

PETITIONER'S CONTENTIONS

- During the course of the hearing, the Petitioner, *inter alia*, raised the following contentions:
 - Due to his demise, the arbitrator became *de facto* unable to perform his functions within the meaning of Section 14(1)(a) of the Act. Section 15(2) therefore applied as per which, a substitute arbitrator was to be appointed “according to the rules that were applicable to the appointment of the arbitrator being replaced”.
 - Section 14(1) of the Act requires that substitution of the arbitrator who has become unable to act, follow immediately on the fact of the inability of the arbitrator becoming known to the concerned party.² Therefore, post the Appointment Order, the Respondent was required to appoint its substitute arbitrator immediately and in any case, with due promptitude.
 - Since the Respondent failed to adhere to this procedure, Section 11(6) of the Act would apply and the appointment of any substitute arbitrator will have to be made by the Court. The Petitioner placed its reliance on *Datar Switchgears Ltd. v. Tata Finance Ltd.*³, *Punj Lloyd Ltd. v. Petronet MHB Ltd.*⁴, *U.O.I. v. Bharat Battery Manufacturing Co. (P) Ltd.*⁵, *Zion Promoters & Developers Pvt. Ltd. v. Ferrous Infrastructure Pvt. Ltd.*⁶ and *Dakshin Shelters P. Ltd. v. Geeta S. Johari*⁷ to state that though no time period was mentioned in Section 11(6), the Respondent was to appoint its arbitrator within thirty days from the date on which it was made aware of the necessity of doing so and in any case, before the other party approached the Court under Section 11(6). Reliance was also placed on *A.C.C. Ltd. v. Global Cement Ltd.*⁸ to clarify that Section 11(6) also applies to the appointment of a substitute arbitrator under Section 15(2).
 - Once the Petitioner had reached the Court, the right of the Respondent to appoint the Substitute Arbitrator stood extinguished and therefore, appointment of the Substitute Arbitrator was illegal.

RESPONDENT'S CONTENTIONS

- The Respondent, on the other hand, raised the following contentions:
 - The present petition is premature. As per the Arbitration Clause, the Petitioner had to mandatorily issue the Respondent a notice requesting for appointment of the new arbitrator. However, the Petitioner had failed to issue such a notice to the Respondent.
 - Despite the difficult conditions prevailing due to Covid-19, the Respondent had acted with due promptitude in appointing the Substitute Arbitrator.
 - As the period of 30 days expired after March 15, 2020, the said period would stand extended by the Hon'ble Supreme Court's order dated May 6, 2020⁹ until further orders. The present petition is thus premature.
 - In any event, the Substitute Arbitrator has been appointed by the Respondent and therefore the petition has become infructuous.

FINDINGS OF THE COURT

- Finding in favour of the Respondent, the Court dismissed the present petition. In support of its conclusion, the following reasons were given by the Court:
 - Relying upon the judgements in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.*¹⁰ and *National Highways Authority of India v. Bumihway DDB Ltd. (JV)*¹¹, the Court reiterated that Section 11(6) of

² To buttress this submission, the Petitioner relied upon the phrase “shall be substituted by another arbitrator” used in Section 14(1).

³ (2000) 8 SCC 151; Paragraph 19

⁴ (2006) 2 SCC 638 Paragraphs 5-7

⁵ (2007) 7 SCC 684; Paragraph 12

⁶ 229 (2016) DLT 209

⁷ (2012) 5 SCC 152; Paragraph 17

⁸ (2012) 7 SCC 71; Paragraph 17

⁹ *In re. Cognizance for Extension of Limitation, Suo Motu Writ (Civil) 3/2020.*

¹⁰ (2006) 6 SCC 204; Paragraph 4

¹¹ (2006) 10 SCC 763; Paragraphs 30 and 44.

the Act has application only if there is a failure to appoint the substitute arbitrator in accordance with Section 15(2) i.e. as per the arbitration provision contained in the agreement.¹²

- The judgements¹³ relied upon by the Petitioner can be distinguished since unlike the facts of the present case, they neither involve applicability of Section 15 nor envision the issuance of a notice requesting appointment of arbitrator from the other party.
 - In the present case, the Arbitration Clause specifically required issuance of a notice by the Petitioner to the Respondent for appointing an arbitrator. No such notice was issued by the Petitioner. In the absence of any such notice, the Petitioner was not entitled to plead extinguishment of the Respondent's right to appoint the Substitute Arbitrator.
 - The Petitioner was not able to point out any principle emanating either from a statute or precedent, to justify their assertion that the period of 30 days for appointment of the substitute arbitrator was to be reckoned from the date when the Respondent acquired knowledge of the demise of the arbitrator.
 - The Respondent did appoint its Substitute Arbitrator later on, which cannot be regarded as unreasonable given the restrictions imposed due to Covid-19. The appointment of the Substitute Arbitrator was also in line with the Arbitration Clause and also the Appointment Order.
- In view of the above findings, the Court did not deem it necessary to return any observation, regarding the reliance placed by the Respondent on the order passed by the Supreme Court on May 6, 2020 in *In re Cognizance for Extension of Limitation*.

CONCLUSION AND ANALYSIS

The procedure to be adopted for appointment of substitute arbitrators has always been a hotly debated subject. Placing reliance on the agreed mechanism of appointment of the arbitrator, the Court read the provisions of Section 15(2) and 11(6) in a purposive manner. It is indeed incomprehensible that a party may be allowed to seek judicial appointment of a substitute arbitrator even before exhausting the existing contractual mechanism. Allowing so would invariably result in breach of party autonomy and also the principle of minimal judicial intervention.¹⁴ From the above judgement it is clear that even in cases requiring appointment of substitute arbitrators, the Court shall give primacy to the party-agreed appointment procedure over judicial appointments.

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¹² See also paragraph 17 of *A. C. C. Ltd. v. Global Cement Ltd.* (2012) 7 SCC 71.

¹³ With respect to the judgement in *Datar Switchgears*, the Court held that the said judgement itself made it clear that it is only where there is demand from one party to appoint an arbitrator, and the other party fails to do so, till the date when the first party approaches the Court under Section 11(6), that the right of the second party to appoint an arbitrator stands extinguished.

¹⁴ The said principle has been embodied in Section 5 of the Act.