

FACTUAL BACKGROUND

SAP India Private Limited (**Petitioner**) and Cox & Kings Limited (**Respondent**) entered into an agreement for provision of services (**Contract**). The Contract contained an arbitration agreement, which provided that disputes between the parties would be referred to a three-member arbitral tribunal, with the parties appointing one arbitrator each. The third arbitrator was to be appointed by the two party-appointed arbitrators.

When disputes arose between the parties, the Petitioner invoked the arbitration agreement and nominated its arbitrator (**First Arbitrator**). The Petitioner simultaneously called upon the Respondent to nominate an arbitrator, but the Respondent refused to do so, as it alleged fraudulent actions by the Petitioner, due to which the dispute would be non-arbitrable.

After the Petitioner filed an application under section 11(6) of the Act (**first section 11 proceedings**) before the Bombay High Court (**High Court**), the High Court appointed the arbitrator (**Second Arbitrator**) on behalf of the Respondent. The Respondent challenged the appointment before the Supreme Court, which was dismissed, and the appointment confirmed.

After the First and the Second Arbitrator nominated the presiding arbitrator, and the tribunal entered reference, the Second Arbitrator had to recuse himself from the tribunal. The Respondent then wrote to the Petitioner, nominating an arbitrator to substitute the Second Arbitrator.

The Petitioner disagreed with the approach of the Respondent, and approached the High Court, under section 11 read with section 14 and 15 of the Act, for appointment of a substitute arbitrator.

ISSUES AND FINDINGS

The Petitioner argued that in view of the Respondent's refusal to earlier appoint an arbitrator, which had led to the first section 11 proceedings, the Respondent had forfeited its right to appoint the substitute for the Second Arbitrator.

Conversely, the Respondent contended that while it had, indeed, refused to appoint an arbitrator on allegations of fraud, once the High Court had disagreed with this view and appointed an arbitrator on the Respondent's behalf, the Respondent would have the right to appoint a substitute arbitrator under section 15(2) of the Act².

The Respondent stated that, in this case, the 'rules' that were applicable to the appointment of the Second Arbitrator, who was being replaced, would mean the arbitration agreement between the parties, as has previously been held by the Supreme Court in various cases. On the other hand, the Petitioner argued that the 'rules' applicable would be the statutory procedure, which was followed while appointing the Second Arbitrator, namely appointment by the High Court.

The High Court noted that there was no controversy between the parties that a substitute for the Second Arbitrator would have to necessarily be appointed in keeping with section 15(2) of the Act. The dispute was as to whether the Respondent still retained a right to nominate an arbitrator as per the arbitration agreement.

The High Court took note of various Supreme Court judgments³ on the issue of forfeiture of a party's right to appoint an arbitrator, and concluded that once a court is required to appoint an arbitrator under section 11(6) of the Act, a respondent certainly forfeits its right to "thereafter" appoint its nominee arbitrator in terms of the arbitration clause.

However, the High Court was still required to decide whether such forfeiture would be only in terms of the arbitrator originally appointed or would extend to the appointment of a substitute arbitrator as well. The High Court observed that the Supreme Court's judgments in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.*⁴ and *Shailesh*

² Section 15(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 *Datar Switchgears Ltd. v. TATA Finance Ltd.*, (2000) 8 SCC 151; *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638; *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.*, (2007) 7 SCC 684; *Deep Trading Company v. Indian Oil Corporation*, (2013) 4 SCC 35; *Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd.*, (2017) 15 SCC 32.

⁴ (2006) 6 SCC 204.

*Dhairyawar v. Mohan Balkrishna Lulla*⁵ clearly demonstrated that section 15(2) of the Act was to be ascribed a wider meaning. The High Court thus noted that the appointment of a substitute arbitrator must be done either in accordance with the “original agreement” or the “provision applicable to the appointment of an arbitrator at the initial stage”.

The High Court held that in this case the provision applicable was the High Court appointing an arbitrator under section 11(6) of the Act. When the Respondent forfeited its right to nominate an arbitrator, it would, consequently mean that the procedure of appointment under section 11 will override the procedure envisaged in the arbitration agreement.

CONCLUSION

In the recent past, there has been a visible trend of courts in India doing their utmost to respect party autonomy, which is a cornerstone of arbitration. However, this decision serves to reinforce the sanctity of an order under section 11(6) of the Act. Such decisions/orders have been granted a distinct finality by virtue of section 11(7). Therefore, it would certainly be incongruous to allow a party to disturb and alter the order of a Court by appointing a substitute arbitrator, in situations such as in the present case. Parties must therefore keep in mind that refusal to appoint an arbitrator at the initial stage could result in complete forfeiture of the right to do so. It would be in a party’s interest to exercise its right to appoint an arbitrator, even if such party does not agree that the disputes are arbitrable, as such a challenge can then be placed before the arbitral tribunal itself.

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⁵ (2016) 3 SCC 619.