

A NATIONAL HIGHWAYS AUTHORITY OF INDIA AND ANR.

v.

BUMIHIWAY DDB LTD. (JV) AND ORS.

SEPTEMBER 25, 2006

B [DR. AR. LAKSHMANAN AND TARUN CHATTERJEE, JJ.]

Arbitration and Conciliation Act, 1996

C *Sections 15 and 16—Arbitration clause providing for arbitral tribunal with Presiding arbitrator appointed by consensus of two arbitrators appointed by parties, and in absence of consensus, appointment by a nominated institution—On disagreement amongst arbitrators about appointment of Presiding arbitrator, one party asking the nominated institution whether it had any judicial officer on its panel, and on receipt of reply in negative, approaching High Court for appointment of Presiding arbitrator under*
D *Section 11(6) of the Act—High Court appointing Presiding arbitrator with consent of parties—Correctness of—Held—Invocation of Section 11(6) was premature and erroneous; it was more so as it could be based only on default of a party—Prior to order of appointment of Presiding arbitrator by High Court only a clarification was sought from the nominated institution and no*
E *reference was made to it—Assumption in High Court order that one of the party had approached the nominated institution for appointment of Presiding arbitrator being wrong, consent of parties read ejudem generis therein was not consent in eyes of law—In accordance with Section 15(2), on termination of mandate of Presiding Arbitrator, the two arbitrators were first required to*
F *reach a consensus and on their failure to arrive at a consensus only the nominated institution was authorized to appoint Presiding arbitrator.*

Arbitration tribunal—Presiding arbitrator—One arbitrator on tribunal being a retired Chief Justice—Held—it is not necessary that the Presiding Arbitrator should be atleast a retired Chief Justice or a retired Judge of a
G *High Court with considerable experience—There is no law requiring that if one of arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge—It was more so as parties entered into a contract after fully understanding its import and terms so agreed cannot be deviated from.*

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Appellant awarded to respondent contract for widening and strengthening of a part of National Highway. The contract had a clause whereby disputes between the parties were to be finally resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal was to consist of three arbitrators-one each appointed by the parties and the third one chosen by those arbitrators was to act as the Presiding arbitrator, and in case of failure of the two arbitrators to reach a consensus, the Presiding arbitrator was to be appointed by the President, Indian Roads Congress [IRC].

Disputes having arisen between the parties, the arbitration clause was invoked and the parties appointed their respective arbitrators. As the two arbitrators could not agree on a Presiding Officer, respondent inquired from IRC whether any judicial officer was available with them for nomination thereto. On receipt of a reply in negative, they filed an application before High Court under Section 11(6) of the Act for appointment of a Presiding arbitrator. One person, YBR, was named by High Court and appointed as Presiding Officer. However, thereafter the arbitrator appointed by appellant and the Presiding arbitrator resigned. Appellant appointed a new arbitrator. Once again, as the two arbitrators failed to agree on a Presiding Officer, both the parties approached IRC for appointment of a Presiding Officer. However, respondent approached the High Court again and it directed the IRC not to appoint any Presiding arbitrator till the next hearing before it. Thereafter the High Court appointed a retired Chief Justice of a High Court as the Presiding Officer. Aggrieved by this, appellant filed the present appeal.

Appellant contended that (i) respondent never sought any intervention of IRC for appointment of the Presiding Arbitrator; what they had sought was only a clarification in that regard (ii) application for appointment of Presiding arbitrator was in violation of Section 11(6) as also against the contractual terms agreed to between the parties without making any reference to IRC for that appointment (iii) on the resignation of an arbitrator, the statutory provision which steps in is only Section 15(2) and not Section 11(6) (iv) after resignation of YBR the process of appointment had restarted as per Section 15(2), however, IRC being restrained by the High Court from making the appointment, there was no failure on its part so as to justify invocation of Section 11(6) which applied only when a party had failed to act in terms of the arbitration agreement.

Respondent contended that (i) IRC had intimated to them that it did not

A have any judicial arbitrator in their panel and it having failed to appoint the Presiding Arbitrator in terms of the Act, they approached the High Court for that purpose (ii) High Court appointed YBR as Presiding arbitrator by consent of both the parties and the appellants having not challenged that appointment were estopped from challenging the subsequent order of mere substitution of name of the Presiding Arbitrator.

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Allowing the appeal, the Court

HELD 1. The appointment of the Presiding Arbitrator by the High Court is set aside. For that purpose the procedure contemplated under the contract agreement has to be followed and IRC should be approached. [608-A-F]

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2.1. The High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the Presiding Arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only IRC was authorized to make the appointment. Unless IRC failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Thus no cause of action had arisen in the facts of the case to seek the appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature. [607-A, B, C]

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Yashwith Construction P. Ltd. v. Simplex Concrete Piles India Ltd. & Anr., (2006) 7 Scale 48 (at para 4), referred to.

2.2. The relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order of appointment of YBR as Presiding arbitrator the respondent only sought a clarification from IRC and without making a reference to them, immediately filed the petition under Section 11(6) on the purported ground that the IRC had failed to make the appointment within the stipulated time. [602-C, D]

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Punj Lloyd Ltd. v. Petronet MHB Ltd., [2006] 2 SCC 638, distinguished.

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2.3. The assumption of the Court being wrong, a consent read *ejudem generis* therein is not consent in the eyes of law. In any case, resignation of YBR forecloses the chapter of consent The invocation of Section 11(6) of the Act is squarely based on a default of a party. [602-G]

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Datar Switchgear Ltd. v. Tata Finance Ltd. & Anr., [2000] 8 SCC 151 and *Punj Lloyds Ltd. v. Petronet MHB Ltd.*, [2006] 2 SCC 638, reiterated.

3. The question arises for consideration here is who had defaulted and on what basis of default has the Court entered jurisdiction under Section 11(6). This question though raised by the appellant in the counter affidavit before the High Court has not been answered at all. Hence, the assumption of jurisdiction and adjudication by the High Court is vitiated. [603-D, E]

4. The impugned order is not an order merely to fill up the vacancy created by the resignation but is a judicial order which takes into account all the facts and circumstances before giving the judicial determination for the appointment. The said judicial order has, *ipso facto*, replaced the earlier administrative order of High Court appointing YBR as Presiding Arbitrator.

[599-H; 600-A]

SBP & Co. v. Patel Engineering Ltd. & Anr., [2005] 8 SCC 618, referred to.

5.1. Before the appellants could file an appropriate petition against the order of High Court appointing YBR as Presiding Arbitrator one of the arbitrators resigned and thereafter, YBR also resigned. Hence, it cannot be said that the order of appointment of YBR had not been challenged and that the impugned order only modifies a part of the said order and is only filling up the vacancy created on resignation. [601-H; 602-A]

5.2. The process of appointment restarted in accordance with the original contractual rules after the resignation of the Presiding Arbitrator. The judicial Order which replaces the administrative order is under challenge before this Court and, therefore, there is no need to challenge the order of appointment of YBR. [602-A, B]

5.3. The appellants have not abandoned their right to challenge the impugned order. [602-A]

6.1. The High Court also is not correct in relying on the contention of the respondent No. 1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. Even otherwise, there does not exist any such provision in law which requires that if one of the arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. [607-E-F]

You One Engineering & Construction Co. Ltd. v. National Highway Authority of India, [2006] 4 SCC 372, relied on

A **6.2. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong. [607-E-F]**

B *Right Approach Group Ltd. v. Rosoboron Export*, [2006] 1 SCC 206, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4251 of 2006.

C From the Final Judgment and Order dated 6.1.2006 of the High Court of Orissa at Cuttack in ARB Pet. No. 23/2005.

G.E. Vahanwati, S.G., Chetan Sharma, Tarun Dua, Madhu Sweta, Hrishikesh Baruah, Chinmoy Sharma, Siddharth Aggarwal and K.C. Dua for the Appellants.

D Altaf Ahmad, A.D.N. Rao, Tushar G. Rao and Promila for the Respondents.

The Judgment of the Court was delivered by

E **DR. AR. LAKSHMANAN, J.** Leave granted.

The appellant—National Highways Authority of India has filed the present appeal against the judgment and order of the High Court of Orissa at Cuttack dated 06.01.2006 in Arbitration Petition No. 23 of 2005 whereby the High Court in modification of its order dated 01.07.2005 substituted Mr. Justice P. Chenna Keshav Reddy, former Chief Justice of Andhra Pradesh and Gauhati High Court as the Presiding Arbitrator in place of Mr. Justice Y. Bhaskar Rao.

FACTS:

G The appellant - National Highways Authority of India (in short “the NHAI”) issued letter of acceptance to respondent No.1, Bumihiway DDB Limited (JV), New Delhi for award of the contract for widening to 4/6 lanes and strengthening of existing 2-Lane carriage of National Highway - 5 from Km 233.000 to Km 284.000 between Ichapuram to Ganjam in the State of Orissa, which was a part of the Chennai-Kolkata Corridor of the Golden

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Quadrilateral connecting Delhi, Mumbai, Chennai and Kolkata.

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On 11.06.2001, the appellants entered into an agreement with respondent No.1 for the aforesaid contract. The contract agreement contained a mechanism for resolution of disputes between the parties as contained in Sub-Clause 67.3

Sub-Clause 67.3 reads as follows:

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“Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.

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- (i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President, Indian Roads Congress. For the purposes of this Sub-Clause, the term “Indian Contractor” means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.

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- (v) If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of Indian Road Congress both in cases of foreign

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A contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of Indian Road Congress making such an appointment shall be furnished to each of the parties.

B (vi) Arbitration proceedings shall be held at Delhi in India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

C (vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.”

D During the pendency of the contract period, the appellant noticed some defaults on the part of respondent No.1 who had neglected the execution of the contract due to which the project of national interest had been delayed by more than 5 years. Thus action in terms of clause 63.1(d) of the conditions of contract was taken by the appellants and respondent No.1 was evicted from the site on 14.01.2004.

E The contractor, respondent No.1, initiated proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 and filed Arbitration Application No. 2 of 2004 in the Court of District Judge, Ganjam who, vide order dated 02.04.2004, restrained the appellants from expelling respondent No.1 from the work site till dispute between the parties are adjudicated as per the contract agreement. The Court further refused to pass any orders restraining the appellants from encashing the Bank Guarantees.

F The said order was challenged by both the parties before the High Court of Orissa. The High Court, vide common order dated 02.11.2004, disposed off both the appeals directing appellant No.1 to constitute Dispute Review Board within a period of 6 weeks. The order of restraint passed by the District Judge was set aside and liberty was granted to appellant No.1 to go for re-tendering process with liberty to respondent No.1 to participate. The aforesaid order was again challenged by both the parties by filing separate special leave petitions, namely:

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(a) SLP (C) No. 24813-24814 of 2004

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(b) SLP (C) No. 25890-25891 of 2004

This Court, vide order dated 13.01.2005, directed both the parties to maintain *status quo* in the meanwhile.

The Dispute Review Board gave its recommendations on 26.02.2005 against which respondent No.1 vide letter dated 03.03.2005 referred the disputes arising thereof to arbitration under Clause 67 of the Conditions of Particular Application of the contract. Respondent No.1 nominated its arbitrator as respondent No.3 herein. In reply to a letter dated 03.03.2005, the appellants also invoked arbitration clause vide letter dated 10.03.2005. Thereafter, the appellant on 31.03.2005 nominated Mr. D.P.Gupta respondent No.5 herein as their arbitrator.

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Vide letter dated 09.04.2005, respondent No.3 requested Mr.D.P.Gupta to concur with the name of the Presiding Arbitrator as proposed by him. This Court, vide order dated 15.04.2005, passed the following order in the aforesaid special leave petitions:

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“Leave granted. Heard Parties.

The Portion of the impugned order whereby Applicant in Civil Appeals arising out of S.L.P. (Civil) Nos. 24813-24814 is permitted to participate in the re-tender process is stayed. We clarify that the observations made by the High Court will not be taken into account in other proceedings including the Arbitration which may be invoked by the parties.”

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Mr. D.P. Gupta, vide letter dated 15.04.2005, disagreed with the names proposed by respondent No.3. Thereafter, in view of the disagreement between the two nominated arbitrators, respondent No.1 sought clarification from respondent No.2 herein vide its letter dated 29.04.2005. Respondent No.1 requested respondent No.2 if any judicial arbitrator is available with them for the purpose of nomination as Presiding Arbitrator. It was pointed out that respondent No.1 never sought any intervention of respondent No.2 for appointment of the Presiding Arbitrator rather it only sought clarification in this regard. Vide letter dated 03.05.2005, respondent No.2 - Indian Road Congress (IRC) informed respondent No.1 that there does not exist any judicial arbitrator in its panel. Thereafter, respondent No.1 filed Arbitration Petition No. 23 of 2005 before the High Court under Section 11(6) of the

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A Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”) requesting for the appointment of the Presiding Arbitrator. The said petition, according to the appellants, was in gross violation of the statutory provisions of Section 11(6) as also against the contractual terms agreed to between the parties without making any reference to respondent No.2 for the appointment of the Presiding Arbitrator.

B On 11.05.2005, the appellants requested respondent No.2 to appoint the Presiding Arbitrator in view of the disagreement between two nominated arbitrators as stipulated in the contractual terms. In the meanwhile, respondent No.2, by a letter dated 31.05.2005, requested the appellants for submission of 50% of the processing fee to enable them to make the appointment as requested.

C Respondent No.1, vide letter dated 02.06.2005, informed respondent No.2 regarding the filing of the petition before the High Court for appointment of the Presiding Arbitrator and asked them to wait for the outcome of the judgment since the matters were subjudiced before the Court. On 01.07.2005, Arbitration Petition No. 23 of 2005 was listed for hearing before the High Court and the High Court ordered to appoint Mr. Justice Y. Bhaskar Rao as the Presiding Arbitrator. Respondent No.1, vide letter dated 06.07.2005, further clarified that the said appointment was made since IRC had failed to appoint the Presiding Arbitrator within the stipulated time of 30 days of the request made by the parties.

E On 11.07.2005, Mr. D.P. Gupta submitted his resignation which was accepted by the appellants and one Mr. L.R. Gupta was appointed as their arbitrator who, in turn, refused to accept the appointment as made by the appellants. On 26.07.2005, Mr. Justice Y. Bhaskar Rao informed the co-arbitrators that he has decided not to proceed with the arbitration. Thereafter, the appellants appointed one Mr. Surjeet Singh as their arbitrator. After resumption of the proceeding in arbitration on the resignation of the Presiding Arbitrator, appellant No.1 filed its counter affidavit in the arbitration petition.

F On 30.08.2005, since the two arbitrators had failed to agree on the name of the Presiding Arbitrator, appellant No.1 requested respondent No.2 for the appointment of the Presiding Arbitrator. In reply to the aforesaid letter, respondent No.2 vide letter dated 06.09.2005, informed that the meeting of the Executive Committee will be held on 09.09.2005 for the appointment of the Presiding Arbitrator. Respondent No.3, vide letter dated 31.08.2005 to both the parties, stated that in view of the failure of both the arbitrators to appoint the Presiding Arbitrator, appropriate steps should be taken in this regard.

G Respondent No.1 filed its rejoinder affidavit before the High Court. The High

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Court, vide interim order dated 09.09.2005 directed to list the matter on 23.09.2005 and directed respondent No.2 not to appoint any arbitrator in the meantime till the next date of hearing. The High Court, vide final judgment dated 06.01.2006, appointed Mr. P. Chenna Keshava Reddy, former Chief Justice of Andhra Pradesh and Gauhati High Court as the Presiding Arbitrator, which according to the appellants, is in clear and express violation of the contract agreement entered into between the parties. Being aggrieved by the impugned order, the above civil appeal was filed. A
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We heard Mr. G.E. Vahanvati, learned Solicitor General of India, appearing on behalf of appellants and Mr. Altaf Ahmad, learned senior counsel appearing on behalf of the respondents and carefully perused the pleadings, the order impugned in this appeal and other records. C

Mr. G.E. Vahanvati, learned Solicitor General made the following submissions:

- (a) The High Court was not justified in making the appointment under Section 11(6) of the Act ignoring the statutory provisions as read under Sections 15(2), 11(6), 11(3) and 11(4) of the Act conferring jurisdiction on the Court to make the appointment only on failure of the persons/institutions designated to perform the functions entrusted to it and the agreed procedure; D
- (b) When the arbitration agreement clearly envisages the appointment of the Presiding Arbitrator by the IRC and there is no specification that the arbitrator has to be different persons depending on the nature of this dispute. It is not open to ignore it and invoke the exercise of powers under Section 11(6) of the Act. E
- (c) The High Court was not justified in referring to the principles of hierarchy and ignoring the express contractual provisions for appointment of the Presiding Arbitrator against the well settled law as laid down by this Court. The order in effect amounts to re-writing the contract against the text, spirit, fabric and intent of the agreed terms. F
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Mr. Altaf Ahmed, learned senior counsel appearing for the respondents, *per contra*, submitted that since the arbitrators nominated by the respondent, namely, Mr. Justice Ashok A. Desai and Mr. Justice K. Jayachandra Reddy had rejected the proposal regarding appointment, the respondent on 29.04.2005 H

A wrote a letter to Indian Roads Congress and sought information from the IRC as to whether any judicial arbitrator preferably former Chief Justice of the High Court or above positions was available in the IRC panel of the arbitrators for the purpose of nomination of the Presiding Arbitrator. By communication dated 03.03.2005, IRC intimated that they do not have any judicial arbitrator in their panel. Since the IRC failed to appoint the Presiding Arbitrator in terms of the Act, the respondent on 05.05.2005 filed arbitration application under Section 11 of the Act in the High Court. The High Court after taking into consideration of the facts and by consent of both the parties by its order dated 01.07.2005 appointed Mr. Justice Y. Bhaskar Rao as the Presiding Arbitrator. Mr. Altaf Ahmed further submitted that the appellants have never challenged the order dated 01.07.2005 appointing the Presiding Arbitrator till date. However, Mr. Justice Bhaskar Rao, Presiding Arbitrator expressed his inability to act as the Presiding Arbitrator and accordingly intimated directly to the High Court of Orissa regarding his inability to act as the Presiding Arbitrator. Thereafter, when the matter was listed on 05.08.2005, the High Court directed the counsel for the appellants to obtain instruction from the appellants. In the meantime, Mr. Ashok Desai, arbitrator appointed by the respondents and Mr. Surjeet Singh, arbitrator appointed by the appellants carried out discussions regarding the appointment of the Presiding Arbitrator. On 06.01.2006, learned counsel for the appellants, under annexure-9, had suggested the names of five retired Judges of the various High Courts including the name of the retired Chief Justice/retired Judge of the Supreme Court of India for appointing one of them as the Presiding Arbitrator. Learned counsel for the appellants herein also submitted that anyone from the said list may be appointed as the Presiding Arbitrator. Learned counsel further fairly submitted that he does not like to suggest any particular name from the said list though the Court may appoint any one of them as the Presiding Arbitrator and appointed Justice P. Chenna Keshava Reddy as the Presiding Arbitrator in place of Justice Y. Bhaskar Rao with the consent of both the parties. Learned senior counsel for the respondents invited our attention to the proceedings of the Court dated 23.06.2006 in Misc. Case No. 6 filed by the appellants in ARB Application No. 23 of 2005 which came up for hearing before the Chief Justice of the High Court of Orissa. By order dated 23.06.2006 on the Miscellaneous Application filed by the appellants, it was clarified as under:

H “By order dated 6-1-2006, I appointed Justice P. Chenna Keshava Reddy, Former Chief Justice of Guwahati High Court as the Presiding Arbitrator on a Fee of Rs. 10,000/- per sitting which should be equally

shared by both Parties. It was further stipulated in the said order that the learned Arbitrator shall be entitled to Rs.10,000/- per sitting towards clerkage etc. Justice P. Chenna Keshava Reddy's name was picked up from a list of various names under Annexure-9 supplied by the petitioner. In that order it was *inter alia*, recorded that learned counsel for Opposite Party nos. 1 and 2 fairly submitted that any one from the said list may be appointed as the Presiding Arbitrator. Now, learned counsel for Opposite Party nos. 1 and 2 submits that it was not submitted by him that any one from the said list may be appointed as Presiding Arbitrator. What learned counsel for Opposite Party nos. 1 and 2 submitted is that he left the question of appointing the Presiding Arbitrator to the discretion of this Court. May be what learned counsel for Opposite Party nos. 1 and 2 submits is correct. However, that discretion having left with me to appoint any one as the Presiding Arbitrator, I acted within my jurisdiction in appointing Justice P. Chenna Keshava Reddy as the Presiding Arbitrator. This misc. case is accordingly disposed of."

It was submitted by Mr. Altaf Ahmed that in view of the clarification issued by the Chief Justice of the High Court nothing survives in the present appeal and that the appellants having not challenged the main order of the Presiding Arbitrator cannot assail the order of mere substitute of name of the Presiding Arbitrator more so, in view of the clarification issued by the High Court of Orissa. Learned senior counsel further submitted that the appellants having accepted the order of the High Court dated 01.07.2005 is thus precluded/estopped from challenging the order dated 06.01.2006 as the subsequent order is nothing but continuation of the proceedings dated 01.07.2005 wherein Mr. Justice Y. Bhaskar Rao was appointed and he had expressed his inability to accept the office. Learned senior counsel submitted that the appeal is devoid of any merit as the impugned order is in accordance with law and is just and proper in the facts and circumstances of the case.

We shall now consider the rival submissions made by both the parties *in extenso* in paragraphs *infra*.

In the facts of the present appeal, the following questions of law have arisen for consideration and determination by this Court from the arguments of both the sides:-

- (a) What is the scope of jurisdiction of the Court on the resignation

- A of an arbitrator considering a specific mandate and mechanism under Section 15(2) of the Arbitration and Conciliation Act, 1996 and Clause 67.3 of the Contract?
- (b) Whether on resignation of one of the arbitrators, the statutory provision that comes into play is Section 15(2) or Section 11(6) of the Arbitration and Conciliation Act, 1996?
- B (c) Whether an Arbitration Clause, which is a sacrosanct Clause, can be rewritten by appointment of a judicial arbitrator when no qualification thereof is provided in the agreement?
- (d) Whether the consent given by one of the parties (if treated to be so on assumption) is enough for the clause to be re-written?
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The present appeal involves the issue relating to appointment of the Presiding Arbitrator in accordance with the agreed contractual terms between the parties. As per Clause 67 of the contract agreement, a dispute resolution mechanism has been agreed to wherein the parties agreed that any dispute arising between them shall, in the first instance, be referred to a Dispute Review Board (DRB).

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Clause 67.3 further stipulates that for the purpose of constitution of the Arbitral Tribunal in respect of challenge to the recommendation of DRB, in case of failure of the two arbitrators appointed by the respective parties to arrive at a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President, Indian Road Congress.

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In the present case, for the purpose of appointment of Presiding Arbitrator, the respondent unilaterally approached the High Court of Orissa at Cuttack under Section 11(6) of the Arbitration and Conciliation Act, 1996, in express violation of the contract agreement without first requesting the Indian Road Congress being the designated authority for appointment of the Presiding Arbitrator.

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It is evident from the record that after the appointment of the Presiding Arbitrator on 1st July 2005, the arbitrator appointed by the appellants Mr. D.P. Gupta resigned on 11th July 2005. The new arbitrator nominated by the appellants did not accept the appointment on 20th July, 2005. Thereafter, Mr. Justice Y. Bhaskar Rao resigned on 26th July, 2005. On the vacancy created by the resignation of Mr. Justice Y. Bhaskara Rao, the process of appointment

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of the Presiding Arbitrator started afresh in accordance with the agreed terms of the Contract. The appellant appointed its arbitrator Mr. Surjeet Singh on 28th July, 2005. Hence, the process of discussion between the two nominated arbitrators was reinitiated as per the agreed contractual terms and in accordance with Section 15(2) of the Arbitration & Conciliation Act, 1996. The two arbitrators failed to arrive at a consensus and, therefore, after 30 days, the appellants referred the issue of appointment of Presiding Arbitrator to IRC on 30th August, 2005.

It is seen from the aforesaid facts that the situation which existed prior to the resignation of Mr. Justice Y. Bhaskara Rao and those which came about subsequent thereto only affirm that the vacancy created by the resignation of Mr. Justice Y. Bhaskara Rao was accepted by the parties to be filled up in accordance with the original rules of appointment, which is wholly in consonance with Section 15(2) of the Arbitration & Conciliation Act, 1996.

Reliance was placed on the case of *Yashwith Construction P. Ltd. v. Simplex Concrete Piles India Ltd & Anr.*, (2006) 7 Scale 48 (at para 4) wherein this Court had held that "The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1) (a) of the Act and therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced." However, the process which had been reinitiated by the two nominated arbitrators was restrained by the High Court vide order dated 9-9-2005. It is pertinent to mention that the re-initiation of the process of appointment was accepted by the Respondents as is evident from the rejoinder filed by them before the High Court.

It was submitted that the resignation and death of an arbitrator mandates application of Section 15(1) and 15(2) of the Arbitration Act. Section 15(1) and 15(2) are complete and wholesome and contra distinct to Section 11(6). Mr. Justice Y. Bhaskar Rao's resignation brought the matter back from vestiges of Section 11(6) though in the first place in law there were none and brought the matter squarely within Section 15(2). Any decision given under Section 11(6) is wholly miscarriage in law and would tantamount to putting the Act upside down. It was also submitted that the matter on Section 15(2) is no longer *res integra* as per the dictum in *Yashwith Construction*.

It may be further seen that the impugned order is not an order merely to fill up the vacancy created by the resignation but is a judicial order which

A takes into account all the facts and circumstances before giving the judicial determination for the appointment. The said judicial order has, *ipso facto*, replaced the earlier administrative order of 1.7.2005. In this regard, reliance was placed on the judgment of this Court in the case of *SBP & Co. v. Patel Engineering Ltd. & Anr.*, [2005] 8 SCC 618. In paragraph 47 of this judgment, this Court held as under:

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“47. We, therefore, sum up our conclusions as follows:

- (i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
- C (ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.
- D (iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.
- E (iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.
- F (v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.
- G (vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court
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only in terms of Section 37 of the Act or in terms of Section 34 of the Act. A

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

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

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

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.*, [2002] 2 SCC 388 and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act. D E

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice. F

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

Before the appellants could file an appropriate petition against the order dated 1.7.2005, one of the arbitrators resigned on 11.7.2005 and thereafter, the Presiding Arbitrator also resigned on 26.7.2005. Hence, the contention raised by the respondents that the order dated 1.7.2005 had not been challenged and that the impugned order only modifies a part of the said order and is only H

- A** filling up the vacancy created on resignation is wholly erroneous and unsustainable. It was denied that the appellants have abandoned their right to challenge the impugned order, as alleged by the respondents. In the facts of the present case as enumerated above, the process of appointment restarted in accordance with the original contractual rules after the resignation of the Presiding Arbitrator. The judicial order which replaces the administrative order is under challenge before this Court and, therefore, there is no need to challenge the order dated 1.7.2005. It may further be pointed out that the petition was disposed of on 1.7.2005 after the appointment and hence, on resignation of the Presiding Arbitrator, Mr. Justice Y. Bhaskar Rao, the respondent again approached the High Court for appointing the Presiding Arbitrator leading to the impugned order.

- It is pertinent to state that under Section 11(6) of the Act, the Court has jurisdiction to make the appointment only when the person including an institution, fails to perform any function entrusted to it under that procedure. In the present case, the relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order dated 1.7.2005, the respondents only sought a clarification from IRC and without making a reference to them, immediately filed the petition under Section 11(6) on the purported ground that the Indian Road Congress had failed to make the appointment within the stipulated time. Therefore, the reliance placed by the respondent on the judgment of this Court in the case of *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, [2006] 2 SCC 638 is wholly erroneous and is not applicable to the facts of the present case.

- It is also pertinent to notice that the order dated 1.7.2005 of the High Court is preceded by an erroneous finding that the respondent, Bumihiway DDB Ltd. had approached the IRC with the request and not having found a response have approached the Court. It was submitted that the letter dated 29.4.2005 is otherwise a mischievous clarification *de hors* contractual provisions which were considered otherwise. The assumption of the Court being wrong, a consent read *ejudem generis* therein is not consent in the eyes of law. In any case, Mr. Justice Y. Bhaskar Rao's resignation 26 days after his appointment i.e., on 26.7.2006 forecloses the chapter of consent.

- Learned Solicitor General appearing for the appellants argued that on the resignation of an arbitrator, the statutory provision which steps in is only Section 15(2) and not Section 11(6). Hence, after the resignation of Mr. Justice Y. Bhaskar Rao, the process of appointment had restarted as per Section 15(2).

However, the concerned institution i.e. IRC being restrained by the High Court from making the appointment, there was no failure on the part of the concerned institution i.e. IRC so as to justify invocation of Section 11(6). A

Reliance was placed on the case of *Yashwith Construction P. Ltd. v. Simplex Concrete Piles India Ltd. & Anr.* (supra) wherein this Court had reiterated the well settled law and held that there was no failure on the part of the concerned party as per arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party had failed to act in terms of the arbitration agreement. In the light of the legal position, it was submitted that the impugned order is wholly erroneous and liable to be set aside. B C

In our view, the invocation of Section 11(6) of the Arbitration & Conciliation Act, 1966 is squarely based on a default of a party. The ratio laid down in the case of *Datar Switchgear Ltd. v. Tata Finance Ltd. & Anr.*, [2000] 8 SCC 151 is the correct proposition and the case of *Punj Lloyds Ltd. v. Petronet MHB Ltd.* (supra) followed *Datar Switchgear*. The question arises for consideration here is who had defaulted and on what basis of default has the Court entered jurisdiction under Section 11(6). This question though raised by the appellant in the counter affidavit before the High Court has not been answered at all. Hence, the assumption of jurisdiction and adjudication by the High Court, in our opinion, is vitiated. D E

It is reiterated by the learned Solicitor General appearing for the appellants that there did not exist any concession on behalf of counsel for the appellants as alleged. Vide the impugned order dated 6.1.2006, the High Court after detailed discussions came to the conclusion that the Court was justified in making the appointment of Presiding Arbitrator. Only after the said judicial determination, a query was put to the appellants about the selection of the name, which was categorically refused by their counsel. On an application filed by the appellants before the High Court, the Court clarified that "what learned counsel for opposite party Nos. 1 & 2 submitted is that he left the question of appointing the Presiding Arbitrator to the discretion of this Court. May be what learned counsel for Opposite Party Nos. 1 & 2 submits is correct." Therefore, the High Court accepted the contention of the appellants that no consent was made in the appointment by the appellant in the impugned order. F G H

A It was argued by Mr. Altaf Ahmed, learned senior counsel for the respondent, that there has been a judicial determination by the High Court in the impugned order which is based on the reasoning that hierarchically a judicial arbitrator must sit with another judge only. This reasoning, in our opinion, is *de hors* the sanction in the Contract. The appointment made by the High Court as per the impugned order is against the express provisions of contract as held by this Court in the case of *You One Engineering & Construction Co. Ltd. v. National Highway Authority of India*, [2006] 4 SCC 372 reaffirming that once the arbitration agreement clearly envisages the appointment of the Presiding Arbitrator by IRC, there is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. *If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).*

D It is beneficial to refer to the judgment of this Court in the case of *Rite Approach Group Ltd. v. Rosoboronexport*, [2006] 1 SCC 206 wherein this Court has clearly held that “in view of the specific provision contained in the agreement specifying the jurisdiction of the Court to decide the matter, this Court cannot assume the jurisdiction, and hence, whenever there is a specific clause conferring jurisdiction on a particular Court to decide the matter, then it automatically ousts the jurisdiction of the other Court.”

E In the present case, by making reference to the High Court under Section 11(6) and alleging that one of the arbitrators is a retired judicial person, the respondent has only admitted to rewrite the contract between the parties, which is against the law of the land.

F Mr. Altaf Ahmad, in reply to the arguments advanced by the learned Solicitor General submitted that as the procedure contemplated in the agreement between the parties had failed to achieve the purpose, the respondents had rightly invoked the provisions of Section 11(6) of the Act and the appellant had given their consent and that the order being a consent order is not amenable to challenge before this Court. He further submitted that the said order cannot be challenged for the reasons that

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- (a) it is only a modification of the order dated 1.7.2005 which itself was an order based on consent given by the appellants.
 - (b) The order dated 1.7.2005 was never challenged by the appellants either by way of a petition under Article 226/227 of the Constitution of India before the High Court or under Article 136
- H

of the Constitution of India before this Court.

- (c) The counsel for the appellants had submitted before this Court on 1.6.2006 that any one from the said list for which time was given on 5.8.2005 for obtaining instructions, be appointed as the Presiding Arbitrator.
- (d) On 23.6.2006 counsel for the appellants once again submitted that he had left the question of appointing the Presiding Arbitrator to the discretion of the High Court.

Mr. Altaf Ahmad further submitted that the decisions upon which reliance had been placed by the appellants are not applicable to the facts of the present case for the following reasons:-

- (i) *You One Engineering and Construction Company Limited and Anr. v. National Highways Authority of India Limited*, (supra) is a case in which the Indian Road Congress had appointed a Presiding Arbitrator whereas in the present case the IRC had failed to appoint a Presiding Arbitrator. The order dated 1.7.2005 was passed by the High Court after 52 days of the appellant moving an application before the IRC (11.5.2005).
- (ii) *Yashwith Construction Private Ltd. v. Simplex Concrete Piles India Limited and Anr.*, (supra) is not applicable for the reason that it was a case in which the Managing Director had initially appointed the arbitrator and was right in appointing/substituting another arbitrator as the first arbitrator had resigned. It was a case wherein the question was whether Section 11(o) would operate or not and this Court had clearly held that Section 15(2) saves the power of the Managing Director to appoint/substitute an arbitrator even though the agreement does not specifically say so.
- (iii) *Right Approach Group Ltd. v. Rosoboron Export*, [2006] 1 SCC 206 is not applicable to the facts of the present case because that was a case in which the arbitration agreement specifically provided to resolve the dispute by negotiation, the dispute would be submitted to the arbitration court under the Chamber of Commerce and Trade of Russian Federation and the application of Section 11(6) or 15(2) was not in question at all.

A He also invited our attention to the judgment of this Court in the case of *Datar Switch Gears*, (supra) and *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (supra) wherein this Court has repeatedly held that once a notice period of 30 days in the present case and the other party has moved the Chief Justice under Section 11(6), party having right to appoint arbitrator under arbitral agreement loses the right to do so.

B

Learned counsel for the respondents, therefore, submitted that in the first place as the orders passed were with the consent of the appellants, they cannot be subject to challenge and secondly in view of Section 11(7) of the Act the orders passed by the Chief Justice are final and binding and, therefore, civil appeal is devoid of merit and does not call for any interference in the exercise of powers under Article 136 of the Constitution.

C

Before proceeding further, we may also consider the salient features of the arbitration procedure as agreed to by the parties under Clause 67.3 of the Conditions of Particular Application (COPA) which reads as under:-

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a. The dispute between the Contractor and Employer is required to be settled under the Arbitration and Conciliation Act, 1996 or any amendment thereof.

b. The Arbitral Tribunal shall consist of Three Arbitrators.

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c. Out of the three Arbitrators to be appointed, one each is to be appointed by the Employer and the Contractor;

d. If one of the parties fails to appoint its arbitrator within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of Indian Road Congress shall appoint the arbitrator. A certified copy of the order of the President of Indian Road Congress making such an appointment shall be furnished to each of the parties.

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e. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator which is to be appointed by consensus of the two arbitrators within a period of 30 days from the appointment of the arbitrator appointed subsequently.

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f. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the

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Presiding Arbitrator shall be appointed by the President, Indian Roads Congress. A

As rightly pointed out by the appellants, the High Court failed to appreciate that in accordance with Section 15(2) of the Act on the termination of the mandate of the Presiding Arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus only respondent No.2 was authorized to make the appointment. Unless respondent No.2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under Section 11(6) of the Act. Respondent No.1 has wrongly invoked the jurisdiction of this Court without first following the procedure agreed to between the parties. Thus no cause of action had arisen in the facts of the case to seek the appointment from the High Court under Section 11(6) of the Act and thus the said petition was premature. The High Court also is not correct in relying on the contention of the respondent No.1 that in case one of the arbitrators is retired Chief Justice, the Presiding Arbitrator should be at least a retired Chief Justice or a retired Judge of a High Court with considerable experience. It was submitted by learned Solicitor General appearing for the appellants that the said finding of the High Court is self contradictory inasmuch as if the Presiding Arbitrator is a retired Judge of the High Court and one of the arbitrators is a retired Chief Justice of the High Court, the member of hierarchy is upset. Even otherwise, there does not exist any such provision in law which requires that if one of the arbitrators is a retired Judge the Presiding Arbitrator also has to be a retired Judge. The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong. B
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If the reasoning of the High Court is accepted, then the law laid down by this Court in the case of *You One Engineering* as well as *Right Approach Group* will be rendered nugatory. Further, it will set a precedent which will vitally affect the appellant which is a Central Government undertaking in all the future contractual agreements. Before concluding, we clarify that the pleadings before the Arbitral Tribunal are not complete and written statement is yet to be filed by the appellant as the appellants have raised their objections with respect to the appointment before the arbitration proceedings which has been duly recorded by the Arbitral Tribunal in the orders passed by them. G

In view of the order now passed setting aside the appointment of the H

A Presiding Arbitrator by the High Court, the appointment of the Presiding Arbitrator as per the procedure contemplated under the contract agreement has to be followed and IRC (Ministry of Shipping, Road Transport and Highways, R.K. Puram, New Delhi should be approached. The parties are at liberty to approach the Arbitrators for any further interim directions.

B For the aforesaid reasons, we allow the appeal and set aside the order passed by the High Court in ARB No. 23 of 2005. No costs.

VS.

Appeal allowed.