

## REVISIONAL CIVIL

Before Prem Chand Pandit, J.

BRIJ BHUSHAN LAL,—Petitioner.

*versus*

CHIEF ENGINEER, ETC.,—Respondents.

**Civil Revision No. 273 of 1971.**

January 12, 1972.

*Arbitration Act (X of 1940)—Section 8—Arbitration agreement conferring power on a person or authority to appoint arbitrator—Prior consent of the parties to such appointment not provided—Section 8—Whether applies.*

*Held*, that a perusal of section 8 of Arbitration Act 1940 shows that where in an arbitration agreement it is provided that the reference will be made to an arbitrator appointed with the consent of the parties and if they do not concur in the said appointment, any of them can serve the other party with a written notice to so concur in the appointment. If the other party does not do so within 15 clear days after the service of that notice, the Court is authorised, on an application having been made to it by the party who gives the notice to appoint an arbitrator after hearing the other party. This section is attracted only if the arbitration agreement specifically provides that the appointment of the *actual person* as an arbitrator must have the consent of both the parties. It is not enough if the parties agree only to the person or authority who will subsequently appoint an arbitrator, **even** if he is told to make only that one who has some special qualifications, without of course, mentioning the *particular individual*. Hence where an arbitration agreement confers power on a person or authority to appoint arbitrator and prior consent of the parties to such appointment is not provided, section 8 of the Act will not apply.

*Petition under Section 115 C.P.C. for revision of the order of Sub-Judge, 1st Class, Ambala, dated 16th January, 1971, dismissing the petition.*

S. K. Jain, Advocate, for the petitioner.

J. N. Kaushal, Advocate-General, Haryana, with Ashok Bhan, Advocate, for the respondents.

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#### JUDGMENT

PANDIT, J.—(1) The facts giving rise to this revision petition are these. On 27th July, 1968, an agreement was entered into between Brij Bhushan Lal, contractor and the Union of India, respondent No. 2, for the construction of certain garages for the army officers in Ambala Cantonment. On the basis of this agreement, the contractor started the work, but during the course of the construction, in June, 1969, the constructed portion of some of the garages was damaged by rain and storm. On 3rd July, 1969, the Chief Engineer, North Western Zone, respondent No. 1, asked the contractor to proceed with the remaining construction and in August, 1969, he further told the contractor to set right the damage caused to the garages at his own cost. To this, the contractor replied that the damage had not occurred due to any faulty construction on his part, but it was because of the defect in the design supplied to him by the Commander Engineer. He was, however, prepared to do the necessary repairs if the Government was ready to pay the additional cost thereof. On 19th September, 1969, the Chief Engineer wrote to the contractor that if he refused to make the said repairs at his own cost, his contract would be cancelled and whatever additional cost would be incurred by the department for the said purpose, the same would be recovered from him. On 26th September, 1969, the Chief Engineer again asked the contractor to effect the necessary repairs, which according to the latter, would have cost him Rs. 64,500. In reply, the contractor said that if the said amount was paid to him, he would do the work. Instead of agreeing to pay this extra amount, the contract was cancelled by the Union of India on 27th October, 1969. As disputes arose between the contractor and the Union of India, the former on 11th November, 1969,—*vide* Exhibit A-8, asked the Chief Engineer to appoint an independent arbitrator in accordance with the provisions of the Arbitration Act, 1940. In reply, the Engineer on 19th November, 1969, informed the contractor that in view of the terms of the arbitration clause in the agreement, no arbitrator could be appointed till alternative arrangements for carrying on the unfinished work were finalised. The contractor did not agree with interpretation put on the arbitration clause by the Government and according to him, there was a difference between appointment of an arbitrator and the reference of the dispute to him. The said appointment could be made by the Government earlier, within the specified time, though the reference of the dispute to

him could be made subsequently when the above mentioned alternative arrangements had been finalised. The Government, on the other hand, did not accept this position and reiterated its earlier stand that no appointment of an arbitrator also could be made till alternative arrangements had been finalised by the Government to get the work completed through some other contractor. That led to the filing of the petition under sections 8 and 20 of the Act by the contractor on 24th April, 1970. In that petition, a prayer was made that as the Chief Engineer had failed to appoint an arbitrator, therefore, the agreement of reference be directed to be filed and an independent arbitrator be appointed by the Court to adjudicate on the points in dispute between the parties.

(2) This petition was opposed by the Union of India and the Chief Engineer on a number of pleas, which led to the framing of the following issues:—

- “1. Whether the respondent failed to appoint an arbitrator within the prescribed time and have now forfeited the right to appoint an arbitrator ?
2. Whether an arbitrator is to be appointed by the Court ?”

(3) It was also pleaded by the respondents that the Chief Engineer had already appointed an arbitrator on 13th May, 1970, and, therefore, this petition did not lie and should be dismissed on that ground.

(4) The trial Judge held that the alternative arrangements to get the unfinished work done were completed in April, 1970 and, consequently, the appointment of the arbitrator in the middle of May, 1970, by the Chief Engineer was perfectly legal. The Government had, therefore, not forfeited its right to appoint an arbitrator on the ground that it had not done so within the prescribed time. As a result, the Court could not make the appointment under section 8 of the Act. In view of this finding on issue No. 1, the learned Judge held under issue No. 2, that the Court had no jurisdiction to appoint the arbitrator, in spite of the fact that the petition was made by the contractor prior to the appointment of the arbitrator by the Chief Engineer. On these findings, the petition was dismissed. Against this order, the present revision petition has been filed by the contractor.

(5) Two arguments have been addressed by the learned counsel for the petitioner. In the first instance, it was submitted that under clause 70 of the Arbitration agreement, though reference to arbitration could be made only after the finalisation of the alternative arrangements for completing the work through another contractor, but the appointment of the arbitrator had to be made within 15 days of the receipt of the letter, dated 11th November, 1969 (Exhibit A-8) by the Chief Engineer. The said letter was written by the Contractor asking the Chief Engineer to appoint an arbitrator and it was received by him, according to the learned counsel, between 13th and 18th November, 1969, and counting 15 days from 18th November, 1969, the appointment of the arbitrator by the Government could have been made on or before 3rd December, 1969. The said appointment, admittedly, having been made on 13th May, 1970, was contrary to law. Counsel also submitted that after the filing of the petition under sections 8 and 20 of the Act, the Chief Engineer could not appoint any arbitrator. The second argument raised by the learned counsel was that according to clause 70, reference had to be made after the alternative arrangements for carrying out the uncompleted work had been finalised. The said arrangements, in this case, had, admittedly, been finalised on 3rd April, 1970. According to section 8 of the Act the appointment could be made, at any rate, within 15 days of 3rd April, 1970, and not beyond that, that is to say, the appointment had to be made on or before 18th April, 1970. The said appointment having been made on 13th May, 1970, was not, therefore, in accordance with the arbitration clause in the agreement and also the provisions of section 8 of the Act and that being so, the Government had forfeited its right to appoint an arbitrator and it was the Court alone, which could do so under section 8 of the Act.

(6) It will be seen from both the arguments of the learned counsel that he is basing them on the supposition that section 8 of the Act applies to this case. The limitation of 15 days after the service of the notice on the opposite party to concur in the appointment of an arbitrator, is given in this section only. Counsel for the respondents, on the other hand, submits that section 8 has no application to the facts of the instant case. If his contention is correct, then obviously there is no force in both the submissions of the learned counsel for the petitioner. So the main question to be decided is whether section 8 of the Act has application to this case or not.

(7) Learned counsel for the petitioner submitted that it was never the case of the respondents before the Court below or in their

reply to the petition that section 8 of the Act did not apply to the present case. It was, according to the learned counsel, conceded by the respondents that this section applied and it was on that basis that the argument proceeded in the Court below and the decision of the trial Judge also presupposed that section 8 had application to the present case. Be that as it may, this is a pure law point and the learned counsel for the respondents, in my opinion, is well within his rights in submitting that section 8 has so application in the circumstances of this case.

(8) In order to decide this point, reference has to be made to section 8 of the Act and clause 70 of the arbitration agreement.

Relevant part of section 8 reads :

“8. (1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one 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

(b) \* \* \* \*

(c) \* \* \* \*

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.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power act in the reference and to make an award as if he or they had been appointed by consent of all parties.”

Relevant portion of clause 70 is in these terms: “Arbitration—All disputes, between the parties to the contract, (other than those for which the decision of the Commander Works Engineer or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the contract to the

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other of them be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.

Unless the parties otherwise agree such reference shall not take place until after the completion, alleged completion or abandonment of the works or the determination of the contract.

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Provided that in the event of abandonment of the works or cancellation of the contract under conditions No. 52 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other contractor or contractors."

(9) A perusal of section 8 will show that in an arbitration agreement, where it is provided that the reference will be made to an arbitrator who will be appointed with the consent of the parties and if they do not concur in the said appointment, then any of them can serve the other party with a written notice to concur in the appointment and if the other party does not do so within 15 clear days after the service of that notice, the Court is authorised, on an application having been made to it by the party who gave the notice to appoint an arbitrator after hearing the other party.

(10) In the instant case, no arbitrator had to be appointed with the consent of the parties. The arbitrator had to be appointed by the authority mentioned in the tender documents, which admittedly was the Chief Engineer, North Western Zone, respondent No. 1, and he too could appoint only an Engineer Officer. The appointment had to be made by him after a written notice by any of the parties to the contract was given to the other party. As I have said, the arbitrator had not to be appointed with the consent of the parties, which was a necessary condition for the applicability of section 8. If the consent of both the parties was not essential, the question of any differences arising between them did not arise. Section 8(1)(a) envisaged a situation where in the arbitration agreement, it had been stated that the arbitrator would be appointed with the consent of the parties and if in that case both the parties did not agree to the appointment of an arbitrator and differences arose, with the

result that one of them gave a written notice to the opposite party naming an arbitrator and asking the other party to concur in the said appointment and if then the appointment was not made within 15 days after the service of the notice, the Court, in such circumstances, had the power to appoint an arbitrator on the application having been made to it by the party, who gave the notice. In the instant case, this is not the position. By virtue of clause 70, the dispute had to be referred to a sole arbitrator, who had to be an Engineer Officer and he had to be appointed by the authority mentioned in the tender documents, namely, respondent No. 1, and this appointment had to be made by him after a written notice had been given by one of the parties to the contract to the opposite party.

(11) The view that I have taken finds support in a Bench decision of the Jammu and Kashmir High Court in *C. Raja v. Union of India*, (1) where it was observed :

“Clause (a) of section 8 (1) gives power to a Court to appoint an arbitrator on failure of the parties to do so, if (a) there is a valid arbitration agreement; (b) there is provision in the arbitration agreement for appointment of an arbitrator by consent of the parties; and (c) all the parties do not concur in the appointment of an arbitrator and notice to the parties was given in terms of sections 8 and 42, Jammu and Kashmir Arbitration Act.

Where the clause of the arbitration agreement provided that one of the parties alone had the power to appoint an arbitrator the other party's consent or no consent was immaterial.”

(12) Learned counsel for the petitioner then contended that if in an arbitration agreement it was provided by the parties that the appointment of the arbitrator would be made by a particular individual named in the said agreement then it would be taken as if the appointment of the arbitrator was to be made by the consent of the parties. In other words, the prior consent of the parties had been given in that agreement itself. In support of this contention, learned counsel relied on a Single Bench decision of the Patna High Court in *Union of India v. D. P. Singh* (2) where it was held:—

“An application under section 8 (1) (a) is maintainable where the party having the sole power under the arbitration

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(1) A.I.R. 1957 J. & K. 27.

(2) A.I.R. 1961 Patna 228.

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agreement to appoint the only arbitrator fails to make the appointment when called upon to do so, even if the agreement has not expressly provided that the appointment should be made by the consent of both parties.

In such a case it is inherent in the arbitration agreement itself that the nomination of the arbitrator by the party who is given the sole power to appoint him shall be deemed to have been made by the consent of both the parties and hence it was not necessary to make any express provision that the appointment should be made by the consent of the parties. There may be an express provision to such an effect but even in the absence of any express provision, such a provision must be taken to be necessarily implied."

On the clear language used in section 8, which I have quoted above, I say with respect, I am not inclined to agree with the interpretation placed by the learned Judge of the Patna High Court on this section. According to section 8(1)(a), it is plain, that it will be attracted only if the arbitration agreement specifically provides that the appointment of the *actual person* as an arbitrator must have the consent of both the parties. It will not be enough if the parties agree only to the person or authority who will subsequently appoint an arbitrator, even if he is told to make only that one, who had some special qualifications, without of course, mentioning the *particular individual*. It may be stated that this decision was also doubted in a ruling of the Allahabad High Court in *Union of India and others v. Gopal Das and Co.* (3), where after quoting the Patna authority, the learned Judge observed :

"With due respect I have my doubts whether the person appointed or nominated by the General Manager as sole arbitrator can in the eyes of law, be deemed to be an arbitrator appointed by consent of the parties. What can be said is that the parties had consented that the dispute shall be decided by a person nominated or appointed by the General Manager. The Arbitrator is appointed or nominated by the General Manager without obtaining the consent of the parties though none of them can challenge the appointment of the arbitrator. \* \* \* \*"



(13) Learned counsel for the petitioner also referred to a Bench decision of this Court in *Union of India v. Messrs, New India Constructors, Delhi and others* (4). A perusal of that authority, however, shows that this precise point as to whether section 8 applies in a case of this kind or not, was not actually raised there. It appears as if it was taken for granted that section 8 was applicable.

(14) I, therefore, hold that section 8 of the Act has no application to the facts of the present case.

(15) As already mentioned above; the petition was made by the contractor both under sections 8 and 20 of the Act. Learned counsel for the petitioner concedes that if my finding be that section 8 has no application, as I have already held, then he does not press his petition under section 20 of the Act.

(16) The result is that this revision petition fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs.

K. S. K.

FULL BENCH

*Before D. K. Mahajan, Bal Raj Tuli and Pritam Singh Pattar, JJ.*

KARNAIL SINGH, ETC.,—Appellants.

*versus*

JABIR SINGH, ETC.,—Respondents.

**Regular Second Appeal No. 560 of 1961.**

March 1, 1974.

*Punjab Pre-emption Act (I of 1913 as amended by Act X of 1960)—Sections 5, 21A, and 31—Suit to pre-empt the sale of waste land—Land reclaimed after the institution of the suit—Suit decided and appeal against the decision pending—Section 5(b)—Whether applies to the case—Suit—Whether liable to fail—Applicability of section 5—Whether to be seen at the date of ultimate decision of the case.*

(4) A.I.R. 1955 Pb. 172.