APPELLATE CIVIL

Before Gurdev Singh, J.

JAGDISH CHANDER GUPTA,—Appellant

versus

LACHHMAN DAS AND OTHERS,—*Respondents*

First Appeal from the Order No. 26 of 1964.

April 3, 1967.

Arbitration Act (X of 1940)—Ss. 8 and 20—Arbitrator refusing to act—Arbitration clause—Whether comes to an end—Court—Whether can appoint another arbitrator—Party to arbitration agreement making application under section 20—Notice under section 8—Whether essential—Procedure to be followed on such application—Imports (Control) Order (1955)—Clause 5—Licence—Whether can be transferred.

Held, that because of the refusal of the arbitrator, appointed by the consent of the parties, to proceed with the arbitration, it was open to one of the parties to proceed in accordance with the provisions of clause (b) of sub-section (1) of section 8 of the Arbitration Act, and to serve a notice on the other party for fresh appointment of the arbitrator, but failure to do so does not put an end to arbitration clause or deprive the court of its jurisdiction to appoint another arbitrator in place of the arbitrator already appointed.

Held, that according to the clear language of section 20(1) of the Arbitration Act, any party to the arbitration agreement has the option to apply under section 20 instead of proceeding under Chapter II in which section 8 occurs. If the intention was to confine the remedy of a party to an arbitration agreement only to section 8, in case an Arbitrator refuses to act or is incapable of acting, the language of section 20(1) would have been materially different. The legislature in that case would not have used the expression "instead of proceeding under Chapter II", but would have said "except in a case falling under Chapter II'. These two provisions make it quite clear that the intention of

the legislature was to give an option to a party to an arbitration agreement to adopt the course laid down in section 8(1)(a), or straight away come to the Court under section 20. It is significant that even under section 8, if the parties do not agree to the appointment of a fresh arbitrator when the requisite notice is given, the matter is to be taken to the Court and it is for the Court to make the appointment of another arbitrator or umpire. The jurisdiction of the court u/s 20, if properly invoked, cannot be taken away merely because of the omission of a party to serve the notice on the opposite party for appointment of an arbitrator when sub-section (1) of section 20 specifically lays down that instead of proceeding under Chapter II, in which section 8 falls, the party concerned may apply to the Court for filing the arbitration agreement.

Held, that an application for filing an arbitration agreement under section 20(1) of the Arbitration Act is to be dealt with undtr sub-section (3) of section 20. After notice to all the parties to the agreement to show cause against the action to be taken, the Court has to proceed under sub-section (4) of section 20.

Held, that clause 5 of the Imports (Control) Order, 1955, does not impose a positive prohibition on the transfer of a licence granted to a particular person. It merely lays down that it shall be deemed to be a condition of every such licence, that no person shall transfer and no person shall acquire by transfer any licence issued by the licensing authority "*except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority.*" From this it is obvious that a transfer of licence can be made with the permission of the authority concerned.

First Appeal from the Order of Shri Raghbir Singh Gupta, Sub-Judge, 1st Class, Ludhiana, dated 27th January, 1964 appointing Shri Jullunduri Pershad, Advocaet, as the sole arbitrator.

BHAGIRTH DASS, AND HIRAJEE, ADVOCATES, for the Appellant.

H. L. SARAIN, SENIOR ADVOCATE, WITH BHAL SINGH MALIK, AND BALRAJ BHEL, ADVOCATES for the Respondents.

JUDGMENT

GURDEV SINGH, J.—This appeal under section 39 of the Arbitration Act, 1940 is directed against the order of the Sub-Judge, 1st Class, Ludhiana, dated 27th January, 1964, whereby he granted the application of Lachhman Dass and others under sections 8 and 20 of the Arbitration Act and appointed Shri Jullunduri Parshad, Advocate

of Ludhiana, as an Arbitrator. The facts giving rise to this appeal are as follows:—

The appellant Jagdish Chander Gupta who is the sole proprietor of the concern known as Foreign Import & Export Association, Bombay obtained a licence for the import of Wool Top Combing Plant for installing it at Kotah (Rajasthan) on 29th June, 1961. Subsequently on 10th January, 1962, he entered into a partnership,—*vide* Exhibit A. 1, with the respondents Lachhman Dass and othes under the name of M/s. Ashoka Combing Mills. Some of the terms of this partnership which are relevant for purposes of this case are as under:—

(1) That Shri Jagdish Chander Gupta will procure a wool combing plant and get necessary amendments in the industrial licence so that it may be in the name of the firm and also to get it amended regarding location of the business.

(2) That the patries of the second, third and fourth parts hereto will construct the building, finance the entire industry; run and manage the entire concern.

(3) That the name of the firm shall be Ashoka Combing Mills. It will work at Miller Ganj, Ludhiana or any other place convenient to the partners.

(4) That the business of the partnership shall be to deal in wool tops combing, spinning and dyeing of wool and wool tops.

* * * * * *

(13) That in case Shri Jagdish Chander Gupta fails to procure the plant he shall have to compensate the parties of the second, third and fourh parts. The amount of compensation will be determined by arbitration.

(14) That if the parties of the second, third and fourth parts hereto fail to provide the necessary finance or building or both, then they will have to compensate Shri Jagdish Chander Gupta. The amount of compensation will be determined by arbitration.

Then followed clause 19 of the agreement, making comprehensive provision for the Arbitration, reading as under:—

> 19. That if at any time during the continuance of the partnership or after its dissolution or determination or after the retirement of any of the partners hereto, any dispute, difference or question shall arise between the partners hereto touching the partnership or the accounts or transactions thereof or the dissolution or winding up thereof or the construction, meaning or effect of these presents, then the same shall be referred to arbitration under the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof for the time being in force.

It is common case of the parties that in pursuance of clause (1) of the agreement, reproduced above, the appellant Jagdish Chander Gupta applied to the authorities concerned for permission to set up the wool Combing Plant at Ludhiana instead of Kotah (Rajasthan) for which the licence had been originally granted ,but the authorities refused to grant the necessary permission. No steps were, however, taken by him to have the industrial licence transferred in the name of the firm. This naturally led to a dispute between the parties on which the respondents appointed Shri Kewal Krishan Adya as Arbitrator. This appointment was agreed to by the appellant, but despite notice issued to him, he did not appear before the Arbitrator and ultimately informed him that he had withdrawn the appointment of the Arbitrator. Thereupon Shri Kewal Krishan Adya Arbitrator refused to proceed with the arbitration. Faced with this situation the respondents moved the Sub-Judge, 1st Class, Ludhiana, on 8th November, 1962, under sections 8 and 20 of the Arbitration Act for filing the agreement and appointment of Shri Kewal Krishan Adya or any other Arbitrator to adjudicate upon the dispute that had arisen between the parties and for assessment of damages suffered by them. Besides objecting to the jurisdiction of the Court, the appellant resisted the application because of the Central Government's refusal to permit change of location of the plant from Kotah to Ludhiana and asserting that the application was barred by time. The learned Sub-Judge tried the case on the following issues:—

(1) Has this Court jurisdiction in the matter?

(2) Was the shifting to or installation of the Combing Plant at Ludhiana a necessary condition for the operation of the partnership as alleged?

(3) Did the Government refuse permission for installing at or shifting the location of the said plant to Ludhiana as alleged, and if so, to what effect ?

(4) Had the partnership become impossible of performance as alleged?

(5) Is this application within time?

Issues Nos 1 and 5 were decided against the appellant. Dealing with issues Nos. 2, 3 and 4 together the learned Sub-Judge held that though the Government had refused permission for shifting of the location of the plant, that in no way affected the validity of the agreement, nor had the agreement become impossible of performance, unlawful or void because of frustration. Accordingly he accepted the application of the present respondents and granting the application for filing the agreement appointed Shri Jullunduri Parshad as the sole arbitrator by his order dated 27th January, 1964.

In assailing the order under appeal Shri Bhagirth Dass, appearing for the appellant, has urged:—

(1) That the partnership agreement was contingent upon the grant of permission by the Government to the shifting of the location of the plant from Kotah to Ludhiana and since the Government had refused to grant permission, the agreement had become void and incapable of performance.

(2) That since according to the rules and the law under which the licence for the plant was granted to the appellant and he was permitted to set up the wool plant at Kotah, the licence could not be sold or otherwise transferred by him to some one else, the agreement of partnership (Exhibit A.1), under which the respondents claimed was illegal and thus could not be made the basis for any claim or relief.

(3) That Shri Jullunduri Parshad could not be appointed as an Arbitrator as the authority of Shri Kewal Krishan Adya, the Arbitrator, appointed by the parties themselves had never been revoked and effect had not been given to the provisions of section 5 of the Arbitration Act.

(4) That the deed of partnership had not been executed properly as it was signed only by four of the parties.

(5) That no action under section 20 of the Arbitration Act for filing the agreement and appointment of a new Arbitrator could be taken by the Court as the respondents had not complied with the provisions of section 8(1) of the Arbitration Act under which they were required to serve a notice upon the appellant to agree to the appointment of a fresh Arbitrator after Shri Kewal Krishan Adya had refused to act.

The finding of the trial Court on the questions of limitation and jurisdiction have not been challenged before me. Shri Bhagirath Dass, learned counsel for the appellant has also not pressed his contention that the agreement was void for want of signatures of one or more of the parties, in view of the fact that the original agreement (Exhibit A. 1), which is on record, admittedly bears the signatures of all the parties. The plea that the agreement of arbitration had become void and incapable of performance because of the refusal of the Central Government to change the location of the plant from Kotah to Ludhiana is clearly untenable as the agreement nowhere provides that the partnership under the name of Ashoka Combing Mills had been set up solely for running the Combing Mills at Ludhiana. On the other hand, clause (3) of the agreement, which has been reproduced earlier, clearly states: "It will work at Miller Ganj, Ludhiana, or any other place convenient to the partners". From this it is evident that if it was not possible to carry on the business of partnership at Ludhiana, the partners could set up the business elsewhere. In fact the agreement also entitles them to set up business at various places including Ludhiana. Apart from this, a perusal of the agreement (Exhibit A. 1) would show that the partnership was not formed solely for setting up and working the wool combing plant at Ludhiana or elsewhere but for other purposes as well. This is quite clear from clause (4) of the agreement, which specifically states that the business of the partnership shall be to deal in wool tops combing, spinning and dyeing of wool and wool tops. In view of these facts the agreement of partnership could not become inoperative or incapable of performance, simply because the Central Government had refused permission to shift the location of the plant (which has yet to be set up), from Kotah to Ludhiana. There is no

impossibility in the partnership functioning even though the refusal of the Central Government to permit the shifting of the location of plant to Ludhiana has not enabled the partnership to set up the plant at Ludhiana.

It may be pointed out here that when the appellant informed the respondents that the Government had not agreed to accord the necessary permission to the shifting of the location of the plant, Rattan Chand Oswal respondent at once informed him by means of the letter Exhibit A. 3 that respondents agreed to the setting up of the plant in Rajasthan. This conduct of the respondent was quite consistent with the provisions made in clause (3) of the agreement reproduced earlier. It is thus obvious that if the appellant had agreed to this suggestion, which is in consonance with the provisions of the partnership deed, there would have been no difficulty in continuing the partnership business. He, however, took a different course, and, according to the allegation of the respondents, sold away his licence for the import of Wool Top Combing Plant to someone else, obviously with a view to obtain some profit for himself. This allegation was made against him by the respondents in their letter Exhibit A. 4 to which he did not reply even to rebut the allegation of transferring the licence to M/s. Nagpal Woollen Mills, Bombay.

In fact the appellant himself treated this partnership agreement valid and binding on the parties as is evident from his conduct in agreeing to the appointment of Shri Kewal Krishan Adya as Arbitrator. It was subsequently that he appears to have changed his mind and attempted to wriggle out of it by informing the Arbitrator that he (the appellant) had chosen to wihdraw his appointment. For all these reasons I find that the agreement is not void or rendered incapable of performance because of the refusal of the Central Government to change the location of the plant from Kotah to Ludhiana.

This brings me to the consideration of the question as to the course the respondents should have adopted when they found that because of the appellant's refusal to recognise the Arbitrator, Shri Kewal Krishan Adya, to whose appointment the parties had previously agreed, the arbitration could not proceed. Shri Bhagirath Dass has contended that the only course which was open to the respondents was to proceed in accordance with the provisions of section 8 of the Arbitration Act, 1940, and to serve a notice upon the appellant calling upon him to appoint another Arbitrator within 15 days

and unless that notice was given, the Court had no power or authority to appoint an Arbitrator in place of Shri Kewal Krishan Adya. Reliance in this connection has been placed on *Poran Lal* v. *Rup Chand* (1), where relying upon an earlier decision of that Court reported as *Jagananth Sahu* v. *Chedi Sahu* (2), it was held that in absence of notice under para 6, Schedule 2 of the Civil Procedure Code, which corresponds with clause (b) of sub-section (1) of section 8 of the Arbitration Act, by one of the parties to the other to appoint the arbitrator, the Court had no power to make a fresh appointment. It is no doubt true that because of the refusal of Shri Kewal Krishan Adya to proceed with the arbitration, it was open to the respondents to proceed in accordance with the provisions of clause (b) of sub-section (1) of section 8 of the Arbitration Act, but the failure of the respondents to serve a notice upon the appellant for fresh appointment of the Arbitrator does not, in my opinion, put an end to the arbitration clause or deprive the Court of its jurisdiction to appoint another Arbitrator in place of Shri Kewal Krishan Adya. The application, which the respondents had made to the Sub-Judge was a composite one under sections 8 and 20 of the Arbitration Act. Section 20(1), which is relevant for our purposes, provides--

> "Where any persons have entered into an 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."

According to the clear language of this provision any party to the partnership agreement has an option to apply under section 20 instead of proceeding under Chapter II in which section 8 occurs. If the intention was to confine the remedy of a party to an arbitration agreement only to section 8, in case an Arbitrator refuses to act or is incapable of acting, the langauge of section 20(1) would have been materially different. The legislature in that case would not use the expression "instead of proceeding under Chapter II", but would

(1) A.I.R. 1931 All. 61.
(2) A.I.R. 1929 All. 144.

have said "except in a case falling under Chapter II". Reading the two provisions together I find that the clear intention of the legislature was to give an option to a party to an arbitration agreement to adopt the course laid down in section 8(1)(a), or straighaway come to the Court under section 20. It is significant that even under section 8, if the parties do not agree to the appointment of a fresh arbitrator when the requisite notice is given, the matter is to be taken to the Court and it is for the Court to make the appointment of another arbitrator or umpire. The decision of the Allahabad High Court, to which the learned counsel for the petitioner has referred, no doubt indicates that unless notice under section 8 is given, the Court has no jurisdiction to proceed with the appointment of fresh arbitrator or umpire, but those observations may apply to the action which is taken under that section. I fail to see how the jurisdiction of the Court under section 20, if properly invoked, can be taken away merely because of the omission of a party to serve the notice on the opposite party for appointment of an arbitrator when sub-section (1) of section 20 specifically lays down that instead of proceeding under Chapter II, in which section 8 falls, the party concerned may apply to the Court for filing the arbitration agreement.

How this application for arbitration agreement is to be dealt with is provided in sub-section (3) of section 20. After notice to all the parties to the agreement to show cause against the action proposed to be taken, what the Court has to do is laid down in sub-section (4) of section 20, which is in these words :—

> "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 patries cannot agree upon an arbitrator, to an arbitrator appointed by the Court."

It is under this clause that the learned Sub-Judge has made the impugned order appointing Shri Jullunduri Parshad as Arbitrator in place of Shri Kewal Krishan Adya, who refused to act as such. This order, in my opinion, is perfectly in accord with the provisions of section 20 of the Arbitration Act.

In *Bhagwan Das* v. *Gurdayal* (3) it has been observed—

> "Where a party has gone to arbitration in a case in which if it had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17, Schedule 2, C.P.C."

In *Shec Narain* v. *Bala Rao* (4) the Division Bench of that Court ruled—

> "Where an agreement of reference to the arbitration has been enterned into by the parties but the arbitrators have not so far functioned, the Court has power to enforce the agreement against the parties."

It was further observed in that case that paragraph 17 far from implying an ouster of jurisdiction, predicated that the arbitrators had the jurisdiction to act on the reference and that the Court should step in and ask them to exercise their powers as arbitrators if they were agreeable to do so.

In *India Hosiery Works* v. *Bharat Woollen Mills Ltd.* (5), it was observed—

> "Section 20(1) contemplates agreements to which the provisions of Chapter II would also apply."

These authorities are fully consistent with the view that I have taken about the competency of an application under section 20 of the Arbitration Act, even though it was open to the respondents to proceed under section 8(1) of that Act.

The only contention that remains to be considered is about the validity of the partnership agreement. Apart from the fact that no

(3) A.I.R. 1921 All. 188.
(4) A.I.R. 1932 All. 348.
(5) A.I.R. 1958 Cal. 488.

such objection was raised in the court of the Sub-Judge at the time of the arguments in that Court, I find this objection entirely untenable. Clause 5 of the Imports (Control) Order, 1955, upon which Shri Bhagirth Das has relied, does not impose a positive prohibition on the transfer of a licence granted to a particular person. It merely lays down that it shall be deemed to be a condition of every such licence, that no person shall transfer and no person shall acquire by transfer any licenced issued by the licensing authority *"except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority."* From this it is obvious that a transfer of licence can be made with the permission of the authority concerned. The agreement of partnership itself contemplates the obtaining of such permission by the appellant as it specifically provides that he shall obtain the "necessary amendments in the industrial licence so that it may be in the name of the firm." As has been observed earlier though the appellant had applied for the change of location of the plant that was to be set up, he never took any action to obtain the necessary permission. This is the alleged breach on his part which constitutes one of the matters in dispute between the parties requiring adjudication by the arbitrator. For all these reasons I am of the opinion that the order of the Sub-Judge does not suffer from any illegality and the appointment of the arbitrator made by him is perfectly valid. The appeal is accordingly dismissed with costs.

The records be remitted to the trial Court to enable the Arbitrator to proceed with the arbitration.

R. N. M.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

DUNI CAND,—*Petitioner*

versus

PUNJAB STATE AND OTHERS,—*Respondents*

Civil Writ No. 1976 of 1967.

September 29, 1967.

Punjab Municipal Act (III of 1911)—*Ss.* 80, 240 *and* 258—*Punjab Municipal Election Rules* (1952)—*Rule* 7(g)—*Making of 'special demand'*—*Whether condition precedent to disqualify a person from seeking election as a member of a*