In the above circumstances, I hold that the finding of the Election Tribunal to the effect that the petitioner was a tenant of the Gram Panchayat, in the absence of any evidence to show that he was liable to pay rent, is not based on any legal evidence, and, therefore, vitiates the whole of the impugned order. This writ petition is, accordingly, allowed, and the impugned order of the Election Tribunal is set aside. The Election Tribunal will now re-decide the case in accordance with law on the basis of the evidence already on record with him, keeping in view the observations made in this judgment.

In the circumstances referred to above, there would be no order as to costs.

K.S.K.

REVISIONAL CIVIL

Before A. N. Grover, J.

M/s ISHAR DAS SAHNI AND BROTHERS,—*Petitioner.*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

Civil Revision No. 535-D of 1966

September 1, 1966

Arbitration Act (X of 1940)—Ss. 8, 19 and 33—Arbitration agreement—Whether lapses because of the inactivity of the parties to get the arbitration proceedings completed—Appointed arbitrator dying or refusing to act—Agreement showing intention not to supply vacancy—Arbitration agreement—Whether can be declared to be ineffective.

Held, that mere delay in getting arbitration proceedings completed after the arbitration agreement is not sufficient to justify a finding that the arbitration agreement has ceased to be effective or has lapsed. Delay would certainly be a relevant factor and may even be an important circumstance for the purpose of arriving at that conclusion but mere inactivity or inaction of the

part of both the parties or either party will not be conclusive in showing that the arbitration agreement has come to an end.

Held, that where the appointed arbitrator either dies or refuses to act and the vacancy cannot be supplied under section 8(1)(b) of the Indian Arbitration Act, because the agreement shows that the parties did not intend to supply the vacancy, the Court will be justified in declaring that the arbitration agreement has been rendered ineffective and cannot be held to be binding any longer on the parties.

Petition for revision under section 115 *of the Code of Civil Procedure and Article 227 of the Constitution of India of the order of Shri H. C. Gupta, Sub-Judge, 1st Class, Delhi, dated 19th April, 1966, holding that the arbitration agreement between the parties has ceased to have effect and the reference of the arbitration agreement lapse and the same is revoked and vacating the interim injunction issued on 26th May, 1955, and allowing the parties to resort to the Civil Court for settlement of their dispute.*

F. C. Bedi, Advocate, for the Petitioner.

Parkash Narain, Additional Central Government Counsel, for the Respondents.

JUDGMENT

Grover, J.—This is a petition for revision which is directed against an order of Shri H. C. Gupta, Subordinate Judge, 1st Class, Delhi, by which he has held that the arbitration agreement entered into between the Union of India and the petitioner firm on 1st September, 1947, has come to an end and has been rendered ineffective. He has further revoked the reference of the arbitration agreement. The facts lie within a narrow compass. By an agreement dated 1st September, 1947, the petitioner firm was granted a licence for running a cinema in the Indian Air Force Campus (I.A.F. Station, New Delhi). The agreement was to remain in force for a period of five years. It contained an arbitration clause in the following terms:—

> "In case of disputes arising between the first party and the second party (the settlement of which has not hereinbefore been specifically provided for) the matter shall be referred to the Air Marshal Commanding and such arbitration shall be governed by the Indian Arbitration Act for the time being in force."

After the expiry of five years the Union served a notice on the petitioner under the Government Premises Eviction Act, 1950, for delivery of possession of the premises to the Government. In the year 1955 the petitioner filed an application under section 20 of the Indian Arbitration Act for filing of the arbitration agreement and for referring certain disputes which had arisen to the Arbitrator. The disputes *inter alia* were that the petitioner was not liable to be evicted from the premises in its occupation and that in any case it was entitled to receive compensation for several improvements, fittings and fixtures made and installed by it before it could be asked to vacate the premises. The petitioner also sought an interim injunction restraining the Government from evicting it from the premises during the pendency of the reference. On 26th May, 1955, Shri Asa Singh Gill, Subordinate Judge, 1st Class, made an order restraining the Government from evicting the petitioner till an award was made by the Arbitrator. The Government appealed from the order granting interim injunction but it was dismissed by the High Court.

In terms of the arbitration agreement a reference was made to Air Marshal S. Mukerji. The petitioner did not file its statement of claim before the Arbitrator till 9th January, 1959. According to the Court below, it further delayed the proceedings and the issues could not be settled till 24th October, 1959. Air Marshal Mukerji unfortunately died on 8th November, 1960. His successor Air Marshal A. M. Engineer declined to act as an Arbitrator by means of a letter, dated 2nd April, 1961. He was succeeded by the present Air Marshal Arjan Singh, who is now designated as Chief of the Air Staff. He was requested in December, 1964, to act as an Arbitrator but he refused to do so.

On 2nd April, 1965, the Union of India filed an application under sections 5, 31(2), 33 and 41, read with Schedule II, of the Indian Arbitration Act and Order XXXIX, rule 4 and section 151, Civil Procedure Code, praying that in the circumstances most of which have been mentioned above the arbitration agreement be declared as having ceased to have effect and that the agreement and the reference be revoked. A prayer was also made for the interim injunction to be vacated. This application was resisted by the petitioner. It was maintained on behalf of the petitioner that the arbitration agreement was still subsisting and that there was no intention in the agreement not to supply the vacancy on the death

of the Arbitrator or on his refusing to act. The following three issues were framed:—

(1) Whether M/s A. M. Engineer and Air Marshal Arjan Singh refused to act as arbitrator, if so, to what effect?

(2) If issue No. 1 is proved, whether the reference to arbitrator does not subsist?

(3) Relief.

On the first issue it was held by the Court below that both Air Marshal A.M. Engineer and Air Marshal Arjan Singh had refused to act as Arbitrator in the dispute between the parties. The decision on the second issue was that there was no intention to fill up the vacancy and that the arbitration agreement had come to an end between the parties. The relief which was granted has already been mentioned before.

Mr. F. C. Bedi, learned counsel for the petitioner, has not contested the finding of the lower Court on issue No. 1. His main submission has centred on the following question:—

(1) Whether in the present case the provisions of section 8(1)(b) of the Arbitration Act were not applicable and the vacancy could not be supplied in accordance with the procedure laid down in section 8?

(2) Whether it was open to the Court to revoke not only the reference but also to declare that the arbitration agreement has come to an end and has ceased to have effect?

Now, section 8(1) relates to the power of the Court to appoint arbitrator or umpire and clause (b) of sub-section (1) provides that if any appointed arbitrator 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 supplied, and the parties do not supply the vacancy, any party may serve the other parties with a written notice to concur in the supplying of the vacancy. Sub-section (2) confers powers on the Court if the appointment is not made within fifteen days after service of a notice to appoint an arbitrator or arbitrators. The controversy in the present case relates mainly to the intention as can be gathered from the arbitration agreement in the light of surrounding circumstances

with regard to the supplying of the vacancy. After the death of Air Marshal Mukerji and the refusal on the part of his successors to act as an Arbitrator, the vacancy can be supplied by the Court only if the arbitration agreement does not show that it was intended that the vacancy should not be supplied. According to Mr. Bedi, there is nothing in the agreement from which any such intention can be spelt out; whereas Mr. Parkash Narain, for the Union maintains that the stipulation that the matter shall be referred to the Air Marshal Commanding rules out any such suggestion that the parties ever intended anyone else to act as an Arbitrator. Mr. Bedi has laid emphasis on the surrounding circumstances also and has pointed out that the disputes which had arisen between the parties related to the compensation payable for fixtures, fittings and improvements which did not require any expert knowledge on the part of the Arbitrator so as to lead to the inference that it was the Air Marshal Commanding alone who owing to his technical and expert knowledge was intended to act as an Arbitrator. In *Bharat Construction Co. Ltd.* v. *Union of India* (1) according to the arbitration clause the disputes were to be referred to the sole arbitration of "Major General I/C, Administration, Eastern Command" whose decision was to be final, conclusive and binding on all parties to the contract. Chakravarti, C.J., who delivered the judgment of the Bench, expressed the view that there was no indication of any intention that a vacancy arising in the office of the Arbitrator should be supplied by the appointment of another person. This is what he said—

> "It should be remembered, however, that under the provisions of the agreement, no vacancy would arise, simply because the particular Major General who was holding the office at the time of the contract ceased to hold that office if he was succeeded by a successor who was also a Major General. So long as the Major General was succeeded by a Major General in the particular office and so long as the course of such succession was not broken by the introduction of an Officer holding a different rank, no vacancy in the office of the arbitrator would arise at all. A vacancy would arise only when the Officer in charge of the Administration, Eastern Command, was no longer a person, holding the rank of a Major General."

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

In *Chief Engineer, Buildings and Roads* v. *Harbans Singh* (2) the actual words in the arbitration clause were; "Chief Engineer shall be the sole arbitrator and judge in case of dispute". Wanchoo, C.J. (as he then was), delivering the judgment of the Bench expressed the view that since the Chief Engineer was not only the sole Arbitrator but was also the sole Judge the intention was that he should be the only Arbitrator and that no other person should act as such. This case is certainly distinguishable from the present case as there are no such words appearing in the arbitration clause that the Air Marshal Commanding was to be the sole Arbitrator and Judge in the case of dispute, but the Calcutta case does lend support to the view which has been taken by the Court below that there was no intention in the present case to supply the vacancy. Mr. Bedi has relied a great deal on the decision of P. C. Malick, J., in *Gannon Dunkerley and Co.* v. *Union Carbide (India), Ltd* (3) in which it was held that where under an arbitration clause in a building contract the Chief Engineer, Central P.W.D., or his nominee was to be appointed as Arbitrator and his award was to be final and binding, there was nothing in the arbitration clause to suggest that the parties agreed that any vacancy in the office of the Arbitrator should not be filled up and that even if the Chief Engineer or his nominee be unable to act it was intended that there should be no adjustment of disputes by any other competent Arbitrator. Unfortunately the learned Calcutta Judge does not discuss or advert to the Bench decision in A.I.R. 1954 Cal. 606. He has, however, relied on the observations of Das, J. (as he then was), in *Governor General in Council* v. *Associated Livestock Farm (India) Ltd.* (4) in which the agreement provided that the dispute shall be referred to the arbitration of the Officer sanctioning the contract. It was a war contract and after the termination of the war when the dispute arose, the office was abolished. It was contended that the office having been abolished no other Arbitrator could be appointed. It was contended on behalf of the opposite party that the incumbent of the office was liable to be transferred in the existing war conditions and the parties should be presumed to have knowledge of that fact and, therefore, they could not have intended that nobody else could arbitrate. This contention found favour with the learned

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

(3) A.I.R. 1962 Cal. 360.

(4) A.I.R. 1948 Cal. 230.

Judge. Mr. Bedi has naturally pressed in support the decision of the learned Judge in the aforesaid case.

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 relevant law come 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.

As regards the second question, the Court below has relied to a large extent on the dilatory tactics followed by the petitioner which made it difficult for Air Marshal Mukerji to conclude the proceedings before his unexpected death as also to complete inaction on the part of the petitioner thereafter. Mr. Bedi has sought to argue that the petitioner was not to blame for the delay. At any rate, the fact remains that although nearly ten years have passed nothing tangible or substantial has been done in the matter of disposal of the disputes by arbitration in the present case and the question is whether in these circumstances the Court below was justified in treating the agreement as having lapsed or become ineffective. Mr. Bedi points out that it is only under section 19 of the Arbitration Act that the Court is competent to supersede the reference and order that the arbitration agreement shall cease to have effect and that it is not the case of either side that section 19 is applicable. That section provides that where an award has become void under sub-section (3) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. There is no other provision in the Act which empowers the Court to exercise powers similar to those conferred by section 19. It may be that under section 33 of the Act a Court can decide the validity of an arbitration agreement or can even determine the effect of certain events which may indicate that the arbitration agreement has lapsed but that will depend on the facts of each case and as at present advised I am of the opinion that mere delay would not be sufficient to justify a finding that the arbitration agreement has ceased to be effective or has lapsed. Delay would certainly be a relevant factor and may even be an important circumstance for the purpose of arriving at that conclusion but mere inactivity or inaction on the part of both the

parties or either party will not be conclusive in showing that the arbitration agreement has come to an end. The difficulty, however, remains as to what is the course to be followed in cases of the present type where the appointed Arbitrator either dies or refuses to act and where the vacancy cannot be supplied under section 8(1)(b) of the Act. Would the Court in this situation be justified in declaring that the arbitration agreement has been rendered ineffective and cannot be held to be binding any longer on the parties? The only authority on this point which has been brought to my notice is of the Sind Court in *Hariram Khiaram* v. *Gobindram Rattan Chand* (5) of O'Sullivan and Thandani, JJ. There the arbitration agreement was executed in 1942 and one of the appointed arbitrators refused to act as far back as 1943 and no attempt had been made at any time to supply the vacancy through the assistance of the Court as provided by section 8 of the Act. It was considered that there would be no justification for permitting the defence to rectify the error of procedure and the order of the Court below staying the suits was set aside. In other words, by necessary implication the reference was treated as having lapsed leaving the parties free to resort to the Civil Court for settlement of their disputes. On a parity of reasoning it would be legitimate to say in the present case that no further effect can be given to the arbitration agreement and that to all intents and purposes it should be treated as if it has become altogether ineffective. In is quite obvious that if no Arbitrator can now be appointed, the agreement cannot be held to be still alive; on the other hand even if it be assumed that an Arbitrator could be appointed and the vacancy could be supplied the reasoning given in the Sind judgment would apply and the result would be the same as has been arrived at by the Court below.

For the reasons given above, this petition is dismissed, but in the circumstances I leave the parties to bear their own costs.

K.S.K.

APPELLATE CIVIL

Before Prem Chand Pandit, J.

MST. SHUGNI,—*Appellant*

versus

BALDEV SINGH,—*Respondent*

Regular Second Appeal No. 1045 of 1958

September 2, 1966

Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952 (VIII of 1953)—S. 3—Punjab Tenancy Act (XVI of 1887)—S. 9—Occupancy

(5) A.I.R. 1949 Sind 24.