**Cites 36 docs - [[View All](https://indiankanoon.org/search/?formInput=cites:91853145)]**

**[Section 11 in The Arbitration Act, 1940](https://indiankanoon.org/doc/596725/)**

**[Section 15 in The Arbitration Act, 1940](https://indiankanoon.org/doc/1294263/)**

**[Section 14 in The Arbitration Act, 1940](https://indiankanoon.org/doc/665266/)**

**[Section 11(6) in THE ARBITRATION AND CONCILIATION ACT, 1996](https://indiankanoon.org/doc/605764/)**

**[THE ARBITRATION AND CONCILIATION ACT, 1996](https://indiankanoon.org/doc/1306164/)**

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**Bombay High Court**

**Sap India Pvt.Ltd vs Cox And King Ltd on 30 April, 2019**

**Bench: G. S. Kulkarni**

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 IN THE HIGH COURT OF JUDICATURE AT BOMBAY

 ORDINARY ORIGINAL CIVIL JURISDICTION

 IN ITS COMMERCIAL DIVISION

 COMMERCIAL ARBITRATION PETITION (LODG)NO.351 OF 2019

 SAP India Private Limited .. Petitioner

 Vs.

 Cox & Kings Limited ... Respondent

 -----

 Mr.Navroz Seervai, Senior Advocate with Mr.Akash Rebello, with Mr.Farhad

 Sorabjee, Mr.Pratik Pawar, Ms.Shanaya Cyrus Irani and Mr.Siddhesh S.Pradhan

 I/b. J.Sagar Associates, for the Petitioner

 Mr.Rampal Singh Kohli with Vikram Chavan, Mr.Jatin Sahai, Ms.Preeti

 Limbachiya, Ms.Ayesha Keshorwalla, Prasad Avhad, Dhvani Jain I/b. C.K.Legal

 Advocates and Consultants, for the Respondent.

 -----

 CORAM : G.S. KULKARNI, J.

 RESERVED ON: 8 April 2019

 PRONOUNCED ON : 30 April 2019

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 Judgment:

1. This is an application under [Section 11](https://indiankanoon.org/doc/596725/) read with [Section 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) of the Arbitration and[Conciliation Act](https://indiankanoon.org/doc/1306164/),1996 (for short 'the Act'), whereby the petitioner prays for appointment of a substitute arbitrator on behalf of the respondent, in place of the arbitrator previously appointed by the Court by an order passed under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act.

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2. The relevant facts are required to be noted:-

An agreement dated 30 October 2015 was entered between the petitioner and the respondent titled as "Services General Terms and Conditions Agreement" (for short 'the said agreement'). Clause 15.7 of the said agreement is the arbitration agreement between the parties whereunder the parties agreed to refer the disputes for adjudication by a panel of three arbitrators. The arbitration clause reads thus:-

"15.7. Dispute Resolution. In the event of any dispute of difference arising out of the subject matter of this Agreement, the parties shall undertake to resolve such disputes amicably. If disputes and differences cannot be settled amicably then such disputes shall be referred to bench of three arbitrators, where each party will nominate one arbitrator and the two arbitrators shall appoints a third arbitrator. Arbitration award shall be binding on both parties. The arbitration shall be held in Mumbai and each party will bear the expenses of their appointed arbitrator. The expense of the third arbitrator shall be shared by the parties. The arbitration process will be government by the Arbitration & [Conciliation Act](https://indiankanoon.org/doc/1306164/),1996."

3. Disputes and differences had arisen between the parties under the said agreement. The petitioner hence invoked the arbitration agreement and nominated Mr.Justice V.C.Daga (Retd) as an arbitrator on behalf of the petitioner and called upon the respondent to appoint its arbitrator as per the arbitration agreement. Respondent, however, did not acceed to this request of the petitioner, interalia for a reason that the petitioner had pvr 3 carbpl351-19final-27-4-19.doc played a fraud on the respondent, in inducing the respondent to enter into the said agreement. In these circumstances the petitioner approached this Court by filing an application under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act being Commercial Arbitration Application No.61 of 2018. The said application was intensely contested by the respondent. This Court by an order dated 30 November 2018 allowed the said application by appointing Mr.Justice D.B.Bhosale, former Chief Justice of the Allahabad High Court as a nominee arbitrator on behalf of the respondent. This order passed by the Court was challenged by the respondent before the Supreme Court in a Petition for Special Leave to Appeal (C) no.33555/2018. The Supreme Court by an order dated 2 January 2019 did not interfere in the order passed by this Court and disposed the Special Leave Petition in terms of the following order:-

" ORDER Heard learned Counsel for the parties and perused the relevant material.

We are not inclined to interfere with the order impugned in the Special Leave petition. However, the two Arbitrators in question, namely, Mr.Justice V.C.Daga, former Judge of the Bombay High Court and Mr.Justice D.B.Bhosale, former Chief Justice of the Allahabad High Court, shall now proceed to appoint the third Arbitrator.

In special leave petition is, accordingly disposed of.

4. As per the above directions of the Supreme Court the two learned Arbitrators as appointed on behalf of the respective parties appointed pvr 4 carbpl351-19final-27-4-19.doc Mr.Justice Madan B.Lokur, Former Judge of the Supreme Court as the Presiding Arbitrator and an arbitral tribunal was so constituted, which entered an arbitral reference.

5. On 25 March 2019 Mr.Justice D.B.Bhosale (Retd), the arbitrator appointed by this Court for the respondent, addressed two letters, one to the co-arbitrators and one to the parties and their Advocates, interalia recording that he has been appointed as a Member Lokpal (Judicial), under the Lokpal and Lokayuktas Act,2013, effective immediately, and consequently, was forthwith recusing himself as a member of the arbitral tribunal in the arbitration proceedings.

6. The Advocates for the respondent on receipt of the said letter from Mr.Justice D.B.Bhosale (Retd), on the very next day (26 March 2019), addressed an e-mail to the learned Presiding Arbitrator and the learned co-arbitrator and the Advocate for the petitioner that as Mr.Justice D.B.Bhosale (Retd) has recused himself as a co-arbitrator, the respondent has nominated Dr.Justice Arijit Pasayat, former Judge of Supreme Court of India as the respondent's nominee arbitrator. The contents of the said e- mail are required to be noted which reads thus:-

pvr 5 carbpl351-19final-27-4-19.doc "From: Surabhi Sharan <surabhi.sharan@advaniandco.com> Sent: 26 March 2019 12.40 To:'MadanLokur',vijaycdaga@gmail.com;bhosale.dilip56@gmail. com CC: Farhad Sorabjee; Pratik Pawar; Arti Raghavan;Siddhesh Pradhan; Shanaya Cyrus Irani; 'Hiroo Advani', Yusuf Sheikh, deepak.lad@advaniandco.com; 'Kanika Arora';

Chirag.bhatia@advaniandco.com Subject: Re: Arbitration matter between SAP and Cox & Kings -

Nomination of Co-Arbitrator.

Dear Sirs, We are concerned for our client, the Respondent in the captioned matter.

This is pursuant to the letters dated 25 March 2019 sent by Hon'ble Mr.Justice Dilip Bhosale (Retd.) and we confirm receipt of the same.

In light of Hon'ble Mr.Justice Dilip Bhosale (Retd) recusing himself as a Co-Arbitrator in the captioned matter, we hereby nominate Hon'ble Justice Dr.Arijit Pasayat (Retd.), Former Judge of the Supreme Court of India.

The contact details of Hon'ble Justice Dr.Arijit Pasayat (Retd.) are mentioned herein below." (emphasis supplied)

7. The advocates for the petitioner replied to the said e-mail of the Advocates for the respondent by an e-mail dated 26 March 2019 interalia recording that the respondent was not entitled to make such appointment and that the procedure followed by the respondent in nominating the substitute arbitrator, was inappropriate. It was recorded that the respondent had failed to appoint its nominee arbitrator when called upon to do so, which had constrained the petitioner to file a [Section 11](https://indiankanoon.org/doc/596725/) pvr 6 carbpl351-19final-27-4-19.doc application before the High Court praying for an arbitrator to be appointed for the respondent and that Mr.Justice D.B.Bhosale (Retd) was appointed by the Court as a nominee arbitrator of the respondent. It was recorded that this order of the High Court was unsuccessfully challenged by the respondent before the Supreme Court. The petitioner stated that on this background the respondent is not entitled to take advantage of the recusal of the learned Arbitrator Mr.Justice D.B.Bhosale (Retd), to now suo moto nominate an arbitrator and that a substitute arbitrator will have to be appointed following the appropriate process by applying to the High Court.

8. The Advocates for the respondent replied to the said e-mail of the petitioner's advocate by e-mail dated 27 March 2019 recording that earlier the respondent had not appointed an arbitrator as it was the respondent's case that due to a fraud the issue was not arbitrable, and that the High Court took a contrary view and appointed Mr.Justice D.B.Bhosale (Retd) as an arbitrator on behalf of the respondent and as Mr.Justice D.B.Bhosale (Retd) has withdrawn from the arbitration, the respondent had a right to appoint a substitute arbitrator under [Section 15](https://indiankanoon.org/doc/1294263/) of the Act. It was also recorded that having already appointed Mr.Justice Arijit Pasayat as a pvr 7 carbpl351-19final-27-4-19.doc substitute arbitrator, the petitioner had no right to object the same and confirmed the appointment of Mr.Justice Arijit Pasayat as a nominee arbitrator on behalf of the respondent. The contents of the respondent's advocates e-mail dated 27 March 2019 are required to noted which reads thus:-

"Dear Sirs, We are in receipt of the email dated 26.03.2019 sent by the Advocates of the Claimant.

We reiterate that our Clients, Cox & Kings Limited, had not appointed an Arbitrator as it was our Client's case that due to fraud the issue was not arbitrable.

The Hon'ble High Court of Bombay took a contrary view and appointed Justice D.B.Bhosale as Arbitrator on behalf of Cox & Kings Limited. As Justice D.B.Bhosale has withdrawn from the arbitration, our clients have a right to appoint a substitute Arbitrator under [Section 15](https://indiankanoon.org/doc/1294263/) of the Arbitration & [Conciliation Act](https://indiankanoon.org/doc/1306164/),1996.

Having said that, our clients have already appointed Justice Pasayat as a substitute Arbitrator and the Coaimant has no right to object to the same.

In view of the above, we reiterate the appointment of Justice Pasayat as a nominee Arbitrator for the Respondents."

(emphasis supplied)

9. The petitioner being aggrieved by this action on the part of the respondent in suo moto and/or unilaterally filling up the vacancy of the respondent's arbitrator as appointed by the Court, has filed this petition for appointment of a substitute arbitrator on behalf of the respondent to pvr 8 carbpl351-19final-27-4-19.doc replace Mr.Justice D.B.Bhosale (Retd), the court appointed arbitrator, who has resigned from the arbitral proceedings.

10. Respondent has appeared and has acridly contested this application. A reply affidavit is placed on record interalia raising an objection to the maintainability of the petition in regard to applicability of[Section 14](https://indiankanoon.org/doc/665266/) of the Act. The respondent contends that on the vacancy caused due to recusal of Mr.Justice D.B.Bhosale (Retd.), the respondent exercising its rights under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act read with clause 15.7 of the agreement, has appointed Dr.Justice Arijit Pasayat, former Judge of Supreme Court of India, as its nominee arbitrator on the Arbitral Tribunal. It is contended that the present petition also filed under [Section 14](https://indiankanoon.org/doc/665266/) of the Act is per se not maintainable, as no circumstance falling under sub-section (2) of [Section 14](https://indiankanoon.org/doc/665266/) of the Act has arisen namely of a controversy concerning any of the grounds referred to in clause (a) of sub-section (1) of [Section 14](https://indiankanoon.org/doc/665266/) of the Act, requiring a party to apply to the Court to decide on the termination of the mandate of the arbitrator. It is contended that under [Section 14](https://indiankanoon.org/doc/665266/) of the Act there is no power conferred on the Court to appoint a substitute arbitrator. It is next contended that Dr.Justice Arijit Pasayat (Retd) has already been appointed as an arbitrator on behalf of the pvr 9 carbpl351-19final-27-4-19.doc respondent who has accepted the appointment, and unless the said nominated arbitrator withdraws or his appointment is set aside, no appointment of the arbitrator can be made. In these circumstances, this petition for appointment of an arbitrator to fill up the vacancy which has arisen on recusal of Mr.Justice D.B.Bhosale (Retd), would not be maintainable. It is contended that even otherwise the respondent as per the provision of [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act has appointed a substitute arbitrator according to the rules which are applicable for such appointment, namely the arbitration agreement. It is contended that [Section 15(2)](https://indiankanoon.org/doc/1294263/) does not confer any power on any Court to make an appointment of a substitute arbitrator, as [Section 15(2)](https://indiankanoon.org/doc/1294263/) merely lays down that the vacancy on the arbitrator's panel can be filled by appointing a substitute arbitrator "according to the rules" that were applicable to the appointment of the arbitrator being replaced. It is contended that the word "rules" as used in sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) as held by the Supreme Court would mean the 'arbitration agreement' between the parties. It is submitted that thus appointment of Dr.Justice Arijit Pasayat (Retd) is made by the respondent in accordance with the provisions of [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act and if the petitioner has any objection in relation to the appointment so made by the respondent, then, the petitioner is pvr 10 carbpl351-19final-27-4-19.doc required to adopt appropriate remedy in law and not by filing the present proceedings which according to the respondent is filed under [Section 14](https://indiankanoon.org/doc/665266/) of the Act.

11. Having noted the ambit of the pleadings, the extensive submissions of the learned counsel for the parties are required to be set out.

12. Mr.Seervai, learned Senior Counsel for the petitioner supporting the prayers as made in the petition has made the following submissions:-

(i) The procedure attempted to be adopted by the respondent in suo moto nominating an arbitrator on recusal of the "Court appointed/nominated arbitrator", is inappropriate and contrary to the well settled legal position laid down in catena of the decisions of the Supreme Court and the High Courts.

(ii) Once an application under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act is filed by one party seeking appointment of an arbitrator, the other party's right to appoint an arbitrator under the agreement stands forfeited and/or extinguished and does not revive.

(iii) The respondent in the present case could not have revived its right under clause 15.7 (supra) being the arbitration agreement and instantly pvr 11 carbpl351-19final-27-4-19.doc fill up the vacancy of a Court appointed arbitrator. It is for this Court to appoint the substituted arbitrator to replace the arbitrator originally appointed by the Court.

(iv) The requirement of law in these circumstances is that once on a judicial adjudication an arbitrator was appointed for the respondent, then it is only the Court which can appoint a substitute arbitrator. This also for the reason that the respondent had willfully failed/neglected to act in accordance with the arbitration agreement when called upon to do so by the petitioner and thereafter the law has taken its own course. Thus, the respondent having foregone and/or waived its right to make an appointment and consequently the right to appoint an arbitrator in terms of clause 15.7 of the agreement having stood extinguished, such a right cannot be resurrected. Thus, the appropriate procedure for the parties that includes the respondent was only to approach this Court and pray for appointment of a substitute arbitrator.

(v) The respondent was not entitled to be an opportunist and take advantage of the recusal of the Court appointed arbitrator and somehow re-grab and/or revive the rights under the contract which in law clearly stood forfeited, and as a consequence of which, resulted in this Court passing an order to appoint a nominee arbitrator for the respondent and pvr 12 carbpl351-19final-27-4-19.doc which order was also approved by the Supreme Court. It is submitted that in this situation the provisions of[Sections 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) are the only relevant provisions under which this Court certainly can exercise jurisdiction to appoint a substitute arbitrator. In support of the submissions that the only recourse to fill up the vacancy of a Court appointed arbitrator is to approach this Court, Mr.Seervai would rely on the decisions in (i) "Union of India & Ors Vs. Uttar Pradesh State Bridge Corporation Ltd."1; (ii) decision of learned Single Judge of this Court in Ignatius Tony Pereira Vs. Mr.Pifran Sanjivan Fernandes2 (iii) decision of the learned Single Judge of Delhi High Court in "Mithlesh Kumar Aggarwal Vs. Athena Infrastructure Ltd."3; (iv) decision of the learned Single Judge of the Delhi High Court in "GMR Ambala Chandigarh Expressways Pvt.Ltd. Vs. National Highway Authority of India & Ors." 4. Mr.Seervai submits that the decisions of Delhi High Court are judicial recognition of the opinion of the learned Single Judge of the Calcutta High Court Smt.Justice Indira Banerjee (as Her Ladyship then was) in "Ramjee Power Construction Ltd. Vs. Damodar Valley Corporation"5 which was an order passed by Her Ladyship as a designate of the Chief Justice. It is submitted that the said 1 (2015)2 SCC 52 2 2016 SCC OnLine Bom 5470 3 2017 SCC OnLine Del 7875 4 2018 SCC OnLine Del 7588 5 2009 SCC OnLine Cal 321 pvr 13 carbpl351-19final-27-4-19.doc order of the Calcutta High Court being not passed by a Court, as per the law laid down by the Supreme Court in "State of West Bengal & Ors. Vs. Associated Contractors"6 by itself would not have a precendential value which now finds a judicial recognition not only by the Delhi High Court but even by a learned Single Judge of this Court in Ignatius Tony Pareira (supra).

(vi) In supporting the contention that the right to nominate its arbitrator as initially available to the respondent, under Clause 15.7 of the agreement, stood forfeited when the same was not exercised, and the Court was required to appoint an arbitrator for the respondent, and to support the contention that the forfeiture of the respondent's right was not restricted only to the proceedings under Section 11(6), but also to any future vacancy which may arise qua the said arbitrator so appointed for the respondent, Mr.Seervai has placed reliance placed on the decisions of the Supreme Court in "Datar Switchgears Ltd. Vs. TATA Finance Ltd. & Anr."7, "Punj Lloyd Ltd. Vs. Petronet MHB Ltd." 8, "Union of India Vs. Bharat Battery Manufacturing Co.(P) Ltd."9 6 (2015)1 SCC 32 7 (2000)8 SCC 151 8 (2006)2 SCC638 9 (2007)7 SCC 684 pvr 14 carbpl351-19final-27-4-19.doc

13. Per contra Mr.Kohli, learned Counsel for the respondent in opposing the petition has made the following submissions:-

(i) The petition is per se not maintainable inasmuch as neither [Section 14](https://indiankanoon.org/doc/665266/) nor [Section 15](https://indiankanoon.org/doc/1294263/) of the Act are applicable. It is submitted that as on date there is no vacancy in view of the appointment of Dr.Justice Arijit Pasayat (Retd.) by the respondent as its nominee arbitrator filling up the vacancy which had arisen on recusal of Mr.Justice D.B.Bhosale (Retd).

(ii) Once, the respondent has filled up the said vacancy which had so arisen, there is no requirement of a judicial intervention, in view of the provisions of [section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act read with [Section 5](https://indiankanoon.org/doc/1091250/) of the Act. In any case, there is scope for intervention under [Section 14](https://indiankanoon.org/doc/665266/) of the Act, in the situation in hand.

(iii) The Court needs to consider the statement of object and reasons along with [Section 5](https://indiankanoon.org/doc/1091250/) of the Act which demonstrates the scheme of the legislation, which is to minimise the supervisory role of the Court, in the arbitral process. Thus once the respondent has exercised it's rights under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act, to fill up the vacancy which arose on the resignation/recusal of Mr.Justice D.B. Bhosale (Retd), nothing remains for this Court to exercise any power under [Section 15](https://indiankanoon.org/doc/1294263/) or 14 or [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act.

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 (iv) The petitioner 's contention that the respondent's right to appoint its

nominee arbitrator and to fill up the vacancy which had so arisen, stood extinguished for the reason of this Court passing an order under [Section 11(6)](https://indiankanoon.org/doc/596725/) in the earlier round of litigation, cannot have any relevance when its a question of a vacancy arising on the arbitral tribunal, for the reason that the order passed by the Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) would be relevant only for the purpose of the said provision and not otherwise.

(v) Once there is vacancy which occurs on the resignation of an arbitrator appointed by the Court, the parties are relegated to the same position as it stood prior to the party approaching the Court in an application under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act.

(vi) If there was to be a failure on the part of respondent to fill up vacancy which had so arisen, only in that event, the petitioner could have approached this Court to fill up vacancy.

14. In support of his submissions, learned counsel for the respondent has placed reliance on the decisions in:-(i) [Government of Haryana -vs- G.F. Toll Road Pvt. Ltd](https://indiankanoon.org/doc/42712583/). 10 ; (ii) S.P. Singla Construction

(iii) National Highway 10 2019 SCC Online SC 2.

 11 2019 2 SCC 488

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 [Authority of India -vs- Bumihiway DDB Ltd (JV](https://indiankanoon.org/doc/1534562/)) 12; (iv) Shailesh

[Dhairyawan -vs- Mohan Balkrishna Lulla](https://indiankanoon.org/doc/48783751/) 13; (v) [Shane Duff -vs- Essel Sports Pvt Ltd](https://indiankanoon.org/doc/13965511/).14 ; (vi)[Gamesa Wind Turbines Pvt.Ltd., Chennai -vs- Mytrah Energy (I) Ltd. Hyderabad](https://indiankanoon.org/doc/11705414/) 15; (vii) [North Eastern Railways and ors -vs- Tripple Engineering Works16 Reasons and Conclusions](https://indiankanoon.org/doc/81298179/)

15. On the above conspectus, the following question would arise for consideration in this petition:-

Whether it was permissible in law for the respondent to fill up the vacancy caused on the resignation/recusal of its nominee arbitrator who was appointed by the Court in exercise of the powers under [Section 11(6)](https://indiankanoon.org/doc/605764/) of the Act.

16. To aid the discussion some undisputed facts are required to be noted. The respondent initially had refused to nominate it's arbitrator as per arbitration agreement between the parties and consequently the petitioner was required to approach this Court invoking the provisions of [Section 11(6)](https://indiankanoon.org/doc/596725/) to appoint an arbitrator. This Court allowed the said application filed by the petitioner, by an order dated 30 th November, 12 (2006) 10 Supreme Court Cases 763 13 (2016) 3 SCC 619 14 2013 (3) Mh. LJ.54 15 2017 SCC Online Hyd 466 16 Civil Appeal No.6275 of 2014 arising out of SLP NO.20427 of 2013pvr 17 carbpl351-19final-27-4-19.doc 2018. The respondent assailed the said order before the Supreme Court in a petition for Special Leave to Appeal which was disposed of without interfering with the orders passed by this Court. In fact the Supreme Court, in it's order observed that the two arbitrators in question Mr. Justice V.C. Daga (Retd), (as appointed by the petitioner) and Mr. Justice D.B. Bhosle, (Retd) (as appointed by the High Court) should proceed to appoint the third arbitrator. These two arbitrators appointed Mr. Justice Madan B. Lokur, former Judge of the Supreme Court of India as the third/presiding arbitrator, and an arbitral tribunal was accordingly constituted. The tribunal entered reference, however, due to appointment of the court appointed arbitrator Mr. Justice D.B. Bhosle (Retd) as a Member - Lokpal (Judicial), by the President of India under Section 3(4) of the Lokpal and Lokayuka Act, 2013, Mr.Justice D.B. Bhosle (Retd), recused from the arbitral tribunal with immediate effect as informed by him to the parties and to the Co-arbitrators by his letter dated 25th March, 2019. Immediately, on the very next day that is on 26 th March, 2019 the respondent's advocates informed the co-arbitrators and the petitioner that in pursuance of Mr.Justice D.B. Bhosle (Retd), having recused as a co-arbitrator, the respondent has nominated Dr.Justice Arijit Pasayat, former Judge of the Supreme Court of India, as its nominee pvr 18 carbpl351-19final-27-4-19.doc arbitrator. The petitioner immediately by it's email dated 26 th March, 2019, objected to the process adopted by the respondent in appointing it's nominee arbitrator to fill up the vacancy which had arisen on the recusal of Mr.Justice D.B. Bhosale (Retd), on the ground that once the respondent's nominee arbitrator was so appointed by the Court and as confirmed by the Supreme Court, the respondent was not entitled to take advantage of the recusal of the learned arbitrator and suo-motu nominate an arbitrator and that the arbitrator will have to be appointed by following proper process by applying to the High Court. This contention of the petitioner was refuted by the respondent by it's advocate email dated 27th March, 2019. However, the contents of this email does not sound to be in a good taste and more particularly in view of the solemnity of the orders dated 30 th November, 2018 passed by this Court, which was a full-fledged adjudication of the [Section 11](https://indiankanoon.org/doc/596725/) application and the subsequent order of Supreme Court dated 02.01.2019, confirming the said order. The contents of this email are thus required to be noted, which reads thus:-

"Dear Sirs, We are in receipt of the email dated 26.03.2019 sent by the Advocates of the Claimant.

We reiterate that our Clients, Cox & Kings Limited, had not appointed an Arbitrator as it was our Client's case that due to fraud pvr 19 carbpl351-19final-27-4-19.doc the issue was not arbitrable.

The Hon'ble High Court of Bombay took a contrary view and appointed Justice D.B.Bhosale as Arbitrator on behalf of Cox & Kings Limited. As Justice D.B.Bhosale has withdrawn from the arbitration, our clients have a right to appoint a substitute Arbitrator under [Section 15](https://indiankanoon.org/doc/1294263/) of the Arbitration & [Conciliation Act](https://indiankanoon.org/doc/1306164/),1996.

Having said that, our clients have already appointed Justice Pasayat as a substitute Arbitrator and the Coaimant has no right to object to the same.

In view of the above, we reiterate the appointment of Justice Pasayat as a nominee Arbitrator for the Respondents."

(emphasis supplied)

17. Be that at it may, as noted above the question is as to whether it was permissible in law for the respondent to fill up the vacancy as arisen on the recusal of the Court appointed nominee arbitrator. To examine this issue, at the threshold, it would be imperative to note the provisions of the Act, which would be relevant in the present context. These provisions are [Section 11](https://indiankanoon.org/doc/596725/) (1) to (7), [Section 14](https://indiankanoon.org/doc/665266/), [Section 15](https://indiankanoon.org/doc/1294263/) of the Act. The first provision which needs to be considered is [Section 11](https://indiankanoon.org/doc/596725/), for the reason that this Court had exercised powers under [Section 11(6)](https://indiankanoon.org/doc/596725/) and had appointed Mr.Justice D.B.Bhosale (Retd) as the nominee arbitrator of the respondent. This order passed by the Court certainly had legal consequences relevant to the rights of the parties, as also considered by the Supreme Court and the High Courts in pvr 20 carbpl351-19final-27-4-19.doc several decisions. [Section 11](https://indiankanoon.org/doc/596725/) with relevant sub-sections in the present context reads thus :-

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.

(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 the Supreme Court or, or as the case may be, the High Court or any person or institution designated by such Court, to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-

section (5) or sub-section (6) to the to the Supreme Court or, as pvr 21 carbpl351-19final-27-4-19.doc the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision."

18. On a plain reading of [Section 11](https://indiankanoon.org/doc/596725/), it is quite clear that [section 11](https://indiankanoon.org/doc/596725/) pertains to 'appointment of arbitrators'. Sub section(3) of this provision provides that when there is an agreement between the parties to have an arbitral tribunal constituted comprising three arbitrators, then each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator, who shall act as a Presiding Arbitrator. Sub section (4) provides that if appointment procedure as contemplated in Sub section (3) applies and a party fails to appoint an arbitral tribunal within 30 days from the receipt of request to do so from the other party, (the situation as had arisen in the present case), in that case the appointment shall be made upon request of a party, by the Supreme Court or as the case may be the High Court or any person or institution designated by such Court. Sub Section (6) of [Section 11](https://indiankanoon.org/doc/596725/), provides that under an appointment procedure agreed upon by the parties if a party fails to act as required under that procedure or the two arbitrators fail to reach an agreement expected of them under that procedure, or a person including institution fails to perform any function entrusted to him or it, under that procedure, in such a situation a party may request the pvr 22 carbpl351-19final-27-4-19.doc Supreme Court as the case may be the High Court to take a necessary measure for securing the appointment. Sub Section (7) of [section 11](https://indiankanoon.org/doc/596725/) provides that a decision on the matter entrusted by sub section (4) sub section (5) or sub section (6) to the Supreme Court or as the case may be, High Court is final and no appeal including Letters Patent appeal shall lie against such decision.

19. The next provision is [Section 14](https://indiankanoon.org/doc/665266/) which pertains to failure or impossibility of the arbitrator to act.[Section 14](https://indiankanoon.org/doc/665266/) reads thus:-

"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 remains 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](https://indiankanoon.org/doc/1137274/), 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](https://indiankanoon.org/doc/750244/)."

[Section 14](https://indiankanoon.org/doc/665266/) thus provides for the circumstances in which the mandate of an arbitrator shall stand terminated and the arbitrator so appointed pvr 23 carbpl351-19final-27-4-19.doc shall be substituted by appointing another arbitrator firstly in case the arbitrator becomes de jure or de facto unable to perform his function or for other reasons fails to act without undue delay; and secondly if he withdraws from his office or parties agree to the termination of his mandate. Sub-section (2) of [Section 14](https://indiankanoon.org/doc/665266/) provides that if a controversy remains, concerning any of the grounds as referred to in clause (a) of sub-section (1) namely that the arbitrator has become de jure and de facto unable to perform his function or for any other reason fails to act without undue delay, a party may unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate. In other words [Section 14(1)](https://indiankanoon.org/doc/13574/) provides that the mandate of the arbitrator shall terminate when it becomes de jure or de facto unable to perform his function or for other reasons he fails to act without undue delay or withdraws from office or the parties agree to terminate his mandate. Thus it is clear that the mandate of the arbitrator stands terminated if the arbitrator withdraws from his office.

20. In the present context the next crucial provision is [Section 15](https://indiankanoon.org/doc/1294263/) which provides for termination of mandate and substitution of arbitrator. Sub-section (1) of [Section 15](https://indiankanoon.org/doc/1294263/) provides that "in addition" to pvr 24 carbpl351-19final-27-4-19.doc the circumstances which are referred in [sections 13](https://indiankanoon.org/doc/862520/) or 14, the mandate of the arbitrator shall terminate (a) where he withdraws from office for any reason or (b) by or pursuant to the agreement of the parties. Sub- section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) provides that 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. The other sub-sections are not relevant to be discussed in the facts of the present case. [Section 15](https://indiankanoon.org/doc/1294263/) reads thus:-

15. Termination of mandate and substitution of arbitrator.--

(1) In addition to the circumstances referred to in [section 13](https://indiankanoon.org/doc/1137274/) or [section 14](https://indiankanoon.org/doc/966297/), 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."

(emphasis supplied)

21. Considering the provisions of [Section 14](https://indiankanoon.org/doc/966297/) and [Section 15](https://indiankanoon.org/doc/626570/), and their application to the facts of the case, it cannot be disputed that the pvr 25 carbpl351-19final-27-4-19.doc learned Arbitrator Mr.Justice D.B.Bhosale (Retd), appointed by the Court has withdrawn/resigned from his office and accordingly the mandate of the said arbitrator stood terminated in terms of [Section 14(1)(b)](https://indiankanoon.org/doc/1779087/) read with [Section 15(1)(a)](https://indiankanoon.org/doc/691153/) of the Act. If this be the clear position, then, [Section 15(2)](https://indiankanoon.org/doc/1937086/) becomes squarely applicable and a substitute arbitrator shall then be appointed in accordance with [Section 15(2)](https://indiankanoon.org/doc/1937086/) of the Act. Up to this position there does not appear to be much controversy.

22. The respondent however in the facts and circumstances has asserted a legal right to fill up the vacancy which has arisen, and in fact states to have filled up the vacancy. On the other hand the petitioner opposing this approach of the respondent has filed this petition making prayers for appointment of a substitute arbitrator to fill up the vacancy on the arbitral tribunal arising on recusal of Mr.Justice D.B.Bhosale (Retd). Considering the earlier order dated 4 April 2019 passed on this petition, the petitioner has pursued this petition under [Section 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) of the Act. In any event there is no other provision which would be attracted considering the plain prayers for appointment of substitute arbitrator as made by the petitioner.

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23. Thus it would be required to be examined as to whether the respondent in the facts of the case had any legal authority under sub- section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) to fill up the vacancy which had arisen on recusal of Mr.Justice D.B.Bhosale (Retd) by appointing its nominee arbitrator or in other words in the present context what can be the interpretation and application of [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act and as to how it would operate.

24. In asserting its right to fill up the vacancy, on behalf of the respondent, it is contended that when sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) provides that a substitute arbitrator be appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced" it would only mean that the respondent is authorised to appoint an arbitrator as per the arbitration agreement between the parties (Clause 15.7) (Supra) and not by the Court. Whereas the petitioners have contended that the rules as applicable in terms of [Section 15(2)](https://indiankanoon.org/doc/1294263/) in the present case would be the statutory procedure which was followed in appointing the arbitrator being replaced, namely only appointment by this Court.

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25. As noted above there are two facets as urged on behalf of the petitioner firstly the right of the respondent to appoint an arbitrator which includes appointment of substitute arbitrator was already forfeited and secondly the interpretation of [Section 15(2)](https://indiankanoon.org/doc/1294263/) as made by the parties in regard to its implications and applicability of this provision in the facts of the case. The issue is purely a legal issue.

26. The learned Counsel for the parties have referred to several decisions as noted above to support their respective interpretation of the provision in question. The exposition of the legal position as discerned from the various decisions is required to be initially discussed. Firstly, it would be necessary to consider the legal consequences which would emerge on the Court exercising jurisdiction in passing an order under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act, in view of the refusal of a party to appoint an Arbitrator.

27. In Datar Switchgears Ltd. (supra) interpreting sub-section (6) of [Section 11](https://indiankanoon.org/doc/109662210/) the Supreme 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 the demand, the right to pvr 28 carbpl351-19final-27-4-19.doc appointment does not get automatically forfeited after expiry of 30 days but would survive even after 30 days of the demand but before the first party has moved the Court under [Section 11](https://indiankanoon.org/doc/596725/). Once the party so demanding has approached the Court seeking appointment of an arbitrator, then right of the opposite party ceases to make appointment of an arbitrator. The observations of the Court in paragraph 19 of the decision are required to be noted which reads thus:-

"19. So far as cases falling under [Section 11(6)](https://indiankanoon.org/doc/605764/) are concerned - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under [Section 11(4)](https://indiankanoon.org/doc/1067630/) and [Section 11(5)](https://indiankanoon.org/doc/401357/) of the Act. In our view, therefore, so far as [Section 11(6)](https://indiankanoon.org/doc/605764/) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to 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](https://indiankanoon.org/doc/1841764/), that would be sufficient. In other words, in cases arising under [Section 11(6)](https://indiankanoon.org/doc/605764/), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under[Section 11](https://indiankanoon.org/doc/1841764/) seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under[Section 11(6)](https://indiankanoon.org/doc/605764/) is forfeited."

(emphasis supplied)

28. In Punj Lloyd Ltd. Vs. Petronet MHB Ltd. (supra) decided by a three judge Bench of the Supreme Court, the respondent had failed to appoint an arbitrator till the appellant had filed an application before the pvr 29 carbpl351-19final-27-4-19.doc High Court under[Section 11(6)](https://indiankanoon.org/doc/605764/) of the Act. Despite the respondent not making an appointment, the learned Judge designated by the Chief Justice of the High Court refused to appoint an arbitrator holding that the remedy available was to move in accordance with clause 14.1 (arbitration agreement) where upon the Functional Director was to be appointed as a sole arbitrator to adjudicate the disputes. The Supreme Court set aside the decision of the High Court following the decision in Datar Switchgears Ltd.(supra) and held that the case was squarely covered by the view that till filing of an application under [Section 11(6)](https://indiankanoon.org/doc/605764/) of the Act, the respondent had not appointed an arbitrator and consequently the respondent's right to appoint an arbitrator as per the arbitration agreement stood extinguished.

29. In Union of India Vs. Bharat Battery Manufacturing Co.(P) Ltd.(supra) the Supreme Court was considering the challenge to an order passed by the Delhi High Court passed under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act appointing an arbitrator. The appellant had failed to appoint an arbitrator within thirty days from the date of receipt of the request from the respondent, being Notices dated 7 June 2005 and 2 January 2006. On 30 March 2006 the respondent filed a [Section 11(6)](https://indiankanoon.org/doc/596725/) application before the High Court which was allowed by the pvr 30 carbpl351-19final-27-4-19.doc impugned order dated 26 May 2006 appointing a retired Judge of the Delhi High Court as an arbitrator. However, after filing of the [Section 11(6)](https://indiankanoon.org/doc/596725/) application and before an order could be passed, the appellant appointed a sole arbitrator purportedly in terms of the arbitration agreement. The order of the Delhi High Court was challenged on the ground that once the appointment was made as per the arbitration agreement prior to the High Court passing an order, such an appointment of the arbitrator by the High Court cannot be held to be illlegal and in fact such appointment by the High Court would be contrary to the arbitration agreement clause 24 therein. The Supreme Court however, rejected the said contention referring to the decision of the Supreme Court in Datar Switchgears Ltd. (supra) and Punj Lloyd Ltd. (supra). The Supreme Court held that once a party fails to make an appointment in response to the notice, before the other party files an application under [Section 11(6)](https://indiankanoon.org/doc/596725/), the other party extinguishes its right to appoint an arbitrator in terms of the clause in the agreement thereafter. The other party therefore, cannot resurrect the clause of the agreement dealing with the appointment of the arbitrator. The Supreme Court in paragraphs 12 and 13 observed thus:-

pvr 31 carbpl351-19final-27-4-19.doc "14. A three-Judge Bench of this Court in Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638 considered the applicability of [Section 11(6)](https://indiankanoon.org/doc/596725/) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under [Section 11(6)](https://indiankanoon.org/doc/596725/), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in [Datar Switchgears Ltd. v. Tata Finance Ltd. and Another](https://indiankanoon.org/doc/41226024/) (2000) 8 SCC 151 wherein at page 158, para 19, this Court held as under:

.. .. .. .. .

As already noticed, the respondent filed [Section 11(6)](https://indiankanoon.org/doc/596725/) petition on 30.3.2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15.5.2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under[Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after [Section 11(6)](https://indiankanoon.org/doc/596725/) petition has been filed by the other party before the Court seeking appointment of an arbitrator.

13. We are, therefore, of the view that the order of appointment of Dr. Gita Rawat by the appellant as a sole arbitrator dated 15.5.2006 was passed without jurisdiction. Once [Section 11(6)](https://indiankanoon.org/doc/596725/) petition is filed by one party seeking appointment of an arbitrator, the other party cannot resurrect the clause of the agreement dealing with the appointment of the arbitrator, in this case Clause 24 of the agreement." (emphasis supplied)

30. In Deep Trading Company Vs. Indian Oil Corporation & Ors. (supra) again a three Judge Bench of the Supreme Court applying the law as laid down in Datar Switchgears Ltd.(supra) held as under:-

"19. If we apply the legal position exposited by this Court in Datar Switchgears to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under [Section 11(6)](https://indiankanoon.org/doc/605764/) to the Chief Justice of pvr 32 carbpl351-19final-27-4-19.doc the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under [Section 11(6)](https://indiankanoon.org/doc/605764/). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not dis-entitled the dealer to seek appointment of the arbitrator by the Chief Justice under [Section 11(6)](https://indiankanoon.org/doc/605764/). We answer the above questions accordingly."

31. In TRF Ltd. Vs. Energo Engineering Projects Ltd.17, the decision in Deep Trading Company Vs. Indian Oil Corporation & Ors.(supra), was also followed and referred with approval. In paragraphs 27 and 28 the Supreme Court observed thus:-

"27. ... ... .... In Deep Trading Co. arbitration clause, as is noticeable, laid down that the dispute or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties thereto or in relation to the agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation or of some officer the Corporation who may be nominated by the Director (Marketing).

28. As the factual matrix of the said case would show, the appointing authority had not appointed arbitrator till the dealer moved the Court and it did appoint during the pendency of the proceeding. Be it noted that dealer had called upon the Corporation to appoint arbitrator on 9-8-2004 and as no appointment was made by the Corporation, he had moved the application on 6-12-2004. The Corporation appointed the sole arbitrator on 28-12-2004 after the application under [Section 11(6)](https://indiankanoon.org/doc/605764/) was made. Taking note of the factual account, the Court opined that there was a forfeiture of the right of appointment of arbitrator under the agreement and, therefore, the appointment of the arbitrator by the Corporation during the pendency of the proceeding under [Section 11(6)](https://indiankanoon.org/doc/605764/) of the Act was of no consequence and remanded the matter to the High Court. ... ... ..."

32. In a recent decision of the Supreme Court in Aravali Power 17 (2017)8 SCC 377 pvr 33 carbpl351-19final-27-4-19.doc Company Pvt. Ltd. Vs. M/s.Era Infra Engineering Ltd. 18 the Supreme Court referring to the decision in Denal (Proprietary Limited) vs. Govt. of India, Ministry of Defence"19 observed thus:-

"20.5. Similarly, in Denel (Proprietary) Ltd. Vs. Ministry of Defence [(2012)2 SCC 759; (2012)2 SCC (Civ)37], the relevant clause provided for sole arbitration of the Director General, Ordinance Factory, Government of India or a government servant appointed by him. It was observed that since no arbitrator was appointed in terms of the governing clause within the stipulated period the respondent had forfeited the right to make an appointment of an arbitrator. .. ... .."

33. Thus the legal position which emerges from the above decision is that the respondent not appointing its nominee arbitrator and the Court having required to appoint an arbitrator under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act the respondent had certainly forfeited its right to "thereafter" (See Union of India Vs. Bharat Battery Manufacturing Co.(P) Ltd. (supra)") appoint its nominee arbitrator in terms of the arbitration clause. The forfeiture of the right can be said to have attained finality in terms of [Section 11(7)](https://indiankanoon.org/doc/596725/) of the Act by the Supreme Court, in confirming the orders passed by this Court.

34. Now whether such forfeiture can be confined only to the appointment as made under [Section 11(6)](https://indiankanoon.org/doc/596725/)of the Act and not 18 AIR 2017 SC 4450 19 AIR 2012 SC 817 pvr 34 carbpl351-19final-27-4-19.doc thereafter when there is a vacancy which is required to be filled. In other words whether the admitted forfeiture of the respondent's right to appoint an arbitrator is required to be ignored to hold that the forfeited rights would stand revived after the arbitrator appointed by the Court has resigned/withdrawn and the respondent is relegated to the same position as it stood prior to the appointment of the respondent arbitrator by the Court. It would be required to be examined whether such an interpretation is possible from a cumulative reading of the legislative scheme as depicted from [Sections 11](https://indiankanoon.org/doc/596725/), [14(1)](https://indiankanoon.org/doc/13574/) and[15(1)](https://indiankanoon.org/doc/1294263/) and (2) of the Act.

35. The legislative scheme in regard to the appointment of arbitrators which also would include a consequence of a failure or impossibility of the arbitrators to function and a consequence of termination of the mandate of the arbitrator(s), requiring substitution of arbitrators, is postulated in the combined reading of [Section 11](https://indiankanoon.org/doc/596725/), [Section 14](https://indiankanoon.org/doc/665266/) and [Section 15](https://indiankanoon.org/doc/1294263/) of the Act. Thus, necessarily each of these provisions are required to be read keeping in mind in a given case, the effect and applicability of each of these provisions. This for the reason that there is certainly an inherent and innate influence of a pvr 35 carbpl351-19final-27-4-19.doc consequence taking place under [Section 11](https://indiankanoon.org/doc/596725/) on something which is relevant for the purposes of [Section 14](https://indiankanoon.org/doc/665266/) or [Section 15](https://indiankanoon.org/doc/1294263/) of the Act. A consequence of a judicial order passed under [Section 11(4)](https://indiankanoon.org/doc/712376/) or [Section 11(6)](https://indiankanoon.org/doc/596725/) cannot be said to be disjunctive to the provisions of[Section 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) and/or of no consequence and more particularly when sub- section (2) of [Section 15](https://indiankanoon.org/doc/1294263/)recognizes appointment of a substitute arbitrator to be appointed "according to the rules" that were applicable to the appointment of the arbitrator being replaced. The phrase "according to the rules" as incorporated in Sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) would certainly take within its ambit the procedure followed by a party in approaching the Court under [Section 11](https://indiankanoon.org/doc/596725/), culminating into the Court passing an order to appoint an arbitrator. Thus the words "according to rules" as used in [Section 15(2)](https://indiankanoon.org/doc/1294263/) are of wide import when it comes to appointment of a substitute arbitrator and cannot be given a narrow restrictive meaning and it would depend in the facts of each case as to what rules were followed in the appointment of the original arbitrator being replaced. Thus considering the plain language of sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/), on first principles it cannot be accepted by a judicial mind that an order passed by the Court under [Section 11(4)](https://indiankanoon.org/doc/712376/) and (6) appointing an pvr 36 carbpl351-19final-27-4-19.doc arbitrator, is of no consequence and/or is alien to sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/).

This apart, as noted above the Supreme Court in several decisions has categorically held that once a party fails to appoint an arbitrator as per the arbitration agreement, and the other party approaches the Court under [Section 11](https://indiankanoon.org/doc/596725/) after 30 days (See [Section 11(4)](https://indiankanoon.org/doc/712376/)) and before the party makes an appointment of an arbitrator, the right of such party to appoint the arbitrator as per the arbitration agreement "thereafter" stands forfeited. The sanctity of an order of the Court appointing an arbitrator under this provision has been raised to a higher pedestal by virtue of the mandate under sub- section (7) of[Section 11](https://indiankanoon.org/doc/596725/) which confers a finality to such a decision/order. The order passed by the Court under[Section 11(4)](https://indiankanoon.org/doc/712376/) or 11(6) is undoubtedly a judicial order which adjudicates the rights of the parties on the arbitration agreement concerning an appointment of an arbitrator. Thus when the Court appoints an arbitrator exercising such powers and jurisdiction, a plain consequence would be that such orders would be required to be disturbed, substituted and/or modified or set aside only in a manner known to law. This more particularly when the Supreme Court has held that such an pvr 37 carbpl351-19final-27-4-19.doc order brings about a legal consequence of the right of one of the parties to the arbitration agreement being forfeited to appoint an arbitrator. A consequence of a vacancy arising of a court appointed arbitrator thus becomes integral to the order passed by the Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act and is required to be factored as an essential ingredient of the requirement of sub-section (2) of[Section 15](https://indiankanoon.org/doc/1294263/) which postulates a statutory recognition to the manner and method of appointment of the original arbitrator when it says that a substitute arbitrator be appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced." This not only substantively but as a matter of procedural jurisprudence is required to be judicially recognized to be intrinsic to the statutory scheme underlying these provisions.

36 Having so observed the decisions cited at the bar in which [Sections 14](https://indiankanoon.org/doc/665266/) and [15(2)](https://indiankanoon.org/doc/1294263/) of the Act were subject matter of consideration, need to be discussed.

37. [In Yashwith Constructions (P) Ltd -vs- Simplex Concrete Piles India Ltd](https://indiankanoon.org/doc/1997730/) and anr20, an issue falling under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act fell 20 (2206) 6 SCC 204 pvr 38 carbpl351-19final-27-4-19.doc for consideration of the Supreme Court. The issue was whether the Managing Director of the respondent company would have any authority as per the arbitration agreement between the parties, to appoint a substitute arbitrator in view of the resignation of the arbitrator earlier appointed by him. The High Court had upheld such appointment of the substitute arbitrator by the Managing Director. In a challenge to the decision of the High Court, the Supreme Court interpreting [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act, upheld the decision of the High Court observing that [Section 15(2)](https://indiankanoon.org/doc/1294263/) would cover not only the case of appointments under the statutory rules framed under the Act, but it would also take within its ambit, the terms of the agreement between the parties for appointment of an arbitrator. In the facts of the case, it was held that although under the arbitration agreement there was no specific provision authorizing the Managing Director to appoint a substitute arbitrator, if the original appointment terminated or the appointed arbitrator withdrew from the arbitration, it was observed that this omission in the arbitration agreement was made up by the specific provision contained in [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act. It was held that withdrawal of the an arbitrator from the office for any reason was within the purview of [Section 15(1)](https://indiankanoon.org/doc/1294263/) (a) of the Act and, thus, [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act would be attracted and a substitute pvr 39 carbpl351-19final-27-4-19.doc arbitrator could be appointed according to rules that are applicable for the appointment of arbitrator to be replaced. The Supreme Court recognized that when [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act says that a substituted arbitrator shall be appointed according to rules that were originally applicable for the appointment of the arbitrator being replaced, does not confine to an appointment under any statutory rule or rule frames under the Act or under the Scheme, but it only means that the "appointment of the substitute arbitrator must be done according to original agreement or the provision applicable to the appointment of the arbitrator at the initial stage." The observations of the Supreme Court, in paragraph No.4 of the decision, are required to be noted and reads thus "4. ... ... ... ... The term "rules" in [Section 15(2)](https://indiankanoon.org/doc/1294263/) 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 fulfill his obligation in terms of [Section 11](https://indiankanoon.org/doc/596725/) of the Act so as to attract the jurisdiction of the Chief Justice under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act for appointing a substitute arbitrator. Obviously, [Section 11(6)](https://indiankanoon.org/doc/596725/)of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When [Section 15(2)](https://indiankanoon.org/doc/1294263/) 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. (emphasis supplied) pvr 40 carbpl351-19final-27-4-19.doc Although this was not a case where the initial appointment was made under[Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act, the Supreme Court upheld the appointment of a substitute arbitrator as made in the facts of the case which was according to the original agreement or "provision applicable" to the appointment of the arbitrator at the initial stage. The Supreme Court has consciously observed that it would not agree with a contrary view taken by some High Courts.

38. [In National Highway Authority of India -vs- Bumihiway DDB Ltd (JV](https://indiankanoon.org/doc/1534562/)) (supra) the Supreme Court was considering a case wherein the respondent contrary to an arbitration agreement as entered with the appellant had approached the High Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act praying for an appointment of a presiding arbitrator. The High Court in its order, impugned before the Supreme Court had appointed a retired Judge of the High Court as a presiding arbitrator. In the said case the arbitration agreement between the parties contemplated that if the two arbitrators appointed by the parties do not reach to a consensus to appoint the presiding arbitrator, then the presiding arbitrator shall be appointed by the President, Indian Roads Congress (IRC). It is in this context the Supreme Court examined the scope of jurisdiction of the Court on pvr 41 carbpl351-19final-27-4-19.doc resignation of an arbitrator considering the specific mandate and mechanism under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act vis a vis the contractual clause between the parties. The Supreme Court referring to its decision in Yashwith Constructions (P) Ltd. (supra) held that under [Section 11(6)](https://indiankanoon.org/doc/162689575/) of the Act the Court has jurisdiction to make appointment only when a person including an institution fails to perform any function entrusted to it under that procedure. It was held that in the facts of the said case, the jurisdiction of the Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) could not have been invoked as it was necessary for the respondent to approach the IRC as per the agreement between the parties. Accordingly, the Supreme Court held that the High Court had failed to appreciate that according to [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act on the termination of the mandate of the Presiding Officer, the two nominated arbitrator are required to reach a consensus and on failure to arrive at the consensus, only then the IRC was authorised to make the appointment and unless IRC fails to exercise its jurisdiction, the High Court could not have assumed its jurisdiction under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act. Thus the order of the High Court making appointment of the presiding arbitrator under [Section 11(6)](https://indiankanoon.org/doc/596725/) was held to be bad. Thus in substance, it was held that power to appoint a substitute arbitrator is required to be read in [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act considering the nature of pvr 42 carbpl351-19final-27-4-19.doc the agreement between the parties. Again this was not a case where initially the arbitrator was appointed by the Court and any vacancy arising of such an appointed arbitrator.

39. [In Shailesh Dhairyawan vs. Mohan Balkrishna Lulla](https://indiankanoon.org/doc/48783751/) 21 the respondent had filed a suit in the Bombay High Court against the appellant and some others, seeking a declaration that the development agreement dated 27 December 2004 together with a power of attorney of even date had stood terminated and for certain other reliefs. On 3 October 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 an arbitration of a retired Judge of the Supreme Court. Several meetings were held by the named arbitrator, the arbitration proceedings continued to drag until by a letter dated 22 January 2011, the arbitrator resigned. Respondent/plaintiff therefore filed an application in the disposed of suit for appointment of a substitute arbitrator. This application was dismissed by the Court observing that an appointment can only be made under [Section 11(5)](https://indiankanoon.org/doc/596725/) of the Act. Pursuant to the dismissal of the said application, the plaintiff filed an application under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act for 21 (2016)3 SCC 619 pvr 43 carbpl351-19final-27-4-19.doc appointment of a substitute arbitrator. The High Court appointed a retired judge of the High Court as a substitute arbitrator. In challenging the decision of the High Court, a contention was raised that by an agreement between the parties a named arbitrator was appointed as recorded in the consent terms. It was contended that under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act when the mandate of the named arbitrator terminates, there being no rules that would apply to the appointment of an arbitrator being replaced,[Section 15(2)](https://indiankanoon.org/doc/1294263/) would not have any application, and this vital fact was missed by the High Court. The Supreme Court taking a review of the law and considering the decisions in SBP & Co. Vs. Patel Engineering Ltd. 22, Yashwith Construction (P) Ltd. (supra), in ACC Ltd. Vs. Global Cements Ltd.23 , held that the High Court was the original appointing authority and the said appointing authority having been approached by the respondent for appointment of a substitute arbitrator, the appointment of a substitute arbitrator so made by the High Court would be required to be held as an appointment according to the rules. The relevant observations in that regard are required to be noted which reads thus:-

"21. On the facts of the present case, it is clear that 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 22 2005(8) SCC 618 23 (2012) 7 SCC 71 pvr 44 carbpl351-19final-27-4-19.doc 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)](https://indiankanoon.org/doc/1937086/) 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)](https://indiankanoon.org/doc/1294263/) of the Arbitration Act,1996. The appeal is, therefore, dismissed."

(emphasis supplied)

40. In Mithlesh Kumar Aggarwal Vs. Athena Infrastructure Ltd.

(supra) a learned Single Judge of Delhi High Court was considering proceedings under [Section 15(2)](https://indiankanoon.org/doc/1294263/)of the Act for appointment of a substitute arbitrator to replace the arbitrator who was appointed by the High Court by an order dated 30 April 2014 under [Section 11](https://indiankanoon.org/doc/596725/) of the Act, and who expired in the midst of the arbitral proceedings on 23 September 2016. The respondent objected and contended that as per the agreement between the parties, the respondent must be given an opportunity to reappoint the arbitrator in place of the arbitrator so appointed by the Court. This contention of the respondent was rejected by the learned Single Judge referring to the decision of the Supreme Court in "Yashwith Constructions (P) Ltd." (supra). It was held that the arbitrator who expired, was appointed by the High Court in a petition under [Section 11](https://indiankanoon.org/doc/596725/) of the Act since the respondent has forfeited its right to appoint anpvr 45 carbpl351-19final-27-4-19.doc arbitrator. The Court also referred to the decision of the Supreme Court in Datar Switchgears Ltd. (supra) to conclude that it was not permissible for the respondent to appoint an arbitrator as initially the appointment itself was made by the Court under[Section 11](https://indiankanoon.org/doc/596725/) of the Act. The court also referred to an order passed by the learned Single Judge of the Calcutta High Court in the case of Ramjee Power Construction Ltd. (supra) of Her Ladyship Justice Indira Banerjee (as her Ladyship then was) who had passed the said order as the designate of the Chief Justice under [Section 11](https://indiankanoon.org/doc/596725/) of the Act, (although this would not have a precedential value being passed by a designate of the Chief Justice as held by the Supreme Court in State of West Bengal & Ors. Vs. Associated Contractors (supra)). However, the learned Single Judge of Delhi High Court referring to the decision of the Supreme Court in Yashwith Constructions (P) Ltd." (supra), Datar Switchgears Ltd. (supra), and the decision of the Division Bench of Delhi High Court in "Chhotanagpur Regional Handloom Vs. Association of Corporation and Apex" allowed the said application appointing a substitute arbitrator. The Court in paragraph 5, 6, 7, 8 and 9 observed as under:-

"5. Mr. Datta, learned Senior Counsel appearing for the respondent does not dispute that an arbitrator is be appointed in place of late Justice S.K.

Mahajan (Retired). He, however, submits that as per the agreement, the respondent must be given an opportunity to re-appoint an arbitrator in pvr 46 carbpl351-19final-27-4-19.doc place of late Justice S.K. Mahajan. This Court is unable to accede to the aforesaid submission principally for the reason that late Justice S.K. Mahajan (Retired) was appointed by this Court in a petition under [Section 11](https://indiankanoon.org/doc/596725/) of the Act, since the respondent had forfeited its right to appoint an arbitrator.

6. The Supreme Court in [Yashwith Constructions (P) Ltd v. Simplex Concrete Piles India Ltd](https://indiankanoon.org/doc/1997730/) (2006) 6 SCC 204 had interpreted [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act liberally and had explained that the provision applicable for appointment of the substitute arbitrator would be the same as " at the initial stage". Thus, the expression, "rules" in [Section 15](https://indiankanoon.org/doc/1294263/) (2) of the Act, was read to imply that the same procedure which was applicable for appointment of an arbitrator, who is sought to be substituted, would be applicable for appointment of the substitute arbitrator.

7. [In The Chhotanagpur Regional Handloom v. Association of Corporation](https://indiankanoon.org/doc/130550045/) and Apex", a Coordinate Bench of this Court while considering the applicability of the provisions of [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act in context of the petition filed under [Section 14](https://indiankanoon.org/doc/665266/) of the Act, rejected the contention that after the mandate of the arbitral tribunal was declared as terminated under [Section 14](https://indiankanoon.org/doc/665266/) of the Act, the parties were to be relegated to start the process under the original agreement and this Court ought not to proceed to appoint a substitute arbitrator. The Court referred to the decision of the Supreme Court in Yashwith Construction (supra) and held that [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act has to be viewed as a part of a broader effort to strengthen the alternative dispute resolution mechanism rather than undermine it. Relegating the parties to commence the process once again may lead to confusion and may in certain circumstances compel one of the parties to again approach the Court under [Section 15(6)](https://indiankanoon.org/doc/1294263/) of the Act which could not be the legislative intent. The Court held that [Section 15(2)](https://indiankanoon.org/doc/1294263/) required the Court to appoint an arbitrator as a logical sequitur to [Section 14](https://indiankanoon.org/doc/665266/) of the Act.

8. [In Ramjee Power Construction Ltd v. Damodar Valley Corporation](https://indiankanoon.org/doc/151754149/) (2009) 2 Arb LR 625, the Calcutta High Court considered the decision of the Supreme Court in Yashwith Construction (supra) and observed as under:-

"As observed above, the expression "rules that were applicable to appointment of the arbitrator being replaced" in [Section 15](https://indiankanoon.org/doc/1294263/), have carefully been chosen. If the arbitrator being replaced was appointed by the Chief Justice and/or his designatre in accordance with[Section 11](https://indiankanoon.org/doc/596725/) of the 1996 Act read with the applicable rules, the substitute arbitrator would also have to be appointed by the Chief Justice and/or his designate in the same manner.".

9. The Calcutta High Court following the decision of the Supreme Court pvr 47 carbpl351-19final-27-4-19.doc in [Datar Switchgear Ltd -v. Tata Finance Ltd](https://indiankanoon.org/doc/41226024/) (2000) 8 SCC 151, held that once an application under [Section 11](https://indiankanoon.org/doc/596725/) was made, the right of either party to appoint an arbitrator stood extinguished. In view of the aforesaid, the Court reasoned that if the arbitrator is appointed in accordance with [Section 11](https://indiankanoon.org/doc/596725/) of the Act, the substitute arbitrator would also have to be appointed in the same manner. This Court respectfully concurs with the aforesaid view." (emphasis supplied)

41. GMR Ambala Chandigarh Expressways Pvt.Ltd. (supra), was a case wherein the learned Single Judge of the Delhi High Court was dealing with a petition under [Section 11(6)](https://indiankanoon.org/doc/596725/) read with [Section 15(2)](https://indiankanoon.org/doc/1294263/)of the Arbitration and [Conciliation Act](https://indiankanoon.org/doc/1306164/). Following the decision of the learned Single Judge in Mithlesh Kumar Aggarwal (supra) as also referring to the decision of the Supreme Court in [National Highway Authority of India -vs- Bumihiway DDB Ltd (JV](https://indiankanoon.org/doc/1534562/))(supra), appointed a substitute arbitrator on the ground that the right of the respondent stood forfeited as the arbitrator was initially appointed by the Court exercising jurisdiction under [Section 11](https://indiankanoon.org/doc/596725/) of the Act. In paragraphs 14 and 15 the Court observed thus:-

"14. However, in the present case as there was a failure on the part of respondent no.2 and 3 to appoint to nominate their arbitrator, so the Court appointed the same under [Section 11(6)](https://indiankanoon.org/doc/596725/). Per settled law as this Court had appointed Mr. Justice B.N. Kirpal (Retd.) the nominee arbitrator for respondent No.2 and 3, hence only this Court can nominate a substitute arbitrator in place of the said arbitrator.

15. In view of the above Mr. Justice A.S. Anand (Retd.), since has expired, I hereby nominate Mr. Justice T.S. Thakur, Chief Justice of India (Retd.) (Mobile No.8800309969) as nominee arbitrator on behalf of respondent no.2 and 3." (emphasis supplied) pvr 48 carbpl351-19final-27-4-19.doc 42 In "Shri.R.B.Rajesh Vs. The Chief Engineer and others."24, a learned Single Judge of the Calcutta High Court was adjudicating an application under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act for appointment of a substitute arbitrator consequent upon the failure on the part of the arbitrator to act upon the mandate. Initially the applicant had approached the High Court in an application under [Section 11](https://indiankanoon.org/doc/596725/) of the Act seeking appointment of an arbitrator which was disposed of by an order dated 13 January 2015 appointing Shri.P.Radhakrishnan as arbitrator. The arbitrator so appointed refused to discharge his function and consequently the said application under [Section 15(2)](https://indiankanoon.org/doc/1294263/) came to be filed. The [section 15(2)](https://indiankanoon.org/doc/1294263/) application was objected by the respondent interalia on the ground that a retired Judge was already appointed by the respondent as a substitute arbitrator to adjudicate the disputes between the parties. The learned Single Judge considered the arbitration agreement between the parties and although the arbitration agreement provided of a consequence of resignation of one of the arbitrators, the Court held that the said clause would not be applicable as in the said case the arbitrator was not initially appointed as per the arbitration agreement as the arbitrator was appointed by the Court. The Court made the following observations:-

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"15. ...... ... But in the instant case, the arbitrator was not initially appointed by either of the aforesaid persons. The arbitrator was appointed by the Court.

16. Therefore, in view of the settled principles of law, as discussed hereinabove, the right of the respondent under Agreement to appoint substitute arbitrator stood extinguished after the disposal of the application filed by the petitioner under the provisions of sub-section (6) of [section 11](https://indiankanoon.org/doc/596725/) of the said Act,1996. Therefore, question of issuing notice prior to filing of this application and/or appointment of substitute arbitrator by the respondents does not arise at all." (emphasis supplied)

43. In "Rajesh K.Shah Vs. Kamlesh K.Sahani"25 a learned Single Judge of this Court (R.D.Dhanuka, J.) was concerned with the appointment of a substitute arbitrator. Considering the decisions of the Supreme Court in Yashwith Constructions (P) Ltd (supra) and Shailesh Dhairyawan (supra), the learned Single Judge held that under [Section 15](https://indiankanoon.org/doc/136959248/) of the Act the Court is empowered to appoint a substitute arbitrator if the mandate of the arbitrator is terminated because of his withdrawal from the office for any reason or pursuant to the agreement of the parties and in the facts of the the arbitrator having withdrawn from his office, [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act was attracted and it became applicable. The learned Single Judge held that as the erstwhile arbitrator as appointed by the Court had withdrawn, the substitute arbitrator, therefore, will have to be appointed by the Court under [Section 15](https://indiankanoon.org/doc/1294263/) of the Act. The learned Single Judge rejecting such contentions in paragraphs 11,12,13,14,15 and 16 observed 25 2018(4) Mh.L.J. 159 pvr 50 carbpl351-19final-27-4-19.doc as under:-

11. Under [section 15](https://indiankanoon.org/doc/1294263/) of the said Act, a Court is empowered to substitute the arbitrator if the mandate of the arbitrator is terminated because of his withdrawal from the office for any reason or pursuant to the agreement of the parties. In this case Mr. Ashish Kamat, a counsel of this Court, who was appointed in substitution of Shri Justice S.S. Parkar, a former Judge of this Court, withdrew from his office. [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Arbitration & [Conciliation Act](https://indiankanoon.org/doc/1306164/), 1996 would attract to the facts of this case.

12. Insofar as the issue raised by the learned counsel for the respondent that this petition is not maintainable under [sections 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) of the said Act and the petition could have been filed under [section 11](https://indiankanoon.org/doc/596725/) of the said Act is concerned, this issue is dealt with by the Supreme Court in case of [Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd](https://indiankanoon.org/doc/1997730/). (2006) 6 SCC 204. The said judgment of the Supreme Court is adverted by the Supreme Court in the later judgment in case of Shailesh Dhairyawan (supra). The Supreme Court in the said judgment Yashwith Constructions (P) Ltd. has construed [section 15(3)](https://indiankanoon.org/doc/1294263/) and also 11(6) of the said Act. It is held by the Supreme Court that there was no failure on the part of the party concerned as per the arbitration agreement, to fulfill his obligation in terms of[section 11](https://indiankanoon.org/doc/596725/) of the said Act so as to attract the jurisdiction of the Chief Justice under [section 11(6)](https://indiankanoon.org/doc/596725/) of the said Act for appointing a substitute arbitrator. It is further held that [section 11(6)](https://indiankanoon.org/doc/596725/) of the said Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. [Section 11(6)](https://indiankanoon.org/doc/596725/) of the said Act can be attracted where under an appointment procedure agreed upon by the parties contemplated in [section 11(2)](https://indiankanoon.org/doc/206503/) read with 11(4) of the said Act, a party fails to act as required under that procedure or the parties or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure.

13. In the facts of this case, admittedly the parties had agreed to refer the disputes and differences to arbitration of Shri Justice A.B. Palkar, a former Judge of this Court in Summons for Judgment No. 186 of 2005. In the said arbitration agreement, no other procedure was agreed upon by the parties for appointment of a substitute arbitrator. The judgment of the Supreme Court in case of Yashwith Constructions (P) Ltd. (supra) thus would squarely apply to the facts of this Court and would assist the case of the petitioner and not the respondent. In my view, the argument of the learned counsel for the respondent is contrary to the principles of law laid down by the Supreme Court in the said judgment.

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14. Be that as it may, the earlier applications filed by the petitioner for substitution of an arbitrator were also under [section 15](https://indiankanoon.org/doc/1294263/) of the said Act. These petitions are thus maintainable under [section 14](https://indiankanoon.org/doc/665266/) read with 15 of the said Act.

15. The erstwhile arbitrator having withdrawn from the office, the substitute arbitrator in place of erstwhile arbitrator will have to be made by this Court in this application under[section 15](https://indiankanoon.org/doc/1294263/) of the said Act. There is thus no merit in the submission made by the learned counsel for the respondent.

16. I therefore, pass the following order :-

"a). Shri A.J. Dholakia, a former Principal District Judge and a former Charity Commissioner having his address at c/o Room No. 56, High Court Law Library, 3rd Floor, High Court, Bombay is appointed in all the seven petitions as a sole arbitrator in place of erstwhile arbitrator Mr. Ashish Kamat, a counsel of this Court, who has withdrawn from the office. The arbitration petitions are disposed of in aforesaid terms.

b). No order as to costs."

44. In Ignatius Tony Pereira Vs. Mr.Pifran Sanjivan Fernandes (supra) a learned Single Judge of this Court (Mr.Justice R.M.Reis, as his Lordship then was) was dealing with a case where a vacancy had arisen in view of the sole arbitrator Mr.Justice G.D.Kamat (Retd) having expired.

The petitioner/applicant had applied for appointing a substitute arbitrator. An objection was raised to the application on the ground that once the arbitrator expires, his mandate gets terminated in terms of[Section 14](https://indiankanoon.org/doc/665266/) of the Act and a new arbitrator would have to be appointed after following the procedure to appoint an arbitrator in terms of the agreement between pvr 52 carbpl351-19final-27-4-19.doc the parties and the power to appoint an arbitrator under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act only arises when there is a refusal on the part of the respondent to appoint an arbitrator in terms of the agreement. On behalf of the applicant, it was contended that once the arbitrator had expired whose appointment was made by the Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act, it is the court which can appoint a substitute arbitrator. The learned Single Judge interalia referring to the decision of the Supreme Court in Yashwith Constructions (P) Ltd. (supra) accepted the petitioners' contention that the respondents' right to make appointment of a substitute arbitrator was forfeited and as the initial appointment was made by an order passed under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act, only the Court can appoint a substitute arbitrator.

45. It can be thus clearly seen from the common thread which flows from decisions of the Supreme Court in Yashwith Constructions (P) Ltd (supra) and Shailesh Dhairyawan (supra) and the decisions of learned Single Judge of Delhi High Court in Mithlesh Kumar Aggarwal (supra) and GMR Ambala Chandigarh Expressways Pvt. Ltd. (supra), and the decision of learned Single Judge of Calcutta High Court in "R.B.Rajesh Vs. The Chief Engineer & Ors."(supra), and the decisions of learned Single Judge of this Court in Rajesh K.Shah Vs. Kamlesh K.Sahani (supra), and pvr 53 carbpl351-19final-27-4-19.doc Ignatius Tony Pereira (supra), that when the initial appointment of an arbitrator is made by the Court by an order passed under [Section 11](https://indiankanoon.org/doc/596725/) of the Act, an appointment of a substitute arbitrator would be required to be made in the same manner by the Court, as in terms of [Section 15](https://indiankanoon.org/doc/1294263/) sub- section (2) of the Act the initial procedure and the rule so followed, would be required to be followed in appointing a substitute arbitrator. This also for the reason that the party whose right to make an appointment of an arbitrator as per the arbitration agreement stands forfeited, in the Court making the appointment as per [Section 11](https://indiankanoon.org/doc/596725/) of the Act, would not have any authority to make an appointment of a substitute arbitrator.

46. The following principles of law can be clearly derived from the aforesaid decisions of the Supreme Court and the High Courts:-

(i) Parties to an arbitration agreement at the threshold would have a right to appoint an arbitral tribunal as per the arbitration agreement entered between the parties. In case of non-concurrence, inaction or disagreement to so appoint, if requested by one party, this right if not exercised for a period of 30 days would continue to exist till an application by the other party is filed under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act.

 (ii) Once one of the parties to an arbitration agreement approaches the

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Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act seeking appointment of an arbitrator on failure of the other party to appoint an arbitrator, the rights of the party not appointing an arbitrator stands forfeited and it will be for the Court to then pass an order under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act to appoint an arbitrator.

(iii) Once the Court appoints an arbitrator by an order passed on an application under [Section 11](https://indiankanoon.org/doc/596725/) of the Act, and a vacancy arises on the arbitral tribunal on account of any of the circumstances as set out under [Section 14(1)](https://indiankanoon.org/doc/13574/) and/or [Section 15(1)](https://indiankanoon.org/doc/1294263/) of the Act, then necessarily [Section 15(2)](https://indiankanoon.org/doc/1294263/) becomes operational for appointment of a substitute arbitrator and it would be the Court which would be required to be approached to fill up the vacancy. The same procedure / rule would be required to be followed by an application under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act to fill up the vacancy of the Court appointed arbitrator.

(iv) As a sequel to (iii) above, once the Court appoints an arbitrator under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act, it is not open for the party against whom such an order is passed to contend that the right which was so forfeited would revive for any purpose including to appoint a substitute arbitrator in case of any vacancy on the arbitral tribunal as postulated by [Sections 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) of the Act.

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 (v) In other words a party who suffers an order under Section 11(6) of

the Act of the Court appointing an arbitrator, cannot contend that the arbitration agreement has become available to such a party after the very foundation of such right to appoint an arbitrator is taken away by the Court appointing an arbitrator.

(vi) The above position in law is implicit from the provisions of sub- section 2 of Section 15 of the Act when the provision says that when the mandate of an arbitral tribunal terminates, a substitute arbitrator shall be appointed "according to the rules that were applicable to the appointment of an arbitrator being replaced".

47. As observed by the Supreme Court in ACC Ltd. Vs. Global Cements Ltd.(supra) [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act has to be given a liberal interpretation so as to apply to all possible circumstances in which the mandate of the arbitrator could be terminated. Also considering the clear position in law which would flow from the decisions as referred above, it cannot be conceived that [Section 15(2)](https://indiankanoon.org/doc/1294263/) would not recognize rights of a party being forfeited (to take recourse to the arbitration agreement) to appoint a substitute arbitrator when such right stood extinguished when the Court appointed an arbitrator in an order passed under [Section 11(6)](https://indiankanoon.org/doc/596725/) pvr 56 carbpl351-19final-27-4-19.doc of the Act. Thus, necessarily the rule that would be applicable to the appointment of a substitute arbitrator would be the rule/procedure which was applicable for the initial appointment namely the appointment by the Court and not appointment by a party who had already lost and/or forfeited its right to make an appointment of an arbitrator. In other words, once such right to make an appointment of an arbitrator/arbitral tribunal are given up by one of the parties, then necessarily the only rule and procedure of an arbitrator being appointed by the Court is required to be recognized in terms of [Section 15(2)](https://indiankanoon.org/doc/1294263/) and no other procedure. It cannot be accepted that the forfeiture of the right of a party not appointing an arbitrator is only a partial or temporary forfeiture limited to [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act and that such a right would resurrect or is reborn when it comes to appointment of substitute arbitrator. Such an interpretation would amount to a complete misreading of the legislative scheme of [Sections 11](https://indiankanoon.org/doc/596725/), [14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) of the Act.

48. In addition to the above discussion in my opinion, a rebirth of a right which stood forfeited also cannot be conceived for other two primary reasons, firstly for the reason that this would amount to a clear waiver of right as recognised by [Section 4](https://indiankanoon.org/doc/1242720/) of the Act, and secondly and most pvr 57 carbpl351-19final-27-4-19.doc importantly the law would not permit sanctity of judicial procedure adopted in the court passing an order under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act to be obliterated, diluted, taken away or being extinguished, merely because there is vacancy on the arbitral tribunal. Once the initial appointment itself is under the orders of the Court, there is no question of waived rights or forfeited rights being revived or resurrected for the purposes of either [Section 14](https://indiankanoon.org/doc/665266/) and [15](https://indiankanoon.org/doc/1294263/) of the Act. In the present case indubitably the appointment of Mr.Justice D.B.Bhosale (Retd) was made in pursuance of an order dated 30 November 2018 passed by this Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act as a nominee arbitrator of the respondent. This order was confirmed by the Supreme Court by its order dated 2 January 2019 passed in a petition of the respondent for Special Leave to Appeal (c) No.33555 of 2018. Thus the rule and the procedure as followed in appointment of initial arbitrator Mr.Justice D.B.Bhosale (Retd) was the rule and the procedure under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act and not any other procedure. This procedure would be required to be recognised as a rule followed in the appointment of initial arbitrator in terms of [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act for the purpose of appointment of a substitute arbitrator.

49. Thus, the contentions as urged on behalf of the respondent that in pvr 58 carbpl351-19final-27-4-19.doc the facts of the case [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act would contemplate a procedure under the arbitration agreement overlooking the forfeiture of the respondent's right simply cannot be accepted. This would be contrary to the law laid down by the Supreme Court in [Yashwith Constructions (P) Ltd -vs- Simplex Concrete Piles India Ltd](https://indiankanoon.org/doc/1997730/) and anr. (supra) and Shailesh Dhairyawan (supra) wherein the Supreme Court in clear terms giving a wider meaning to [Section 15(2)](https://indiankanoon.org/doc/1294263/) has held that when [Section 15(2)](https://indiankanoon.org/doc/1294263/) postulates that a substitute arbitrator can be appointed "according to the rules" that were applicable to the appointment of an arbitrator originally, and it would only mean that appointment of a substitute arbitrator must be done according to the "original agreement" or "provision applicable to the appointment of an arbitrator at the initial stage" In the facts of the case, "the provision applicable to the appointment of an arbitrator at the initial stage" can only be the High Court appointing an arbitrator under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act. This also for the reason that it is available to the parties to waive such a procedure and/or to deviate from the said procedure, which obviously has a consequence in law taking its course, permitting the said agreed procedure to be substituted by a legal procedure as available and provided under [Section 11](https://indiankanoon.org/doc/596725/) of the Act.

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50. The learned Counsel for the respondent thus would also not be correct to contend that in the facts of the case Mr.Justice D.B.Bhosale (Retd.) having recused, the vacancy could be filled up by the respondent by appointing a substitute arbitrator. The respondent in doing so completely overlooked that its right to appoint an arbitrator stood forfeited and in no manner revived, so that it can appoint an arbitrator as informed by the respondent to the petitioner immediately on the next day Mr.Justice D.B.Bhosale (Retd) recused himself from the arbitral tribunal. The respondent had no such legal right. It is thus not correct for the respondent to contend that the respondent having immediately appointed its nominee arbitrator by a communication dated 26 March 2019, there was no vacancy on the arbitral tribunal. The vacancy which is filled up in the absence of any legal right can have no sanctity in law and such filling up of the vacancy by the respondent would be patently illegal. The respondent would also not be correct in contending that forfeiture of its right to appoint an arbitrator was restricted to the appointment made by the Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) of the Act. As noted above such an interpretation of the order passed by the Court under [Section 11(6)](https://indiankanoon.org/doc/596725/) would not only militate against the object of[Section 11(6)](https://indiankanoon.org/doc/596725/) read with [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act but it would amount to doing a violence to these pvr 60 carbpl351-19final-27-4-19.doc provisions as also to the sanctity of the Court orders. This is also reflected from the decisions of the Supreme Court as also from the different High Courts as extensively noted above.

51. The contention of the respondent that [Section 14](https://indiankanoon.org/doc/665266/) is in no manner attracted, also cannot be accepted.[Section 14](https://indiankanoon.org/doc/665266/) in sub-section (1)(b) clearly envisages a vacancy arising on an arbitrator withdrawing from his office., and to provide that in any such eventuality the mandate of the arbitrator shall stand terminated. [Section 15](https://indiankanoon.org/doc/1294263/) provides for the circumstances in addition to the circumstances referred to in[Sections 13](https://indiankanoon.org/doc/862520/) or 14 when the arbitrator withdraws from his office for any reason. Sub-section (2) of[Section 15](https://indiankanoon.org/doc/1294263/) clearly provides that when the mandate of the arbitrator is terminated on the eventualities and the circumstances as falling under [Section 14(1)(a)](https://indiankanoon.org/doc/13574/) and (b) and [Section 15(1)(a)](https://indiankanoon.org/doc/1294263/) and (b), in such an eventuality, a substitute arbitrator shall be appointed in accordance with the rules that are applicable to the appointment of an arbitrator being replaced. As clearly seen, the rules applicable in the present case that is the agreement between the parties to appoint an arbitrator, stood superseded by the procedure as contemplated under [Section 11](https://indiankanoon.org/doc/596725/) of the Act and thus it is this procedure which is required to be held to be a procedure pvr 61 carbpl351-19final-27-4-19.doc or the "rule" applicable to the appointment of an arbitrator being replaced within the meaning of sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) of the Act. In these clear circumstances, the contention as urged on behalf of the respondent that the Court is entertaining a controversy under sub-section (2) of [Section 14](https://indiankanoon.org/doc/665266/), is completely untenable. The Court is also called upon to pass an order to appoint a substitute arbitrator under [Section 15(2)](https://indiankanoon.org/doc/1294263/) of the Act, which is a provision invoked by the petitioner as clear from the prayers as made in the petition. The contention as urged on behalf of the respondent that the petitioner is calling upon the Court to entertain a controversy under[Section 14(1)](https://indiankanoon.org/doc/13574/), is thus totally untenable. There is no factual foundation to such contention.

52. I would now discuss some of the decisions as relied on behalf of the respondents. The respondent's reliance on the decision of the Supreme Court in "[Government of Haryana -vs- G.F. Toll Road Pvt. Ltd](https://indiankanoon.org/doc/42712583/)." (supra) is also not well founded inasmuch as in the said case Indian Council of Arbitration (ICA) which was to be an appointing authority, on the failure of the appellant therein not appointing a substitute arbitrator within 30 days of the notice as received from the ICA proceeded to make such appointment before the notice period could expire. It is in this context the pvr 62 carbpl351-19final-27-4-19.doc Court made observations that the procedure as agreed between the parties for initial appointment would be required to be followed and the ICA not following the said procedure, the appointment was held to be illegal. The following observations of the Court are required to be noted:-

"3.3 In the present case, clause 39.2.2. of the agreement expressly provided that each party shall nominate one arbitrator, and the third arbitrator shall be appointed in accordance with the Rules of the ICA.

3.4 The Appellate - State had vide Letter dated 16.11.2015 requested for 30 days' time to appoint another nominee arbitrator, after objections were raised by the ICA to the first nomination. The ICA declined to grant the period of 30 days, and instead appointed the arbitrator on behalf of the Appellant - State. The ICA could have filled up the vacancy only if the Appellant-State had no intention of filling up the vacancy. The ICA could not have usurped the jurisdiction over appointment of the nominee arbitrator on behalf of the State prior to the expiry of the 30 days' period requested by the Petitioner.

3.5 The appointment of the nominee arbitrator on behalf of the Appellant - State by the ICA was unjustified and contrary to the Rules of the ICA itself."

53. The decision of the Supreme Court in S.P.Singla Construction Pvt. Ltd. Vs. State of Himachal Pradesh, would also not help the respondents. The issue which fell for consideration of Supreme Court is not relevant in the facts of the present case. In para 7 of the decision the Supreme Court has noted the point for consideration to be that in the light of the agreement between the parties (clause 65 of the General Conditions of the Contract), whether the appellant contractor can challenge the appointment of Superintendent Engineer, Arbitration Circle, pvr 63 carbpl351-19final-27-4-19.doc as an arbitrator to resolve the disputes between the parties. This was not a case where the initial appointment was made by the High Court under [Section 11](https://indiankanoon.org/doc/596725/) of the Act but the respondent had made an appointment of the Superintending Engineer as an arbitrator in terms of clause 65 of the agreement. The appellant before the Supreme Court was aggrieved by such appointment and had approached the High Court by an application under [section 11(6)](https://indiankanoon.org/doc/596725/) of the Act praying for appointment of an independent arbitrator. It is in this context the High Court referring to the decision of the Supreme Court in "Antrix Corporation Ltd. Vs. Devas Multimedia Pvt.Ltd.26" rejected the said application holding that the respondent had already appointed the Superintendent Engineer as per Clause (65) of the arbitration clause and therefore,[Section 11(6)](https://indiankanoon.org/doc/596725/) could not be invoked. The Supreme Court upheld the decision of the High Court. This decision is therefore, would not be relevant in the present context.

54. The decision of the learned Single Judge of this Court (R.D.Dhanuka, J) in [Shane Duff -vs- Essel Sports Pvt Ltd](https://indiankanoon.org/doc/13965511/). (supra) would also not assist the respondent as the said decision is prior to the decision of the Supreme Court in Shailesh Dhairyawan (supra). Moreover, the learned Single Judge (R.D.Dhanuka, J.) in Rajesh K Shah (supra) has re-

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considered the said position in law referring to the decisions of the Supreme Court in Shailesh Dhairyawan (supra) and also in Yashwith Constructions Pvt.Ltd.(supra) as noted above in extenso.

55. In so far as the decision of the learned Single Judge of the Andhra Pradesh and Telangana High Court in "[Gamesa Wind Turbines Pvt.Ltd., Chennai -vs- Mytrah Energy (I) Ltd. Hyderabad](https://indiankanoon.org/doc/11705414/)" (supra), I am not persuaded to concur with the opinion of the learned Single Judge in the said decision. This for two reasons, firstly that the said decision does not take into consideration the decision of the Supreme Court in Shailesh Dhairyawan (supra), secondly I am not in agreement with the interpretation, the learned Single Judge has placed on the decision of the Supreme Court in Yashwith Constructions Pvt.Ltd.(supra) when in paragraph 34 of the decision the learned Single Judge observes that the reference to rules in sub-section (2) of [Section 15](https://indiankanoon.org/doc/1294263/) would only mean the arbitration agreement. With respect, this may not be the correct reading of the decision in Yashwith Constructions Pvt.Ltd.(supra) inasmuch as the Supreme Court in Yashwith Constructions Pvt.Ltd.(supra) has also given due recognition not only to the original agreement between the parties but also to the "provisions applicable to the appointment of the pvr 65 carbpl351-19final-27-4-19.doc arbitrator at the initial stage" as clearly observed in paragraph 4 in Yashwith Constructions Pvt.Ltd.(supra). While not agreeing with the view taken by the Andhra Pradedsh and Telangana High Court in the said decision, I find myself in complete agreement with the view taken by the learned Single Judge of the Delhi High Court in Mithlesh Kumar Aggarwal Vs. Athena Infrastructure Ltd. (supra) and "GMR Ambala Chandigarh Expressways Pvt.Ltd. Vs. National Highway Authority of India & Ors. (supra) and the decision of the learned Single Judge of Calcutta High Court in Shri.R.B.Rajesh Vs. The Chief Engineer and others (supra), as also in two decisions of the learned Single Judge of this Court in Rajesh K.Shah Vs. Kamlesh K.Sahani (supra) and Ignatius Tony Pereira Vs. Mr.Pifran Sanjivan Fernandes (supra).

56. In regard to the submissions as urged on behalf of the respondent referring to the statement of object and reasons of the Act read with the provisions of [Section 5](https://indiankanoon.org/doc/1091250/) of the Act, that party autonomy is required to be respected in a judicial intervention under [Section 15(2)](https://indiankanoon.org/doc/1294263/), in the facts of the case, cannot be accepted. The Supreme Court in Union of India & Ors Vs. Uttar Pradesh State Bridge Corporation Ltd.(supra) has held that the principles of party autonomy in the choice of procedure would stand deviated in those cases where one of the parties has committed default by pvr 66 carbpl351-19final-27-4-19.doc not acting in accordance with the procedure prescribed. It was held that the principle of default procedure would stand extended in the cases where the question is of appointment of a substitute arbitral tribunal. The observations of the Supreme Court as made in the said decision are required to be noted which read thus:-

"16) First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration.

Interestingly, second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the Arbitration Agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the Court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. (see [Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and another](https://indiankanoon.org/doc/1997730/), (2006) 6 SCC 204. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in para 5 of Tripple Engineering Works (supra). We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under [Section 11](https://indiankanoon.org/doc/596725/) of account of 'default procedure'. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in Singh Builders Syndicate (2009)4 SCC 523." (emphasis supplied) pvr 67 carbpl351-19final-27-4-19.doc

57. In the above circumstances, I am of the clear opinion that the petition is required to be allowed by appointing a substitute arbitrator to fill up the vacancy which has arisen on the recusal/resignation of Mr.Justice D.B.Bhosale (Retd), the arbitrator appointed for the respondent. Hence, the following order:-

ORDER

(i) Dr.Justice A.K.Sikri, Former Judge of the Supreme Court of India, is appointed as a substitute Arbitrator on behalf of the respondent.

(ii) The learned substitute arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of [Section 11(8)](https://indiankanoon.org/doc/596725/) read with [Section 12(1)](https://indiankanoon.org/doc/584075/) of the Arbitration and [Conciliation Act](https://indiankanoon.org/doc/1306164/), 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties.

(iii) The Arbitral proceedings shall commence from the stage the proceedings had reached before the erstwhile arbitral tribunal.

(iv) All contentions of the parties on merits of the disputes are expressly kept open.

(v) The petition is disposed of in the above terms. No costs.

 (vi) Office to forward a copy of this order to Dr.Justice A.K.Sikri (Retd),

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the learned Substitute Arbitrator by e-mail and by post at the following address:-

144, Sunder Nagar, New Delhi 110003.

email:aksikrij@gmail.com Tel.- 011-41802321 and 011-24356006.

58. At this stage learned Counsel for the respondent seeks a stay of this order for a period of eight weeks.

59. Considering the facts and circumstances of the case, it may not be in the interest of the parties to delay the arbitration proceedings. The request as made on behalf of the respondent therefore cannot be accepted. It is rejected.

(G.S.Kulkarni, J.)