP and Company (2) v. Patel Engineering. Ltd. and Anr., (2009) 10 SCC 293, this Court had to construe Section 15(2) in the light of the arbitration clause in that case. The arbitration clause read as follows:-

> "19. During the continuance of this piece-work agreement/contract or at any time after the termination thereof, if 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.
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> 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." [at para 7]

15. On the facts in that case, two arbitrators were appointed by each of the parties. The arbitrator appointed by respondent No.1 declined to arbitrate in the matter for the reasons stated by him. Thereafter, respondent No.1 requested another person to act as arbitrator on its behalf, which person communicated his consent. However, respondent No.2, who was the arbitrator appointed by the petitioner, sent a letter informing the parties that in view of respondent No. 1's arbitrator refusing to act, he had become the sole arbitrator in the case as per the arbitration clause between the parties. It is at this stage that respondent No.1 filed an arbitration application under Section 11

for appointment of a third arbitrator by asserting that the second person nominated by it had agreed to be a substitute arbitrator and that, therefore, the third arbitrator should be appointed by the Court under Section 11. This very matter travelled all the way up to this Court which in a 7-Judge Bench ultimately decided that the power exercised by the Chief Justice of the High Court under Section 11 of the Act is not an administrative power but is a judicial power. The matter, on facts, having been reverted to a Division Bench of this Court, this Court was then asked to decide as to whether the appointment of the substitute arbitrator by respondent No.1 was correct in law. After setting out the various provisions of the Arbitration Act, this Court held:

> "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.
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> 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.
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> 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 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 1 was that Respondent 2 who was appointed as an arbitrator by the appellants became the sole arbitrator for deciding the disputes or differences between the parties.
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> At the cost of repetition, we consider it necessary to observe that the agreements entered into between the appellant and Respondent 1 do not contain a provision for appointment of a substitute arbitrator in case the arbitrator appointed by either party was to decline to accept appointment or refuse to arbitrate in the matter. Therefore, Respondent 1 cannot draw support from the ratio of the judgment in Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. [(2006) 6 SCC 204]." [at paras 30, 31, 40 and 48]

16. In ACC Ltd. v. Global Cements Ltd., (2012) 7 SCC 71, the arbitration clause with which this Court was confronted read as follows:-

> "21. 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." [at para 2]

17. As both Shri Palkhivala and Shri Seth had died, it was contended by the petitioner before this Court that the arbitration clause would not survive as the two named arbitrators were the only persons who the parties had reposed their faith in. In arriving at the conclusion that substitute arbitrators could be appointed, this Court held:

> "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].
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> Sections 14 and 15 provide the grounds for termination of the mandate of the arbitrator on the ground of incapability of the arbitrator to act or if he withdraws from his office or when the parties agree to the termination of the mandate of the arbitrator. Section 15(2) states that a substitute arbitrator shall be appointed as per the rules that were applicable to the appointment of the arbitrator being replaced. Section 15(2), therefore, has to be given a liberal interpretation so as to apply to all possible circumstances under which the mandate may be terminated.
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> The legislative policy embodied in Sections 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a

substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in Clause 21 of the agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the agreement. 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 question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

We are of the view that Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under Clause 21 of the agreement." [at paras 17, 18, 21, 28 – 30]

18. Thus, it will be seen that in the Yashwith Constructions case this Court construed Section 15(2) liberally and held that the expression "the rules" that were applicable to the appointment of the arbitrator would include the arbitration clause or agreement itself, apart from any institutional rules or other rules which may apply. Since it was clear that the Managing Director in the aforesaid case was the appointing authority for a particular arbitrator, in case the said arbitrator appointed refuses to act, the Managing Director was stated to be the authority under the arbitration agreement that could always appoint a substitute arbitrator in terms of Section 15(2). Similar is the case in the ACC Ltd. judgment where this Court held that despite two named arbitrators having died, substitute arbitrators could be appointed in terms of the said clause unless there is a clear prohibition or debarment that could be read on a true construction of the arbitration agreement. It found that the expression "at any time" clearly showed that the arbitration clause had no nexus with the lifetime of the named arbitrator and therefore no such prohibition could be read. It also held that 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, as this is the mandate of Section 15(2) of the Act.

19. On the other hand, in the SBP and Company case, the arbitration clause itself indicated that one of two appointed arbitrators who refused to act would not be liable to be substituted by another arbitrator as the other appointed arbitrator would then continue with the reference as sole arbitrator. This Court, therefore, held that since Section 15(2) referred to the arbitration agreement, the arbitration agreement had to be strictly followed which would on the facts of that case indicate that no substitute arbitrator is to be appointed in the place of the arbitrator who refused to act but

the other appointed arbitrator would continue as the sole arbitrator.

20. The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now needs to be appreciated. Under Section 8(1)(b) read with Section 8(2) if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the Section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 is resurrected while construing Section 15(2). The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, sub-sections (3) and (4) of Section 15 also throw considerable light on the correct construction of sub- section (2). Under sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly appointed Tribunal, unless parties have agreed otherwise. Equally, orders or rulings of the earlier arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be sub-served by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off.

21. On the facts of the present case, it is clear that there is nothing in clause 8 of the consent terms extracted above to show that the resignation of Justice Sujata Manohar would lead to her vacancy not being supplied. All that the parties have done by the said clause is to agree to refer their disputes to the arbitration of an independent retired Judge belonging to the higher Judiciary. There is no personal qualification of Mrs. Justice Sujata Manohar that is required to decide the dispute between the parties. In fact, she belongs to a pool of independent retired High Court and Supreme Court Judges, from which it is always open to the appointing authority to choose a substitute arbitrator. One example will suffice to show that clause 8 in the present case cannot be construed to either expressly or by necessary implication exclude the appointment of a substitute arbitrator. Take the case of a family dispute in which the arbitration clause clearly specifies that a particular grand uncle of a joint family is the only person in whom all members of the family have confidence as a result of which he has been appointed arbitrator to resolve their disputes. In the case of resignation or death of such grand uncle, it could possibly be contended that by necessary implication no other person was competent to arbitrate disputes between the family members and that, therefore, on such

resignation or death, the arbitration clause would spend its force. In the present case, as has been noted above, we do not have any such factual scenario nor do we have expressions such as “only” which would indicate that the confidence of the parties was in only the named arbitrator and in nobody else.

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

.....J. (A.K. Sikri) .....J. (R.F. Nariman) New Delhi;

October 16, 2015.

REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 8731 OF 2015 (ARISING OUT OF SLP (C) NO. 19617 OF 2015) |SHAILESH DHAIRYAVAN |...APPELLANT | |VERSUS | | |MOHAN BALKRISHNA LULLA |...RESPONDENT | J U D G M E N T A.K. SIKRI, J.

I am entirely in agreement with the conclusion arrived at by my learned Brother R.F. Nariman, J. in his accompanying judgment on the interpretation of Section 15(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'). It is held by my learned Brother that since arbitration agreement that was arrived at between the parties herein did not specifically bar the appointment of another arbitrator on the recusal/withdrawal of the earlier arbitrator appointed by the parties with mutual agreement, Section 15(2) of the Act would be attracted and a substitute arbitrator could be appointed according to 'Rules' that govern the field. In the instant case, it was the agreement between the parties which is treated as 'Rules' for the purposes of Section 15(2) of the Act. My learned Brother has given cogent reasons while interpreting the said provision of law in the

aforesaid manner, which, inter alia, includes reliance upon the earlier judgment of this Court in ACC Ltd. v. Global Cements Ltd.[1] While concurring with the judgment authored by my learned Brother, I would like to give some additional reasons in support, which are as under:

> Section 15(2) of the Act is also to be interpreted keeping in mind the ethos of the arbitration generally and also in the light of the spirit behind Section 89 of the Code of Civil Procedure, 1908 (for short, 'CPC') in particular. No doubt, in the instant case, there was no arbitration agreement between the parties when the suit was filed by the respondent herein. However, in the said suit which was filed, parties arrived at an agreement whereby it was agreed between them that the matter be decided through arbitration and not by the court of law.
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> It was held in P. Anand Gajapati Raju & Ors. v. P.V.G. Raju (D) & Ors.[2] that the Arbitration Act governs the case where arbitration is agreed upon before a pending suit by all parties. This Act, however, does not contemplate a situation as in Section 89 of the CPC where the Court asks the parties to choose one or the other ADR methods, including arbitration, and the parties choose arbitration as their option. At the same time, once the parties agree for arbitration under the Act and the matter is referred to arbitration, thereafter the situation is almost at par with what is contemplated in Section 89 of the CPC, to which aspect we shall advert little later. What is emphasized at this stage is that in a suit which is filed in the Court, when the parties agree for deciding the disputes by means of arbitration, they have obviously agreed that the court of law may stay its hands of such a dispute as the parties have chosen alternate method, namely, one of the forms of ADR.
>
> It hardly needs to be emphasized that the parties choose arbitration as a dispute resolution mechanism keeping in view that it offers a timely, private, less formal and cost effective approach for the binding determination of disputes. It provides the parties with greater control of the process than a court hearing. The non-judicial nature of arbitration makes it both attractive and effective for several reasons. Apart from it being cost effective and speedier method of settling the disputes when compared with court adjudicatory method, the confidentiality of the arbitration process may appeal to those who do not wish the terms of settlement to be known. Therefore, first thing that has to be kept in mind, when in a pending suit the parties agree for reference to arbitration, though there was no arbitration agreement when the suit was filed, is that they have consciously preferred arbitration rather than the court process. It, thus, follows that the intention is to settle the disputes through arbitration and not the Court.
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> Secondly, in such a situation, Section 89 of the CPC also springs into action, which provides for 'settlement of disputes outside the Court'. As per this provision, where it appears to the Court that there exists elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the

parties, the Court may re-formulate the terms of a possible settlement and refer the same for -

a) arbitration;

b) conciliation;

c) judicial settlement, including settlement through lok adalat; or

d) mediation.

It has been noticed by this Court in some earlier judgments that Section 89 of the CPC is not very happily worded. Be that as it may, Section 89 provides for alternate methods of dispute resolution, i.e. those methods which are alternate to the Court and are outside the adjudicatory function of the Court. One of them with which we are concerned is the settlement of dispute through arbitration. Insofar as reference of dispute to arbitration is concerned, it has been interpreted by this Court that resort to arbitration in a pending suit by the orders of the Court would be only when parties agree for settlement of their dispute through arbitration, in contra-distinction to the Alternate Dispute Mechanism (for short, 'ADR') through the process of mediation where the Judge has the discretion to send the parties for mediation, without even obtaining the consent of the parties. Thus, reference to arbitration is by means of agreement between the parties. It is not in dispute that there was an agreement between the parties for reference of dispute to the arbitration and it was so referred.

On making such an application based on arbitration agreement between the parties, order is passed in terms of Section 89 of the CPC referring the matter to arbitration. The purpose for enacting Section 89 is to encourage the parties to the dispute to settle their dispute by adopting one of the four methods provided therein. Not only that it results in lessening the burden of the court, experience has shown that many cases which come to the Court can be resolved more suitably and with better outcomes if the methods of ADR prescribed in Section 89 of the CPC are resorted to. It is here that depending upon the nature of dispute and relationship between the parties etc., the Court may suggest a particular form of ADR, whether arbitration or mediation etc. can be chosen. Therefore, what is to be kept in mind is that once arbitration agreement was entered into between the parties, that too in a pending suit, the intention of the parties was to settle the matter through arbitration and not to come back to the Court again for decision of the same dispute by court adjudicatory process.

It is in this backdrop we have to decide the applicability of Section 15(2) of the Act when the arbitrator to whom the matter was referred earlier with the consent of the parties withdraws therefrom.

The aforesaid two reasons given by me, in addition to the reasons already indicated in the judgment of my learned Brother, would clearly demonstrate that provisions of Section 15(2) of the Act require purposive interpretation so that the aforesaid objective/ purpose of such a provision is achieved thereby. The principle of 'purposive interpretation' or 'purposive construction' is based on the

understanding that the Court is supposed to attach that meaning to the provisions which serve the 'purpose' behind such a provision. The basic approach is to ascertain what is it designed to accomplish? To put it otherwise, by interpretative process the Court is supposed to realise the goal that the legal text is designed to realise. As Aharan Barak puts it:

> "Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language."[3] Of the aforesaid three components, namely, language, purpose and discretion 'of the Court', insofar as purposive component is concerned, this is the ratio juris, the purpose at the core of the text. This purpose is the values, goals, interests, policies and aims that the text is designed to actualize. It is the function that the text is designed to fulfil.
>
> We may also emphasize that the statutory interpretation of a provision is never static but is always dynamic. Though literal rule of interpretation, till some time ago, was treated as the 'golden rule', it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced. Not only legal process thinkers such as Hart and Sacks rejected intentionalism as a grand strategy for statutory interpretation, and in its place they offered purposivism, this principle is now widely applied by the Courts not only in this country but in many other legal systems as well.
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> Dynamic statutory interpretation also persuades us to take into consideration ethoes of arbitration process, including the spirit behind Section 89 of the CPC.
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> Once we keep in mind the aforesaid fundamental aspects of the arbitration, the irresistible conclusion would be that whenever parties agree for mediation, and even name a specific arbitrator with no specific provision for appointment of another arbitrator on the recusal/withdrawal of the said arbitrator, the said omission is made up by Section 15(2) of the Act and unless arbitration agreement between the parties provides a categorical prohibition or debarment in resolving a question or dispute or difference between the parties by a substitute arbitrator in case of death or the named arbitrator or non-availability of the said arbitrator, Courts have the power to appoint substitute arbitrator, which power is given by Section 15(2) of the Act as this provision is to be given liberal interpretation so as to apply to all possible circumstances under which the mandate of the earlier arbitrator may be terminated.

The aforesaid are my additional grounds to support the view taken by my learned Brother, thus, dismissing the appeal of the appellant herein.

.....J. (A.K. SIKRI) NEW DELHI;

OCTOBER 16, 2015.

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[1] (2012) 7 SCC 71 [2] (2000) 4 SCC 539 [3] Aharan Barak – Purposive Interpretation in Law