

PARBHAT GENERAL AGENCIES ETC.

v.

UNION OF INDIA & ANR. ETC.

October 12, 1970

[J. C. SHAH, K. S. HEDE AND A. N. GROER, JJ.]

Arbitration Act, 1940, s. 8(1)(b)—Scope of—Circumstances in which an arbitrator in place of named or designated arbitrator can be appointed.

The appellants entered into agreements with the Union of India under which they were allotted certain areas in a forest to tap Resin Blazes. The agreement included an arbitration clause which provided that any questions, differences, or disputes between the parties would be referred for arbitration to the Judicial Commissioner, Himachal Pradesh. After certain disputes had arisen, the appellants requested the respondents to refer the disputes to the arbitration of the Judicial Commissioner but the respondents declined to agree. The appellants then filed an application under s. 20 of the Arbitration Act, 1940, for an order on the respondents to file the agreements in the court and for reference of the disputes to the Judicial Commissioner for arbitration. The Trial Court accepted the applications and referred the disputes. However the Judicial Commissioner declined to act as an arbitrator. An application made to the Court for the appointment of some other arbitrator was opposed by the respondents on the ground that the arbitration clause did not provide for such an appointment and this application was rejected by the court. The Judicial Commissioner dismissed the revision petitions filed by the appellants following an earlier decision of that court and holding that under the agreements, no reference for arbitration could be made to anyone other than the named authority.

On appeal to this Court,

HELD: The appeal must be allowed and the orders passed by the trial court as well as the Judicial Commissioner set aside. The cases must be remitted to the Trial Court for appointing a new arbitrator in place of the Judicial Commissioner.

The substantive rights of the parties are found in s. 8(1)(b). Before s. 8(1)(b) can come into operation, it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) any one or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled; and (5) the parties or the arbitrators as the case may be had not supplied the vacancy. [568 E]

In the present case all the other requirements were satisfied and the only question was whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not 'that the parties intended to supply the vacancy' but that 'the parties did not intend to supply the vacancy'. In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of s. 8(1)(b) what is required is not the intention of the parties to supply the vacancy

A but their intention not to supply the vacancy. [568 G]

The Judicial Commissioner as well as the trial court erred in thinking that merely because the arbitrator was designated with reference to the office held by him, it should be inferred that the parties intended not to supply the vacancy. The appointment of the Judicial Commissioner as arbitrator by itself does not afford any indication that the parties to the agreement intended not to supply the vacancy if the Judicial Commissioner refused to act or was incapable of acting. What the Judicial Commissioner could have competently done if he had acted as an arbitrator could certainly be done by an independent and impartial person possessing adequate knowledge of law. The language of s. 8(1)(b) is plain and unambiguous and the terms of the agreement in the present case did not in the least show that the parties intended not to supply the vacancy. [569 D]

C *Governor General in Council v. Associated Live Stock Farm (India) Ltd.*, 11 R. 1948 Vol. 1 Cal. 161; *Union of India v. Raj Narain Misra*, (1952) 1 Cal. 342 and *Fertilizer Corporation of India Ltd. v. M/s. Domestic Engg. Installation*, A.I.R. 1970 All. 31; referred to.

Chief Engineer, Buildings and Roads, Jaipur and anr. v. Harbans Singh A.I.R. 1955 Raj. 30 and *M/s. Isherdass Sahni and Bros. v. Union of India and ors* 68, P.L.R. p. 325; distinguished.

D *District Co-operative Federation Ltd. v. Khub Chand*, A.I.R. 1961 H.P. 35 and *Bharat Construction Co. Ltd. v. Union of India*, A.I.R. 1954 Cal. 606; disapproved.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1961 to 1963 of 1966.

E Appeals by special leave from the order dated October 27, 1965 of the Judicial Commissioner's Court, Himachal Pradesh at Simla in Civil Revision Nos. 16 to 18 of 1965.

Bishan Narain, B. Datta, for the appellant (in C.A. No. 1961 of 1966).

F *B. Datta*, for the appellants (in C.As. Nos. 1962 and 1963 of 1966).

V. C. Mahajan, for the respondents (in all the appeals).

The Judgment of the Court was delivered by

G *Hegde, J.* These appeals by special leave raise a common question of law. Therefore they can be dealt with together. The appellants herein entered into agreements with the Union of India under which they were allotted certain areas in a forest to tap Resin Blazes and supply the same to the Turpentine Factory at Sirmur. The agreements entered into included an arbitration clause. That clause is common in all the three agreements. That

H clause reads thus :

"If any question, difference or objection whatsoever shall arise in any way connected with or arising out of

this or the meaning or operation of any part thereof or the rights dues or liabilities of either party, then save in so far as the decision of any such matter is hereinbefore provided for and has been so decided, every such matter including whether its decision has been otherwise provided for and whether it has been finally decided accordingly or whether the contract should be terminated or has been rightly terminated and as regards the rights and obligations of the parties as the result of such termination be referred for arbitration to the Judicial Commissioner, Himachal Pradesh, and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any awarded in such arbitration shall be recoverable in respect of the matter so referred."

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The parties are agreed that no other clause in the agreements is relevant for our present purpose. Disputes arose between the appellants and the respondents in respect of some claims arising from the said contracts. The appellants requested the respondents to refer the disputes to the arbitration of the Judicial Commissioner, Himachal Pradesh. The respondents declined to agree to make the reference in question. Thereafter the appellants moved the Senior Sub Judge, District Sirmur Nihan under s. 20 of the Indian Arbitration Act, 1940 (to be hereinafter referred to as the Act) for ordering the respondents to file the agreements in question in his court and for referring the disputes to the Judicial Commissioner, Himachal Pradesh for arbitration. The learned Sub-Judge accepted these applications and directed the respondents to file the agreements in question into his court. Thereafter he referred the disputes to the arbitration of the Judicial Commissioner, Himachal Pradesh. The Judicial Commissioner, in our opinion rightly declined to act as an arbitrator. Thereafter the learned subordinate judge was moved to appoint some other arbitrator in place of the Judicial Commissioner. The respondents opposed that prayer on the ground that arbitration clause did not provide for such an appointment. The learned subordinate judge accepted that contention and dismissed the applications. As against that decision the appellants went up in revisions to the Judicial Commissioner, Himachal Pradesh. The Judicial Commissioner following an earlier decision of that court in *District Co-operative Federation Ltd. v. Khub Chand*⁽¹⁾ dismissed the revision petitions holding that under the agreements no reference for arbitration can be made to anyone other than the named authority. The question for decision is whether the interpretation placed by the courts below on the relevant provision in the arbitration agreements is correct.

(1) A.I.R. 1961 H. P. 35.

- A.** It may be noted that the agreements in these appeals relate to the exploitation of certain forest produce. The disputes that have arisen between the parties are not of technical nature requiring any specialised knowledge on the part of the arbitrator. It is clear from the terms of the agreements that the Judicial Commissioner was not appointed as an arbitrator because of any special or technical knowledge possessed by him relating to the subject matter of the dispute. Evidently he was appointed, though in our opinion quite improperly, arbitrator because he was a high judicial officer. The relevant provisions of the Act which bear on the point under consideration are ss. 8(1) and 20(4) of the Act. Section 8(1) reads :
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“Power of Court to appoint arbitrator or umpire.

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“In any of the following cases—

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(a) where an arbitration agreement provides that the reference shall be two or more arbitrators to be appointed by consent of the parties, and all the parties do not after differences have arisen, concur in the appointment or appointments; or

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(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be filled and the parties or the arbitrators, as the case may be, do not supply the vacancy.

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(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.”

Section 20 reads thus :

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“(1) Where any persons have entered into a arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

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(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be

interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

- (3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed;
- (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitration, to an arbitrator appointed by the Court.
- (5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

Section 20 is merely a machinery provision. The substantive rights of the parties are found in s. 8(1)(b). Before s. 8(1)(b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy.

In the cases before us it is admitted that there is an agreement to refer the dispute to arbitration. It is also admitted that the parties had designated the Judicial Commissioner of Himachal Pradesh as the arbitrator for resolving any dispute that may arise between them in respect of the agreement. The Judicial Commissioner had refused to act as the arbitrator. The parties have not supplied that vacancy. Therefore the only question is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not 'that the parties intended to supply the vacancy' but on the other hand it is that 'the parties

A did not intend to supply the vacancy'. In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of s. 8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. We have now to see whether the agreements before us indicate such an intention.

B As mentioned earlier the only relevant provision in the agreements before us is the provision relating to arbitration. The other provisions in the agreements do not throw any light as regards the intention of the parties. We have earlier mentioned that the Judicial Commissioner, Himachal Pradesh could not have been appointed as the arbitrator for any specialised knowledge possessed by him relating to any dispute that may arise under the agreement. What the Judicial Commissioner could have competently done if he had acted as an arbitrator could certainly be done by an independent and impartial person possessing adequate knowledge of law. In our opinion the language of s. 8(1)(b) is plain and unambiguous and the terms of the agreement before us do not in the least show that the parties intended not to supply the vacancy. The Judicial Commissioner as well as the learned subordinate judge erred in thinking that merely because the arbitrator was designated with reference to the office held by him, it should be inferred that the parties intended not to supply the vacancy. Evidently the parties did not mention the name of any particular Judicial Commissioner as arbitrator because there may be a change in the personnel. The appointment of Judicial Commissioner as arbitrator by itself does not afford any indication that the parties to the agreement intended not to supply the vacancy if the Judicial Commissioner refused to act or is incapable of acting.

F In *Governor General in Council v. Associated Live Stock Farm (India) Ltd.*⁽¹⁾, the arbitration clause that came to be considered by the Court read as follows :

G "Any dispute or difference arising out of the contract, settlement of which is not hereinbefore provided for, shall be referred to the arbitration of the officer sanctioning the contract whose decision shall be final and binding."

Interpreting that clause read alongwith other clauses in the arbitration agreement Das J. (as he then was) observed :

H "I do not find anything in the arbitration clause suggesting that the parties agreed that any vacancy in the

(1) I. L. R. 1948 Vol. 1 Cal. 161.

office of arbitrator should not be filled up. In the absence of any such agreement the vacancy can be easily supplied and there is no reason to think that the arbitration will be infructuous at all. If the particular officer sanctioning the contracts refuses to act or is incapable of doing so by reason of his absence or otherwise there are provisions in the Arbitration Act for the appointment of another arbitrator in his place and the arbitrator so appointed will be quite competent to proceed with the arbitration."

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In *Union of India v. Raj Narain Misra*⁽¹⁾ S. R. Das Gupta J. (as he then was) held that in the absence of an indication in the agreement against supplying any vacancy in the office of the arbitrator and in view of the provision in s. 8 of the Arbitration Act, 1940, for supplying a vacancy, the agreement for arbitration cannot become infructuous due to a vacancy.

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In *Fertilizer Corporation of India Ltd. v. M/s. Domestic Engg. Installation*⁽²⁾, a division bench of the Allahabad High Court laid down that a perusal of cl. (4) of s. 20 of the Act indicates that there are three courses open to the court under that provision of law. After the arbitration agreement has been ordered to be filed the court shall proceed to make a reference firstly to the arbitrator appointed by the parties in the agreement; secondly to the arbitrator not named in the agreement, but with regard to whom the parties agree otherwise; and thirdly when the parties cannot agree upon an arbitrator, to an arbitrator appointed by itself.

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The respondents, in support of their case that the vacancy could not be filled up relied on the decision of the Rajasthan High Court in *Chief Engineer, Buildings and Roads, Jaipur and anr. v. Harbans Singh*⁽³⁾. Therein Wanchoo C.J. (as he then was) after referring to the various clauses in the agreement and particularly to the clause which said "that the Chief Engineer shall be the sole arbitrator and judge in case of dispute. . . ." came to the conclusion that the parties to the agreement intended that the vacancy should not be filled up if the Chief Engineer refused or failed to act. The said decision turned on the facts of that case. The learned judges who decided that case came to the conclusion by reference to the various clauses in the agreement that the parties to the agreement intended not to supply the vacancy. Hence this decision is clearly distinguishable.

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Reliance was next placed by the respondents on the decision of the division bench of the Calcutta High Court in *Bharat Construction Co. Ltd. v. Union of India*⁽⁴⁾; Therein Chakravarti C.J.

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(1) (1952) 1, Cal. 342.

(3) A.I.R. 1955 Raj. 30.

(2) A.I.R. 1970 All. 31.

(4) A.I.R. 1954 Cal. 606.

- A speaking for the court opined that it is doubtful whether cl.(b) of s. 8(1) of the Arbitration Act at all applies to a case where a named arbitrator, obviously chosen for the possession of qualifications special to him, has become unavailable or refused to act; but any way the applicability of that clause in a particular case, must be determined by the test laid down in the section itself; the test is that the arbitration agreement must not show that it was intended that the vacancy should not be supplied; in other words however individual, the original choice may appear to be, if the agreement itself contains sufficient indication that the parties nevertheless intended that, in default of their original nominee, they would be prepared to fill up the vacancy by choosing another arbitrator, the section will apply and a new appointment may be made either by the parties or by the Court, as the case may be.

- B In our opinion the learned judge while approaching the question from a correct angle fell into the error of thinking that the agreement must indicate that the parties intended to fill up the vacancy. That is not what s. 8(1)(b) says. What that section says is that "the arbitration agreement does not show that it was intended that the vacancy should not be supplied."

- D Reference was next made to the decision of the Judicial Commissioner, Himachal Pradesh in *Distt. Co-operative Federation Ltd.'s case*⁽¹⁾. Therein the learned judge purporting to follow the decision in *Harbans Singh's case*⁽²⁾ held that it may reasonably be assumed that the way arbitrator is appointed by the parties with reference to the office the intention is that the arbitration should be conducted by the holder of that office and by none else; and on refusal of such an arbitrator to act, the court has no power to appoint another in his place. The learned judge, in our opinion; has misunderstood the decision of the Rajasthan High Court and the principles of law enunciated by him are not borne out by the provisions of s. 8(1)(b).

- E Lastly reference was made on behalf of the respondents to the decision of the Punjab High Court in *M/s. Isherdass Sahni and Bros. v. Union of India and ors.*⁽³⁾ wherein one of us (Grover J.) after referring to the various decisions rendered under s. 8(1)(b) and s. 20(4) of the Act and noticing the conflict of the judicial opinion rejected the revision petition solely on the ground that he would not be justified in the exercise of his revisional powers in setting aside the view taken by the lower court. In fact in the course of his judgment he observed :

- H "If the matter were *res integra* I might have agreed with one view or the other but in my opinion the court below has on a consideration of the material facts and

(1) A. I. R. 1961 H. P. 35.

(2) A. I. R. 1955 Raj. 30.

(3) 68, P. L. R. p. 325.

relevant law came to the conclusion that the arbitration agreement in question showed that there was no intention to fill up the vacancy. I would not be justified in Revision in setting aside that finding even if I was disposed not to concur with the decision of the trial court on this point."

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For the reasons mentioned above we allow these appeals, set aside the orders passed by the subordinate judge as well as by the Judicial Commissioner and remit the cases to the trial court for appointing a new arbitrator in place of the Judicial Commissioner, Himachal Pradesh. The respondents shall pay the costs of the appellants both in this Court as well as in the courts below.

B**R.K.P.S.***Appeals allowed.*