application, retransfer the site to the outgoing transferee, on payment of an amount equal to 12 per cent of the premium originally payable for such property or one-third of the difference between the price originally paid and its value at the time when the application for transfer is made, whichever is more.

xx xx xx xx xx

xx xx xx xx xx"

(24) A perusal of the above provision would show that it is only when a property has been resumed that the landlord has to seek retransfer in accordance with this provision. In the present case we have already found that the order of resumption was not valid. Thus, there is no occasion for the landlords to seek retransfer. The provisions of Rule 11-D would not be attracted to the present case.

(25) No other point has been raised.

(26) In view of the above, we allow the writ petition and set aside the impugned orders of resumption and eviction passed against the respondent-landlords as well as the tenant M/s Naresh Departmental Store. So far as the petition filed by Bishambar Dass is concerned, we are constrained to dismiss it in default as no one has put in appearance to argue the case. In the circumstances of the case, we make no order as to costs.

R.N.R.

Before A.B. Saharya, C.J. & Swatanter Kumar, J

UNION OF INDIA,—*Petitioner*

versus

M/S HARBANS SINGH TULI AND SONS,—*Respondent*

C.R. No. 1685 of 1994

31st January, 2000

Arbitration Act, 1940—Ss. 2(C), 4, 5, 8, 11, 12, 14, 20, 28 and 31—Contract agreement between the UOI and a Contractor—Dispute between the parties—Arbitrators appointed by the designated authority either resigned or failed to act—Claim of the contractor could not be adjudicated—Despite notice, Government failed to appoint an Arbitrator—Trial Court appointing an arbitrator and subsequently ordering appointment of another arbitrator by removing the previous

arbitrator—UOI challenging the order of appointment—Orders of Trial Court attained finality—Jurisdiction of the trial Court to appoint an Arbitrator under Section 8 of the Act—Scope of, stated—Having accepted the initial appointment by the trial Court, UOI would be estopped to challenge the subsequent appointments by the trial Court on account of maintainability—Locus standi—UOI failing to raise an objection with regard to the locus standi of the Company after the death of its sole proprietor—Having specifically accepted the stand of the Company and itself impleading the Company as the sole respondent, UOI cannot raise objection with regard to the locus standi of the Company after the lapse of more than 17 years—Control over the arbitration proceedings—Whether by the trial Court or by the High Court—Trial Court being the competent jurisdiction appointing Arbitrators and exercising effective & complete control over the proceedings—High Court in exercise of its revisional powers only affirming the orders passed by the trial Court—Trial Court being the Court of lowest grade is the competent Court to entertain and decide the petition under Sections 5 & 11 of the Act.

Held that the arbitrator was appointed by the authority designated on three different occasions without intervention of the Court and on consent of the parties under the machinery prescribed under Clause 70 of the agreement. Subsequently, arbitrators were appointed by the Court, which parties accepted voluntarily or such orders attained finality in law or otherwise. There was an agreement between the parties to refer the dispute to the arbitration. There was an appointed arbitrator. The arbitrators had neglected or refused or had become incapable because of their resignation or otherwise. The agreement does not show that the parties did not intend to supply the vacancy and the vacancy was infact not supplied after notice. Conditions being satisfied in the present case we are unable to understand the basis for objection of the Union of India in regard to the maintainability of the application for appointment of an independent Arbitrator by the Court. The present case is not one of initial appointment but successive arbitrators being appointed by the Court itself. Non-compliance of the provisions of the notice would certainly have the effect of designated authority abdicating its right and lifting the bar, if any, in exercise of the jurisdiction by the Competent Court. It is also obvious that various arbitrators appointed earlier had even refused to act as resignation by an arbitrator would be manifestation of its intention not to proceed with the matter any further. Where the Court is satisfied of these ingredients, there would be no bar for the Court to supply such a vacancy.

(Para 35)

Further held, that the conduct of the parties in arbitration proceedings is a very material consideration to be looked into by the Court. Successive arbitrators having been appointed by the Court which the parties accepted voluntarily or the said orders attained finality long ago, coupled with the participation of the parties before the arbitrator, would operate as a complete waiver in relation to the plea on maintainability of the application or otherwise of the appointment of such arbitrators by the Court.

(Para 43)

Further held, that we are unable to see any error of jurisdiction in the order of the learned trial Court in appointing Mr. Gupta as an arbitrator, The grounds stipulated under Section 11 of the Act were specifically pleaded for removal of the arbitrator as he failed to use all resaonable despatch in entering on and proceeding with the reference and making an award. The arbitrators are not so powerless under the enactment that any of the party to the dispute could frustrate the very purpose of reference and its determination by the arbitrator. We have no hestitation in coming to the conclusion that in the alternative the application could be treated as an application Under Section 11 of the Act and consequential order of appointment of an arbitrator of the Court was passed within the four corners of law and its jurisdiction provided under Section 12 of the Act. Hence, application under Section 8 of the Act was maintainable, the Union of India by its conduct or otherwise waived the objection on its maintainability and appointment, if any, and, in any event the application could well be treated as an application under Section 11 of the Act.

(Para 50 & 51)

Further Held, that after the death of Mr. Tuli in June, 1982, various proceedings have taken place where the Union of India itself has accepted the locus standi of the Company and itself impleaded the Company as the sole respondent in the proceedings. The Union of India having failed to raise an objection with regard to the locus standi of the Company and on the other hand having specifically accepted the stand of the Company for all this period, it will be unfair even for the Court to unsettle things so that they revert to 30 years back on this approach.

(Paras 53 & 56)

Further held, that normally all proceedings will have to be taken in the Court which initially appointed the Arbitrator or dealt with the subject matter of reference at the initial stage. Subsequent applications in relation to extension of time as well as for filing of award and control

over the arbitration proceedings should be filed and maintained with the Court before whom initially the proceedings were commenced in relation to the arbitration agreement and the subject matter of the reference. The Court competent to entertain subject matter of a reference would be the Court as defined under Section 2(c) a Civil Court having jurisdiction over the subject matter of reference if the same had been the subject matter of the suit. In other words, under sub-section (4) of Section 31 'Court' would be the Civil Court having jurisdiction and competent to try a suit of the nature of the subject matter of a reference in the arbitration proceedings under the Act.

(Para 61)

Further held, that at no point of time the High Court in exercise of its revisional powers had ever appointed any arbitrator or had given effective direction of material consequence in relation to the progress in furtherance of the arbitration proceedings. On the contrary, the High Court from time to time had only affirmed the order passed by the learned trial Court and the record clearly shows that the trial Court had exercised effective and complete control over the proceedings.

(Para 86)

Further held, that the trial Court being the Court of competent jurisdiction had appointed arbitrators. Furthermore, no prejudice would be caused to either of the parties to these proceedings if the learned Trial Court is allowed to continue to exercise the control and deal with the matters in accordance with law being the Court of original jurisdiction.

(Para 91)

Further held, that the learned trial Court being the Court of competent jurisdiction, the award ought to have been filed before the trial court, which had initially appointed Mr. Gupta as the arbitrator. The petition of Union of India under Sections 5 and 11 of the Act and its objections filed to the making of the award rule of the Court, shall be heard and decided together by the learned trial Court.

(Para 99)

Arun Nehra, Advocate with Ms. Deepali Puri, Advocate for U.O.I.

Harkrishan Singh Tuli, in person.

Civil Revision No. 1685 of 1994 Union of India v. H.S. Tuli & Sons.

Civil Revision No. 1076 of 1996, H.S. Tuli and Sons v. Union of India.

JUDGMENT

Swatanter Kumar, J.

(1) The Hon'ble Supreme Court of India,—*vide* its Order, dated 12th August, 1997, disposed of Special Leave Petitions No. 18521, 18522, 18897 and 18898, all of 1996. The Order reads as under:—

> "We have heard both the sides. We are of the view that the objections raised in this Court should be heard by the High Court itself. Having regard to the importance of the matter, we direct that the Chief Justice should himself hear the case sitting in a Division Bench. In hearing the case the *Bench* presided over by the Chief Justice *will not be bound by any previous Order passed in this case* by any other Bench of the High Court.
>
> The Special Leave Petitions are disposed of."
>
> (emphasis supplied by us)

(2) As some controversy was raised before us by the learned counsel appearing for the Union of India and the petitioner appearing in person in regard to the scope of the order of the Apex Court, dated 12th August, 1997, we consider it imperative to explain what we understand of the said order. The direction contained in the order of the Hon'ble Apex Court requires the High Court to hear the objections raised before the Supreme Court and not to be bound by any previous order passed in this case by any other Bench of the High Court. The expression "in this case" obviously means the cases/applications, before the High Court which had resulted in filing of the afore-stated Special Leave Petitions before the Supreme Court. Certainly the expression "this case" appearing in the order does not mean, the order passed by the Court of competent jurisdiction including the High Court and the Supreme Court in other connected cases, *inter se* parties which have already attained finality. There are orders of the trial Court which have been accepted and acted upon by the parties for years now and we do not think their Lordships of the Supreme Court intended to unsettle the settled or determined rights except the orders which were subject matters of above-mentioned four Special Leave Petitions before the Supreme Court. At best, this Bench is not to be influenced by the orders passed by the High Court or the Subordinate Courts at different stages or final stage of the cases which gave rise to the said four special leave petitions. Thus, we are not in a position to accept the contention of the learned counsel for Union of India that all orders passed by any Court including the Supreme Court in the earlier proceedings between the parties are to be over-looked.

(3) In order to clarify the matter, at the very outset, we would refer to the cases and applications which had given rise to the aforestated 4 Special Leave Petitions before the Supreme Court.

(4) (a) Civil Revision No. 1685 of 1994 had been preferred by Union of India against the order, dated 4th July, 1995 passed by the learned trial Court appointing Shri Gupta as sole arbitrator. This revision was dismissed by a learned Single Judge of this Court on 4th July, 1995.

(5) A review petition was filed by the Union of India for recalling and reviewing the order dated 4th July, 1995. This was also dismissed by the same Hon'ble Judge,—*vide* order, dated 7th September, 1995. These two orders were challenged by Union of India before the Hon'ble Supreme Court of India in Special Leave Petitions No. 18521 and 18522 of 1996 respectively.

(6) (b) In the said Civil Revision No. 1685 of 1994, two applications were filed by M/s Harbans Singh Tuli and sons being Civil Misc. No. 13460-C-II of 1995 and Civil Misc. No. 7375-C/II of 1996. These applications were filed for extension of time before the Arbitrator Mr. Gupta. Both these applications were allowed by the High Court,—*vide* its orders, dated 14th March, 1996, and 16th July, 1996 respectively. Both these orders were challenged by the Union of India in Special Leave Petitions No. 18897 and 18898 of 1996.

(7) This is how all the four Special Leave Petitions were disposed of by a common order, dated 12th August, 1997.

(8) Before we proceed to discuss the rival contentions raised by learned counsel for the parties appearing before us, reference to some basic facts would be necessary.

(9) The parties had entered into an agreement and as per the agreement, terms and conditions of the tender were to be treated as integral part of the agreement. The agreement was executed between the parties on 19th April, 1969. The work under the contract was to be completed by 2nd August, 1970. However, time for completion thereof was extended. The Chief Engineer acting on behalf of the Union of India, cancelled the contract on 8th August, 1973. Disputes has arisen between the parties. The contractor had filed an application under Section 20 of the Arbitration Act on 26th September, 1973. The designated authority in terms of Clause 70 of the contract appointed Col. Gurdial Singh as arbitrator on 24th December, 1973. The application of the contractor was, thus, dismissed by the learned trial Court on 15th January, 1974 as it had become infructuous. The

contractor still preferred an appeal against that order which was dismissed by the High Court.

(10) One after the other arbitrators were appointed by the designated authority and 5th arbitrator was appointed by the authority on 8th May, 1984 before whom some proceedings progressed, but nothing effective could be done as the sole proprietor of the contractor firm Shri Harbans Singh Tuli died on 16th June, 1982, leaving behind six legal representatives including Shri Harkishan Singh Tuli the Managing Director of the claimant company. On 8th March, 1988 Shri P.D. Gujrati resigned. On 24th March, 1988 Mr. Tuli served notice on behalf of the claimant company for appointment of an arbitrator. The claimant company filed two applications one on 27th February, 1989 and the other on 17th October, 1989. Order passed by the learned trial Court on both these applications attained finality. The appointment of Brig. Parihar was not challenged at all by the Union of India before the higher Court while appointment of Mr. Wadhwa was challenged before the High Court.

(11) The order of the trial Court was upheld by the High Court in terms of the orders passed by the High Court in Civil Revision No. 1220 of 1991,—*vide* its order, dated 9th July, 1993. The order in Civil Revision No. 1220 of 1991 was challenged before the Supreme Court and the Special Leave to Appeal No. 1139 of 1994 was dismissed by the Hon'ble Supreme Court on 14th July, 1994. We would shortly discuss the effect of this application and the orders passed there-upon in great detail hereinafter while discussing the question of Court of competent jurisdiction.

(12) It was the third application, dated 26th October, 1993, filed by the claimant company which was allowed by the learned trial Court and Shri O.P. Gupta was appointed as an arbitrator vide order, dated 5th April, 1994. It is this order which has been assailed in the present revision.

(13) We must refer to the arbitration clause i.e. general condition No. 70 of the agreement, which is the very basis of the contentious pleas raised by the parties, which reads as under :—

> "70. ARBITRATION—All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. 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 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.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, fixing the date of hearing.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time, for making and publishing the award.

The Arbitrator shall give his award on all matters referred to him and shall indicate his findings, alongwith the sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

(14) The claimant company in its third application had prayed for supplying the vacancy caused by Shri B.K. Wadhwa. It was pleaded in the said application that earlier two arbitrators were appointed by the Court and the authority concerned having failed to appoint an arbitrator after service of the notice had abdicated himself of the powers to appoint the arbitrator. It is interesting to note that Union of India raised no objection to the maintainability of this application on the ground of *locus standi* and pleaded that the Engineer-in-Chief should appoint an arbitrator. The learned trial Court discussed the merits of the case at great length and held as under:—

"It is not disputed fact that as per the contract agreement, on account of any dispute between the parties, the sole Arbitrator was to be appointed by the Engineer-in-Chief, but when the respondent delayed the matter of appointment more than fifteen years, then the petitioner moved an application before this court for appointment of an independent Arbitrator and Shri A.K. Suri, Ld. Predecessor of this court appointed Sh. B.K. Wadhwa as an Arbitrator to adjudicate the dispute

between the parties,—*vide* order dated 16th February, 1991. The respondent agrieved from the order dated 16th February, 1991, filed a civil revision No. 1221 of 1991 in the Hon'ble High Court of Punjab & Haryana at Chandigarh and in the said civil revision, Hon'ble Mr. Justice V.K. Bali of the Punjab & Haryana High Court,—*vide* his order dated 13th October, 1992 confirmed the order passed by this court dated 16th February, 1991. The operative part of the order of Hon'ble High Court is as under :—

"It has been proved on record of the case that the Arbitrator appointed by the Union of India from time to time did not give any award and in the process, fifteen years had gone by. During the pendency of the application filed by the respondent below, however, Arbitrator was appointed by the Union of India, but in the facts and circumstances of the case, the court below rightly appointed the Arbitrator Shri B.K. Wadhwa."

"Admittedly, Shri B.K. Wadhwa has resigned. So, in these circumstances, this Court finds no merits in the objection raised by respondent that the sole Arbitrator is to be appointed by Engineer-in-Chief as envisaged in the contract agreement. This question has already been decided by this Court,—*vide* order dated 16th February 1991 and the order has been upheld by the Hon'ble High Court,—*vide* order dated 13th October, 1992 and in case this court again put the clock back to decide this question once again, it will cause great prejudice to the petitioner whose claim has not been adjudicated by the various Arbitrators despite availing more than fifteen years time. During the course of arguments, petitioner filed a panel of Arbitrator. One Sh. B.S. Cheema, S.E., Punjab Mandi Board, second Sh. Puranjit Singh, Chief Engineer, Chandigarh Housing Board, Sector 9, Chandigarh and Mr. O.P. Gupta, Chief Engineer, MITC, Haryana, Chandigarh, and the respondent in their reply also mentioned three names for the appointment of Arbitrator but the same cannot be considered as being subordinate to the respondent. They have not supplied any panel of independent Arbitrator. Therefore, Sh. O.P. Gupta, Chief Engineer, M.I.T.C., Haryana, Chandigarh is appointed as Arbitrator in regard to adjudicate the dispute between the parties with reference to contract agreement No. CENWZ/AMB-24/1969-70 within the period of four months from the date he enters upon the reference. No order as to costs. File be consigned to record room."

(15) To examine the validity of this order and merits of the respective contentions raised on behalf of the parties, the following questions would fall for consideration of the Court:--

(i) Whether application under Section 8 of the Act, for appointment of arbitrator in face of Clause 70 of the Agreement read with Section 4 of the Act, which postulates appointment of the arbitrator by a designated person, is maintainable ?

(ii) Whether Union of India is estopped from and/or it had waived its right for taking objection to the maintainability of the application by its conduct or otherwise ?

(iii) In the alternative, whether appointment(s) made by the Court, in the facts and circumstances of the case, can be termed as appointment(s) within the purview of Sections 11 and 12 of the Act ?

(16) The learned counsel for the Union of India while relying upon the judgments of the Hon'ble Supreme Court as well as this Court and other High Courts, vehemently argued that the third application dated 26th October, 1993 filed on behalf of the claimant company for supplying the vacancy caused by Shri B.K. Wadhwa and for appointment of an arbitrator under Section 8 was not maintainable. It was contended that the jurisdiction to appoint an arbitrator vested in the designated authority alone within the purview of Section 4 of the Act. Thus, in the facts and circumstances of the case, the Court has acted without jurisdiction in appointing Shri O.P. Gupta as an arbitrator. Mr. Tuli contends that the trial Court has exercised its jurisdiction in consonance with the settled principles of law and the designated authority had lost its right to appoint an arbitrator, if any by its own conduct and otherwise. For this purpose, he also placed reliance upon various judgments passed by the Hon'ble Supreme Court of India. We shall shortly proceed to discuss the various judgments cited by the respective parties before us.

(17) The undisputed fact that emerges from the record is that two arbitrators had been appointed by the Court on two different applications prior to the appointment of Shri O.P. Gupta, while under the first application the Court was requested to appoint an arbitrator in place of Shri P.D. Gujrati who had resigned and despite notice dated 24th March, 1988 the Engineer-in-Chief had failed to supply the vacancy. This application was allowed. The subsequent application was filed praying for removal of Brig. M.M.S. Parihar who had neglected

to adjudicate the claims and for appointment of arbitrator. This application was also allowed by the learned trial Court and as already noticed these orders had attained finality and the parties acted upon these orders, participated in the arbitration proceedings without any objection and protest.

(18) Once the Court had appointed Brig. Parihar as arbitrator after the designated authority had failed to discharge its obligations and after the subsequent application for his removal was filed and rejected, there could hardly be any bar for the Court to exercise jurisdication within the purview and scope of Section 8 of the Act. Such a plea may be available to the Union of India at the initial stage of appointment, but thereafter, exercise of the powers under Section 8 of the Arbitration Act, upon its ingredients being satisfied by the applicant, there could be no justification to read the said provisions so as to exclude the jurisdication of the Court to appoint an arbitrator despite Clause 70 of the agreement.

(19) The learned counsel for the Union of India had placed heavy reliance upon *Union of India, v. M/s Ajit Mehta and Associates, Pune and others* (1) and *Brij Bhushan Lal v. Chief Engineer, North Western Zone (Central Govt.) and another* (2) while, on the other hand, the claimant company relied upon *Union of India v. D.P. Singh* (3). In Ajit Mehta's case the Bombay High Court had relied upon the judgment of the Punjab & Haryana High Court and Brij Bhushan's case. However, the Hon'ble Supreme Court of India in the case of Nandyal Co-op. 1993(2) S.C.C. 654 did not accept the view of Bombay High Court and distinguished the same in regard to application of provisions of Section 8 of the Act. Further more, the Bombay High Court, in any case, is not of much help to the Union of India as that was a case of initial appointment as is clear from facts narrated by the Court in paragraph No. 19 of the judgment. The judgment of Patna High Court in the case of D.P. Singh has bearing on the facts of the present case. We do not propose to discuss the judgments of the High Courts relied upon by the parties any further or in great detail, primarily for the reason that the controversy in issue is fairly settled by the various judgments of the Hon'ble Apex Court, which we are bound to follow more particularly keeping in view the facts of the present case.

(20) Further, reliance has been placed by the Union of India on the case of *M/s Harbans Singh Tuli and Sons Builders Pvt. Ltd. v.*

(1) A.I.R. 1990 Bombay 45.
(2) A.I.R. 1972 P. & H. 266.
(3) A.I.R. 1961 Patna 228.

Union of India (4), where the Court held as under :—

> "Section 8 provides a simple machinery for appointment of an arbitrator, initially or for supplying the vacancy if the said vacancy occurs during the period of arbitration. Sub-sec. (1)(a) would apply to a case of initial appointment of an arbitrator or arbitrators. The implication is in the arbitration agreement, the arbitrator or arbitrators must not have been named. Where, therefore, they are named, this section will have no application. Similarly, the arbitrator or arbitrators are required to be appointed by all parties to the reference with consent. On the contrary, if there is some other mode of appointment, for example, S. 4, where the parties to the agreement agree that the arbitrator has to be appointed by a person designated in the agreement either by name of hold, for the time being in office, certainly, this section will not apply. In the instant case the clause in the contract provided that the arbitrator is to be appointed by the Engineer-in-Chief. If that arbitrator resigns or vacates his office or is unable or unwilling for some reason or other, then he may appoint another arbitrator. Under the said clause the successive arbitrators had been appointed even the vacancy was actually supplied by the Engineer-in-Chief. therefore, in the circumstances, it cannot be said that the conditions under S. 8(1)(b) were satisfied, consequently the appointment of the arbitrator by the Court, would be illegal and the award passed by him without considering the matter in its proper perspective through a process of reasoning would be liable to be set aside."

(21) The important observations of the Hon'ble Apex Court on the facts of that case are that sub-section 1(a) of section 8 would apply to initial appointment of arbitrator and their Lordships found that conditions precedent to application of section 8(1)(b) of the Act were not satisfied in that case. Their Lordships also observed in para no. 23 of the judgment that the respondent would forfeit the right to appoint an arbitrator on the expiry of 15 days of the notice, but such a situation had not arisen in that case. These are some of the distinguishing features in addition to other important decisions of the Supreme Court directly applying to the present case which we shall shortly discuss.

(22) The other case relied upon by the learned counsel for Union of India is of *Shri Bhupinder Singh Bindra* Versus *Union of India and*

(4) A.I.R. 1992 S.C. 1124.

another (5) with emphasis on the following observations of the Court:—

> "It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent . There is no general power for the court to appoint an arbitrator unless the case falls within the relevant provisions of the Act nor will the court make an appointment where the arbitration agreement provides a method by which appointment is to be made."

(23) The Court in this case held that where a nominated arbitrator was provided under the terms of the agreement and there is no just and sufficient cause for revocation of the arbitrator's authority, the Court is not entitled to interpose and interdict the appointment of such arbitrator. The underlying principle in this judgment is that the parties having consented to terms of such agreement and they participated before the arbitrator and there being no misconduct on the part of the arbitrator, Court may not be justified in appointing the arbitrator. We would also discuss the application of these principles to the facts of the present case and after having discussed other judgments pronounced by the Hon'ble Apex Court.

(24) The provisions like Sections 5, 8, 11, 12, 20 and 31 of the Arbitration Act have been subjected to various interpretations over the long span of time, but the absolute exclusion of the jurisdiction of the competent Court within the meaning and purview of section 31 of the Act has not so far been countenanced by the Hon'ble Apex Court. Once the ingredients and conditions precedent to the application of any of the particular provisions afore-noticed are satisfied, the Court has jurisdiction to pass appropriate orders including that of appointment of an arbitrator. It will neither be advisable nor proper for the Court to provide a straight-jacket formula for such proposition of law as each case has to be decided and determined on its own merits. The facts and circumstances of the present case are in a way complex resulting from the lapse of time, but as it evident from the afore-noted circumstances the Courts upon fulfilment of the ingredients under a particular provision had exercised jurisdiction to appoint an arbitrator and such orders were accepted by the parties and attained finality as back as in the year 1989 and 1993.

(25) Now we shall proceed to discuss the enunciation of legal principles in regard to maintainability of an application under section 8 of the Act and its application in relation to the scope of jurisdiction exercisable by a Court otherwise competent to entertain petitions under the Act.

(5) J.T. 1995(6) S.C. 612.

(26) In the case of *M/s Prabhat General Agencies etc.* versus *Union of India and another* (6), the Supreme Court was concerned with the arbitration clause relating to a named arbitrator. The judicial Commissioner, Himachal Pradesh was the named arbitrator, whose decision was accepted to be final and binding upon the parties. The Judicial Commissioner declined to act as arbitrator and in that context the Court considered the scope of sections 8(1)(b) and 20 of the Act on the basic principle whether the parties intended to supply the vacancy or not. The Court held as under :—

> "Section 20 is merely a machinery provision. The substantive rights of the parties are found in section 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) 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 noticed 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 did not intend to supply the vacancy'. In other words, if that 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 section 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."

(6) A.I.R. 1971 S.C. 2298.

The Supreme Court while allowing the appeals infact directed the learned trial Court in that case to appoint an arbitrator.

(27) In the case of *Chander Bhan Harbhajan Lal* versus *The State of Punjab* (7) again the Court was concerned with an arbitration clause which required the Government to nominate the Committee for settlement of disputes whose decision was to be final. The Government appointed a Committee but before its conclusion the Committee was abolished. The Second Committee entered upon the reference and passed the award. The award was set aside by the Civil Court. The Government gave notice to the appellant to concure on the appointment of a fresh arbitrator which was not replied to and the Court appointed fresh Committee. The Court held as under :—

> "We are equally clear that under section 8 the Court is entitled to act and appoint a committee. As already found by us when the second Settlement Committee ceased to function the Committee became "incapable of acting" and therefore it was within the competency of the court to proceed to appoint a new committee. Equally untenable is the contention that section 8 is not applicable to cases where the condition stipulates the appointment of a Settlement Committee by one of the parties. This submission was made relying on the wording of the section that 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. This part of the section no doubt contemplates two parties but the section cannot be read as not being applicable where the agreement provides for the nomination of the committee by one of the parties for the section itself says that the party may serve the other parties. "May serve the other parties" will include not serving other parties in cases in which the service on the other party is not contemplated."

(28) In the case of *Union of India* versus *M/s R.B. Ch. Raghunath Singh & Co.*(8), the Hon'ble Supreme Court though again dealing with the arbitration clause containing the name of an arbitrator even in the event of abolition of the post named to act as arbitrator, highlighted the principle of intent of parties in the agreement that vacancy was not intended to be supplied being one of the basic considerations to be

(7) A.I.R. 1971 S.C. 1210.
(8) (1979) 4 S.C.C. 21.

considered for application under Section 8(1)(b) of the Act, held as under :—

> "The Chief Commissioner, however, was available but he refused to act. That led the respondent company to apply to the court under Section 8 of the Act for appointment of another arbitrator. The argument put forward on behalf of the appellant is that when there was a named arbitrator even though he was named by office, it was not open to the court to supply the vacancy in his place under Section 8(1)(b) of the Act. We do not find any substance in this argument. The court had no power to supply the vacancy under Section 8(1)(b) only if the arbitration agreement did show that the parties did not intend to supply the vacancy. If no such intention could be culled out from the arbitration clause, the court could supply the vacancy. There is a direct decision of this Court in M/s Prabhat General Agencies v. Union of India."
>
> In our opinion while considering the provisions of Section 8(1)(b) of the Act. that decision is of no help to the appellant. The Full Bench decision was given with reference to the corresponding provisions of law contained in Schedule II of Code of Civil Procedure, 1908 in paragraph 5 whereof the crucial words occurring in Section 8(1)(b) of the Act were not there. The words in Section 8(1)(b) are these : "and arbitration agreement does not show that it was intended that the vacancy should not be supplied."

(29) In more recent judgment the Apex Court appears to have expended the scope of jurisdiction exercisable by the trial Courts and maintainability of an application under the provisions of Section 8(1)(b) of the Act. In the case of *State of West Bengal* versus *National Builders* (9), where the Court was concerned with the arbitration clause where the dispute between the parties was to be referred to Chief Engineer or to an arbitrator appointed by the Chief Engineer, it was held as under :—

> "It, therefore, follows that in a case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act then the agreement clause stands exhausted. And it is for the court to intervene and appoint another arbitrator under Section 8(1)(b), 'if arbitration agreement does not show that it was intended that the vacancy should not be supplied'. That is, the agreement should not debar any further

(9) 1994(1) S.C.C. 235.

arbitration. If it is provided in the agreement that if the arbitrator appointed in accordance with the agreement refuses to act then the dispute shall be resolved by another arbitrator, there is an end of the matter. But if the agreement does not show this then the next arbitrator can be appointed by the court only. The expression used in the sub-section is clear indication that the court is precluded from exercising its power only if the parties, intended that the vacancy should not be filled. In other words the court shall exercise jurisdiction to appoint another arbitrator except where it is specifically debarred from doing so. The word 'show' used in the clause appears to be significant. It in fact furnishes the key to the construction of the expression. Mere neglect or refusal to act alone is not sufficient to empower the court to intervene. The agreement must not further show that the parties intended that the vacancy shall not be supplied. To put it affirmatively in absence of clear words or explicit language to the contrary the court may appoint another arbitrator. The true effect of the word is that it extends jurisdiction of the court to exercise power, if the agreement does not specifically debar it from doing so. To put it simply the court's power to interfere and appoint an arbitrator comes into operation if the arbitrator refuses to act and the agreement does not show that the parties did not intend that the vacancy shall not be supplied. In Prabhat General Agencies *vs.* Union of India it was held by this Court: (1971) 1 SCC 79 at P. 82, para 4)

> ".....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 party 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 Section 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."

"That would be contrary to the very basis of arbitration that no one can be forced to act against his free will. It would also be contrary to the agreement and if their is no agreement to appoint another person, the only remedy is to approach the court to exercise its statutory power and appoint another arbitrator. Same result follows where the arbitration clause empowers the sole arbitrator either to arbitrate himself or to nominate anyone else. It was urged that the principle of

agreement clause coming to an end cannot apply where the sole arbitrator has been given power to nominate another person. According to the learned counsel once the nominee refused to act the Chief Engineer was again empowered to nominate another person in his place. In our opinion the submission is not well founded in law. A person nominated by the sole arbitrator stands substituted in his place. He does not have any independent personality. The power and authority exercised by him is the same as the authority which nominated him. Therefore, once the nominee refuses to act it shall be deemed that the arbitrator mentioned in the arbitration clause has refused to act and, therefore, the clause would cease to operate in the same manner as the Chief Engineer himself has refused to act. The appointment of next arbitrator could, only be in accordance with Section 8(1)(b) of the Act."

(30) Following the case of *Nandyal Co-operative Spinning Mills* v. *K.V. Mohan Rao* (10) with approval in the case of *G. Ramachandra Reddy and Co.* v. *Chief Engineer, Madras Zone, Military Engineering Service* (11). The Supreme Court held that power of the Court to apoint an arbitrator was wide enough and an arbitrator could be appointed once notice of such intention was served by one party on the other.

(31) In a very recent case titled as *Mohinder Kumar Jain* v. *Beas Construction Board and another* (12), the Supreme Court was considering clause 25A of arbitration agreement in that contract. As per that clause the dispute was to be referred to the arbitrator to be appointed by the Chief Engineer/Electrical Beas Project. In other words, Chief Engineer of the project was the designated authority while XEN Electical of the project and the contractor were parties to the arbitration. The Court upholding appointment of the arbitrator by the Court held as under :—

"Learned counsel appearing for the appellant drew our attention to the decision of this Court in *Nandyal Co-op. Spinning Mills Ltd.* v. *K.V. Mohan Rao,* which has exhaustively considered an identical situation and took the view that where a contract authorises a party to appoint an Arbitrator, but no Arbitrator is appointed by that party within time stipulated in the notice served by the other party, court would get jurisdiction in terms of Section 8 of the Act.

(10) 1993 (2) S.C.C. 654.
(11) 1994 (5) S.C.C. 142.
(12) 1999 (2) Arbitration Law Reporter 566 (SC)..

Applying the aforesaid principle to the facts of the present case, we set aside the order made by the High Court and restore that of the trial Court. Now the Arbitrator appointed by the trial Court shall proceed with the matter as expeditiously as possible."

(32) Analytical examination of the aforenoticed principles of law settled by the Hon'ble Apex Court would show that even the judgments relied upon by the claimant—Union of India in the cases of.Harbans Singh Tuli and sons *(supra)* and Bhupinder Singh Bindra *(supra)* do not support the proposition of complete ouster of jurisdiction of the Court if the case was covered under any of the relevant provisions of the Arbitration Act. In Harbans Singh Tuli's case *(supra)* the Court upheld the principles of forfeiture of the right to appoint an arbitrator upon expiry of the statutory period. Further, their Lordships left the question open whether an application under Section 20 could be filed for such appointment. The application for such principles in that case related to the initial appointment of the arbitrator. While, in the case of Bhupinder Singh Bindra *(supra)* the power of the Court to appoint an arbitrator under Section 8 was upheld, of course, subject to the proviso that the "case falls within the relevant provisions of the Act."

(33) It is hardly in dispute before us that notice was duly served by the claimant company calling upon the designated authority as well as the Union of India to supply the vacancy and as well as to appoint an arbitrator. The Union of India having failed to exercise such a right even for the third time. the claimant company had filed third application before the Court praying for removal of the arbitrator Brig. Parihar as he had neglected to act and for appointment of independent arbitrator within the purview and scope of Section 8 of the Act. The Court concluded that Brig. Parihar had failed to act, and in any case, because of his resignation in the meanwhile, the Court had appointed an independent arbitrator.

(34) The Legislature in its wisdom had used the expression "if any appointed arbitrator" in Section 8(1)(b) of the Act. To give this expression a restricted meaning or limited scope cannot be justified on any accepted canons of interpretation of Statutes. Whether the arbitrator was appointed by the parties by consent or by any other mode, as referred to in Section 8(1)(b) does not admit of any such distinction. The arbitrators appointed by various modes within the purview and scope of the Act would have to be treated at par for that limited purpose. The paramount consideration for application under Section 8(1)(b) of the Act is that there is an arbitration agreement between the parties and does not show that it was intended that

vacancy should not be supplied. If the parties failed to supply the vacancy, in that event there is no principle or law completely ousting the jurisdiction of the competent Court to appoint an arbitrator under Section 8 (1)(b) of the Act. This principle is, of course, subject to the condition that application must satisfy the prerequisites of Section 8 (1)(b) of the Act. This is the cumulative effect of the principles enunciated by the Supreme Court in the case of Parbhat General Agencies; Nandyal Co-op. Shipping Mills Ltd.; National Builders; Mohinder Kumar Jain and Raghunath Singh.

(35) The condition precedent to the application of Section 8(1)(b) of the Act as enunciated by the Hon'ble Supreme Court in the case of Parbhat General Agency *(supra)* is fully satisfied in the present case. The arbitrator was appointed by the authority designated on three different occasions without intervention of the Court and on consent of the parties under the machinery prescribed under Clause 70 of the agreement. Subsequently, arbitrators were appointed by the Court, which parties accepted voluntarily or such orders attained finality in law or otherwise. There was an agreement between the parties to refer the dispute to the arbitration. There was an appointed arbitrator. The arbitrators had neglected or refused or had become incapable because of their resignation or otherwise. The agreement does not show that the parties did not intend to supply the vacancy and the vacancy was in fact not supplied after notice. Conditions being satisfied in the present case we are unable to understand the basis for objection of the Union of India in regard to the maintainability of the application for appointment of an independent Arbitrator by the Court. The present case is not one of initial appointment but successive arbitrators being appointed by the Court itself. Non-compliance of the provisions of the notice would certainly have the effect of designated authority abdicating its right and lifting the bar, if any, in exercise of the jurisdiction by the competent Court. It is also obvious that various arbitrators appointed earlier had even refused to act as resignation by an arbitrator would be manifestation of its intention not to proceed with the matter any further. Where the Court is satisfied of these ingredients, there would be no bar for the court to supply such a vacancy. In the case of National Builders *(supra)*, where there was a nominated arbitrator as well as arbitrator to be named by the designated authority, the Apex Court had held that in the event of appointed arbitrator declining or refusing to act, the power of the Court to appoint an arbitrator was upheld.

(36) Another consideration that must weigh with this Court is application of principles of *res judicata* or constructive *res judicata* in relation to the orders in challenge in the present revision. This plea is,

however not in derogation to the plea of waiver, as discussed above. The Union of India had itself conceded and permitted two orders passed by the learned trial Court dated 30th May, 1989 and 16th February, 1991 in regard to appointment of arbitrators to attain finality. In other words, the court of competent jurisdiction had passed an order after adjudicating upon the controversies raised before the Court. The material and substantial question even in the impugned order was whether the Court could appoint an arbitrator in the circumstances of the case by removing the previous arbitrator or not ? This question was squarely answered by the learned trial Court in its previous order. Every petition under the Act is registered as a suit or petition in itself but even if we presume it to be inter-locutory order for the progress of the main arbitration proceedings even then the aid of Section 141 of Civil Procedure Code, the procedure of suits is even applicable to the applications to be decided under the provisions of the Code. In other words, the principle of *res-judicata* would also apply to inter-locutory orders until and unless they were falling under the non-exceptions to the principles of *res-judicata.* In this regard, reference can be made to the Judgment of Hon'ble Supreme Court in the case titled as *Arjun Singh* versus *Mohindra Kumar and others(13)* and of this Court in the case of *Jaipal* versus *Smt. Bhagmali and others, Civil Revision No. 4717 of 1998, decided on 12th August, 1999.*

(37) In the present case the arbitration agreement i.e. clause 70 of the contract clearly postulates that parties would supply the vacancy. Thus, it is not a case where arbitration agreement between the parties intended not to supply the vacancy and prohibited continuation of further arbitration proceedings. In other words, the arbitration proceedings were not to be terminated if the vacancy was caused by any of the recognised modes by an appointed arbitrator. Section 20 is merely a machinery and the substantive rights of the parties are controlled by Section 8(1)(b) of the Act.

(38) It was contended before us that the Engineer-in-Chief was not a third party to the agreement but in fact was part and parcel of the Union of India and provisions of Section 4 of the Act would not be attracted in any case. We have noticed that the Engineer-in-Chief is head of the Chief Engineers who enter into such agreement. Though he is admittedly an appointing authority and he having failed to act, the Union of India cannot be permitted to take any undue advantage on that score. We will leave this contention at that.

(39) Arbitration clause and proceedings are primarily based upon consent of the parties. In other words mutual consent is the essence of

(13) A.I.R. 1964 S.C. 993

arbitration law. The Union of India accepted the two appointments made by the Court and participated before the said arbitrators without protest. Having concurred in the initial appointments we do not even think it to be fair on the part of the Union of India to plead objection to such appointment and maintainability of the application before the Court.

(40) Even if, for the sake of arguments, we assume that the application under Section 8 was not maintainable before the arbitrator filed by the claimants company, the Union of India itself had filed application under Section 8 in reply to the first application and the Court had appointed an arbitrator out of the panel suggested by the parties. The parties accepted that appointment and without any protest or demur participated in those proceedings in furtherance to such orders. In other words, parties consented before the Court in appointment of the arbitrators namely, Brig. Parihar and Mr. Wadwa. The parties had every opportunity to express their views and take recourse to the appropriate remedies available to them at that stage. In the first appointment no steps were taken by either party to assail the order and they both accepted the same and, thus, would be estopped to challenge the said appointment on account of maintainability. In second appointment, the order was assailed by the Union of India and lost till the Supreme Court. Even the second appointment, thus, attained finality as per law. The Court having interfered with on the merits of the case and the parties having already accepted initial appointment of arbitrator by the Court, the appointing authority having failed to act despite notice, would be deemed to have been abdicated of its right of appointment.

(41) In the case of Nandyal Coop, Spinning Mills Ltd. *(supra)* the Supreme Court was concerned with an arbitration clause where there was *no named arbitrator* but the disputes between the parties were required to be referred to the arbitration of an arbitrator to be appointed by the administrative head of owner in that case. While rejecting the argument that sole arbitrator could be appointed only in terms of the contract and Court had no power to appoint an arbitrator despite requisite notice having been served under Section 8, the Court held as under:—

> "If no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). Therefore, the

contention that since the agreement postulated preference to arbitrator appointed by the administrative head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. Under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case in hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power had been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1)(a), then the respondent has been given a right under the terms of the contract (*see* para 4) to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator."

(42) Of course, the parties would be at liberty to question appointment of an arbitrator for the bias, dishonesty or misconduct of the arbitrator but his appointment by the Court in view of the peculiar facts of this case can hardly be questioned in law as well as on the ground of maintainability.

(43) The conduct of the parties in arbitration proceedings is a very material consideration to be looked into by the Court. Successive arbitrators having been appointed by the Court which the parties accepted voluntarily or the said orders attained finality long ago, coupled with the participation of the parties before the arbitrator, would operate as a complete waiver in relation to the plea on maintainability of the application or otherwise of the appointment of such arbitrators by the Court. In the case of *Union of India and others* versus *M/s Allied Construction Company* (14) where the Hon'ble Apex Court was concerned with same Clause 70 of the contract and arbitrator had been appointed by the Court while exercising powers under Sections 8 and 20 of the Act and that order was upheld by the Court, the Supreme Court observed as under :—

"It appears from the order, dated 2nd December, 1976, of the learned Subordinate Judge, Balasore, which has been affirmed by the High Court, that Shri Banabasi Patnaik is the Superintending Engineer of the National Highway Circle, Sambalpur in Orissa and is a person whose ability and

(14) 1980 (2) S.C.C. 215

integrity are not doubted. The name was selected by the learned Subordinate Judge from a panel of names prepared by the respondent, and no objection was entered by the appellants to it. In the circumstances, we see no reason why Shri Banabasi Patnaik should not be allowed to enter upon the arbitration and make his award in each of the two cases."

(44) In the case of *M/s M.K. Shah Engineers and Contractors* versus *State of Madhya Pradesh* (15) the Supreme Court discussed at Some length the applicability of provisions of the Act to a situation like that somewhat similar to the one in the present case. Under clause 3.3.29 the decision of the Superintending Engineer on certain items was final in relation to the disputes raised by the Contractor who, upon dissatisfied with such decision, could serve a notice for appointment of arbitrator within 28 days of such decision being known to him. The State Government was required to appoint an arbitrator from the panel in terms of the agreement whose decision was to be final. In this recent judgment the Hon'ble Apex Court while considering the law at some length observed with regard to the conduct of the parties and effect of such arbitration clauses provided a particular act to be done in the specified manner, commented as under :—

"The arbitration agreements may contain a clause which requires a certain act to be completed within a specified period and which provided that if that act is not done either the claim or the ability to commence an arbitration will be barred. The plea of bar, if any, created by the earlier part of Clause 3.3.29 cannot be permitted to be set up by a party which itself has been responsible for frustrating the operation thereof. It will be travesty of justice if the appellants for the fault of the respondents are denied right to have recourse to the remedy of arbitration."

"The steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived. The party at fault cannot be permitted to set up the bar of non-performance of pre-requisite obligation so as to exclude the applicability and operation of the arbitration clause."

"The subsequent conduct of the respondents in voluntarily agreeing to the appointment of the arbitrators in both the

(15) J.T. 1999 (1) S.C. 315

cases and not pursuing their objections under section 33 of the Arbitration Act amounts to waiver on their part of the plea of non-compliance with the earlier part of clause 3.3.29, if only there was such non-compliance. The trial court and the High Court were not justified in setting aside the awards and remitting them back for decision afresh by the arbitrator on the ground of non-compliance with the earlier part of clause 3.3.29."

(45) We have already noticed that appointment of Brig. Parihar was made by the Court,— *vide* its order, dated 30th May, 1989, which was not challenged by any of the parties. The Union of India's plea that Brig. Parihar was appointed by the appointing authority on 25th May, 1989 does not inspire confidence primarily for the reason that the Union of India neither pleaded such a fact in their reply nor filed the alleged lettter dated 25th May, 1989, on record. On the contrary the Union of India itself filed an application on 30th May, 1989, under Section 8 of the Act praying before the trial Court to appoint an arbitrator out of the panel suggested in Para No. 3 of the said application. The Court,—*vide* its order, dated 29th May, 1989, accepted the application and,—*vide* order, dated 30th May, 1989, appointed Brig. M.M.S. Parihar as sole arbitrator whose name was certainly out of the panel suggested by the Union of India. Still the appointment was an appointment by a Court and not by the appointing authority. The Court having entertained the request of the Union of India upon decision of the application of the claimant company cannot turn back to say now that the appointment was not by the Court when it participated before Brig. Parihar in furtherance of the order of the Court at the time given by the Court.

(46) Still, as another alternative, it was argued before us on behalf of the claimants company that the application was filed before the learned trial Court even prior to the appointment of Mr. Gupta as arbitrator, which is impugned before us in this revision, the prayer was for revocation or removal of arbitrator and appointment of an independent person. In this regard the Court after accepting the application had appointed Mr. Wadhwa as arbitrator, The application did satisfy the basic ingredients of Section 11 of the Act and power to appoint an arbitrator would come within the purview and scope of provisions of Section 12 of the Act.

(47) It is a settled principle of law that title of an application or incorrectly described title of an application, by itself would not determine the fate of that application in regard to its maintainability or otherwise. At this stage, reference to the contents of the second

application filed on behalf of the claimant company before the learned trial Court would be necessary. We have already noticed that there was specific averment in the application that Brig. M.M.S. Parihar had neglected to act or enter upon and proceed with the reference in accordance with law and the period prescribed had already ended. Specific prayer was made for appointment of an independent and impartial arbitrator. This application was contested by the Union of India, but was ultimately allowed on merits as well as for the reason that Brig. Parihar had resigned on 15th December, 1990.

(48) Mr. B.K. Wadhwa was then appointed as arbitrator. His appointment was challenged by the Union of India in the High Court, but the revision filed by it was dismissed. The basic order in view of which civil revision filed by Union of India was dismissed was based upon the order passed in Civil Revision No. 1220 of 1991 of the same date i.e. 9th July, 1993 and the Special Leave Petition preferred by the Union of India was dismissed by the Supreme Court against Civil Revision No. 1220 of 1991 on 14th July, 1994.

(49) It is evident from the record that Union of India failed to make appointments despite notice of demand to that effect by the claimant company on various occasions. The arbitrators appointed either resigned or failed to act. The Union of India blames the claimant company for undue delay and obstructing the arbitration proceedings while the claimant company condemns the conduct of Union of India in intentionally obstructing the arbitration proceedings, by its omissions and commissions. Whosoever may be responsible to be blamed for this delay, it is clear from the record that no effective arbitration proceedings were taken till Mr. Gupta was appointed as arbitrator,—*vide* order dated 5th April, 1994 and he gave his award on 27th August, 1996. In other words right from 1969 till 1994 no effective proceedings were taken by any of the appointed arbitrators.

(50) We are unable to see any error of jurisdiction in the order of the learned trial Court in appointing Mr. Gupta as an arbitrator. The grounds stipulated under section 11 of the Act were specifically pleaded for removal of the arbitrator as he failed to use all reasonable despatch in entering on and proceeding with the reference and making an award. The arbitrators are not so powerless under the enactment that any of the party to the dispute could frustrate the very purpose of reference and its determination by the arbitrator. We have no hesitation in coming to the conclusion that in the alternative the application could be treated as an application under section 11 of the Act and consequential order of appointment of an arbitrator of the Court was

passed within the four corners of law and its jurisdiction provided under Section 12 of the Act.

(51) In view of the above discussion and the peculiar facts and circumstances of this case, we are firmly of the view that application under section 8 of the Act was maintainable, the Union of India by its conduct or otherwise waived the objection on its maintainability and appointment, if any; and, in any event the application could well be treated as an application under section 11 of the Act. This is how we answer the questions formulated above.

(52) With some emphasis the learned counsel on behalf of the Union of India contended that M/s Harbans Singh Tuli and Sons Builders Private Ltd. had no *locus standi* to file *any of the petitions filed so far, including the present* revision petition, as it is stranger to the contract containing the arbitration clause between the parties. Emphasis was placed on the fact that the contract No. CENWZ/AMB-24 of 69-70 was executed between Mr. H.S. Tuli, the sole proprietor of M/s Harbans Singh Tuli and Sons, who died in the year 1982 and without producing the succession certificate on record, the present company could not have been prosecuted the proceedings on behalf of the deceased.

(53) This argument raised on behalf of the Union of India is not only without substance but has also been raised at a much belated stage. It is true that the original agreement, being contract No. 24 of 69-70, was executed between the deceased Mr. Tuli as sole proprietor and the Union of India. Said Mr. Tuli died leaving behind six legal representatives. It is claimed on behalf of the company that these legal representatives had filed applications before the learned trial court. In the first application under section 8 of the Arbitration Act, 1940 for appointment of an Arbitrator by the Court, notice was given to the respondents on 24th March, 1988 and all the documents including the affidavits of other legal representatives agreeing to bring the above said company as legal representatives on record was also filed. After the death of Mr. Tuli in June, 1982, various proceedings have taken place where the Union of India itself has accepted the *locus standi* of the Company and itself impleaded the company as the sole respondent in the proceedings. All these documents were also given to the Union of India along with the order of the Court dated 27th August, 1984 before Shri P.D. Gujarati, the sole Arbitrator appointed by the Union of India itself. The company in its application filed before the trial court had specifically averred in paragraph 2 of the application that the company had taken over all assets and liability of the sole proprietorship concern of deceased Mr. Tuli and as such competent to

pursue the proceedings to which no objection was taken by the Union of India, as already noticed. The learned trial court,—*vide* its order dated 19th February, 1983 brought on record M/s Harbans Singh Tuli & Sons Builders Private Limited as legal representative of M/s Harbans Singh Tuli and Sons. In paragraph 2 of the application filed on behalf of the Company, it was stated as under :—

> "2. That Sh. Harbans Singh Tuli the sole proprietor of the concern expired in New York (U.S.A.) on 16th June, 1982 leaving behind the following legal heirs :—
>
> | | | |
> |---|---|---|
> | (i) | Smt. Parkash Kaur Tuli | Widow |
> | (ii) | Sh. Balbir Singh Tuli | Son |
> | (iii) | Sh. Lakhbir Singh Tuli | Son |
> | (iv) | Sh. Harkrishan Singh Tuli | Son |
> | (v) | Dr. Rani Balbir Kaur | Daughter |
> | (vi) | Sh. Balkrishan Singh Tuli | Son |
>
> On the death of said Sh. Harbans Singh Tuli, all the assets and liabilities were succeeded and inherited by the above said six legal heirs who had become entitled to realise all the dues and damages from the respondent, but all the above said legal heirs unanimously decided and the Petitioner-Company took over all the assets and liabilities of all the legal heirs which they have inherited on the death of Sh. Harbans Singh Tuli in respect of M/s. Harbans Singh Tuli & Sons."

(54) No reply to this application was filed. However, a petition under section 8 of the Arbitration Act was filed in the case No. 20 of 1989 on behalf of the Union of India praying for appointment by the Court of an Arbitrator from the panel suggested in the application. These two applications were disposed of by the learned trial court,—*vide* order dated 29th May, 1989 and 30th May, 1989 respectively. The said orders had attained finality between the parties. Right from the year 1982, after the death of Mr. Tuli, the company has been prosecuting the case and the Union of India in its pleadings as well as by its conduct has fully accepted the fact that the Company is lawfully entitled to represent the estate of the deceased by taking its complete liabilities and benefits.

(55) To us, it appears that the Union of India's objection with regard to the *locus standi* of the company is without substance. The documents, which are available on record of the Civil Revision fixed

for hearing before us and the other connected matters show that,— *vide* letters dated 10th May, 1989 and 25th May, 1989, written by officiating Engineer-in-Chief to Shri AJ Kuanaresan and Brig. M.M.S. Parihar respectively appointing them as Arbitrator on the following recitals:—

"AND WHEREAS the disputes are still persisting.

AND WHEREAS M/s Harbans Singh Tuli & Sons Builders Private Ltd. have taken over all assets and liabilities of M/s Harbans Singh Tuli & Sons.

(56) Counsel for the Union of India tried to derive advantage by contending that the above letter was written by the Engineer-in Chief and the Union of India and not by a party to the agreement, as such it cannot be treated as admission of the Union of India. It is a settled principle of law that strict rule of evidence of procedural law are not attracted in the arbitration proceedings. It is not disputed before us that Engineer-in-Chief is head of the department of various Chief Engineers including the Chief Engineer party to the present contract. Both these authorities are nothing but persons in hierarchy working under the control and supervision of Union of India. The Union of India having failed to raise an objection and on the other hand having specifically accepted the stand of the company for all this period, it will be unfair even for the Court to unsettle things so that they revert to 30 years back on this approach.

(57) Civil Revision No. 1685 of 1994 and for that matter even other revisions preferred by the Union of India, interestingly, the Union of India itself has impleaded M/s H.S. Tuli & Sons Builders Private Ltd. as the sole respondent in all these revisions. Neither there can be any dispute to the aforestated facts nor any dispute has been raised before us. We are of the considered view that the Union of India cannot sustain its objections. Raising objection at such a belated stage after the lapse of nearly more than 2 years, we find no reason not to apply the principle of acquiescence and estoppal also to the disadvantage of the Union of India.

(58) At this stage, it may be appropriate to refer to the provisions governing the subject under the Arbitration Act. The expression 'legal representatives' has been defined under section 2 (d) of the Act to mean a person who in law represents the estate of the deceased person and including any person who intermingle with the estate of the deceased. Section 6 of the Act contains legislative mandate that agreement shall not be discharged by the death of any party thereto, but it necessarily

becomes enforceable by or against the legal representatives of the deceased. Even the authority of the arbitrator shall not be revoked by any of the party by whom he was appointed. On the cumulative reading of these provisions, we see no reason as to why the Company has no *locus standi* to continue with the proceedings. The averments made by the company before the Arbitrator as well as before the learned trial court remained unrefuted and the order passed thereupon unassailed in regard to the present legal representatives on record. The legislative intent appears to provide liberal construction to the expression 'legal representatives' and to ensure conclusion of the arbitration proceedings rather than frustrating the same on such plea. The arbitration proceedings are primarily based on the mutuality of the parties and the parties having accepted the position with regard to the estate, the Court would be least justified in disturbing such mutuality and in any case at this late stage of the proceedings. An objection with regard to the *locus standi* of the party is primarily available to a party and is capable of being waived. It is not a matter of equitable jurisdiction of Court or lack of inherent jurisdiction. The Union of India with all its wisdom had not only waived the objection, but had specifically accepted the company as the proper heir of the deceased with definite pleadings that the company had taken all the assets and liability of the deceased. Therefore, we are unable to trace any element of merit in this contention raised on behalf of the Union of India.

(59) It has been contended by Mr. Tuli, who appears in person on behalf of the claimant company, that the High Court had extended time for making the award by the arbitrator on various occasions and as such this Court had retained the control unto itself on the arbitration proceedings. Thus, High Court would be the Court of competent jurisdiction where the arbitrator ought to file the award. On the other hand, it is argued on behalf of Union of India that the learned trial Court being the Court of competent jurisdiction and which had passed various orders during the pendency of proceedings before the arbitrators including appointment of arbitrators, is the only Court of competent jurisdiction.

(60) Section 2(c), 14, 28 and 31 of the Arbitration Act have to be read together for the purposes of answering this question. On the cumulative reading of these provisions it is clear that the Court under this Act means the civil Court having jurisdiction to decide the question forming subject matter of the reference, if it had the jurisdiction to decide such a suit. Under Section 14 the award has to be filed in the Court to make the award rule of the Court. Within the provisions of

Section 28 the Court has the jurisdiction to extend the time for making award. Section 31 is the Section which controls the jurisdiction of the Court as referred to in the other provisions of the Act. Under sub-section (1) of section 31 an award may be filed in any Court having jurisdiction in the matter to which the reference relates. Sub-section (2) is a non-obstante clause which provides that all questions regarding the validity, effect or extension of award or arbitration of an agreement between the parties shall be decided by the Court in which the award has been filed or may be filed and further imposes a restriction that no other Court would have jurisdiction in that behalf. Under sub-section (3) all applications in relation to the conduct of the arbitration proceedings should be made to the Court where the award has been or may be filed and again prohibits any other Court from exercising jurisdiction over such matters. Sub-section (4) of Section 31 is a very material provision. The said sub-section again contains a non-obstante clause as well as imposes restriction on any other Court from exercising jurisdiction over such matters. It categorically states *"where in any reference any application under this Act has been made in a Court, competent to entertain it, that Court alone shall have the jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and arbitration proceedings shall be made in that Court and in no other Court."*

(emphasis supplied by us)

(61) Normally all proceedings will have to be taken in the Court which initially appointed the arbitrator or dealt with the subject matter of reference at the initial stage. It is a settled principle of law that subsequent applications in relation to extension of time as well as for filing of award and control over the arbitration proceedings should be filed and maintained with the Court before whom initially the proceedings were commenced in relation to the arbitration agreement and the subject matter of the reference. The Court competent to entertain subject matter of a reference would be the Court as defined under Section 2(c), as already noticed a Civil Court having jurisdiction over the subject matter of reference if the same had been the subject matter of the suit. In other words, under sub-section (4) of Section 31 'Court' would be the Civil Court having jurisdiction and competent to try a suit of the nature of the subject matter of a reference in the arbitration proceedings under the Act. Thus, it becomes necessary for us to refer to the provisions of Section 15 of the Code of Civil Procedure, which reads as under :—

> **"15 Court in which suits to be instituted**—Every suit shall be instituted in the *Court of the lowest grade* competent to try it. (emphasis supplied by us)

(62) The Court of lowest grade in the Union Territory of Chandigarh has jurisdiction to entertain suits or petitions of any value. While Section 15 of the Civil Procedure Code which describes the place of suing refers to "Court of lowest grade competent to try it" and Section 31(4) of the Arbitration Act refers to the Court competent to entertain any application filed under the Act. In order to apply the above provisions to the facts of the present case reference to the various applications which were filed by respective parties at the initial stage of the proceedings would be inevitable. Prior to the passing of the impugned order in these revisions before us some other similar applications were filed by the parties which stood finally disposed of by the Court of competent jurisdiction and have attained finality *inter se* the parties.

First application :

(63) An application under Section 8 of the Arbitration Act being case No. 20 of 1989 was filed on behalf of the company praying that the arbitrator appointed by the respondents Shri P.D. Gujrati, sole arbitrator, had resigned on 8th March, 1988 and the respondents despite notice dated 24th March, 1988 had failed to appoint the arbitrator. And thus, application for supplying the vacancy by the Court was filed by the company. This application is dated 25th February, 1989 and was registered on 27th February, 1989 as a suit. Learned Sub Judge Ist Class, Chandigarh,—*vide* order dated 29th May, 1989 held that the Court was fully competent to appoint an arbitrator under Section 8 of the Arbitration Act and allowed the said application and fixed the case for 30th May, 1989. On 30th May, 1989 the Union of India itself filed an application under Section 8 of the Arbitration Act Praying that the Engineer-in-Chief be permitted to appoint an arbitrator and in the alternative arbitrator be appointed by the Court from the panel of arbitrators suggested in paragraph No. 3 of the said application. The application of the petitioner as well as Union of India was thus, finally disposed of,—*vide* order dated 30th May, 1989 where the Court appointed Brig. M.M.S. Parihar as the sole arbitrator. The relevant part of the order reads as under :—

> "After hearing Ld. counsel for the parties, I have come to this conclusion that although the court is not bound to appoint arbitrator out of the list given by either of the party, keeping in view the interest of justice and also for the expeditious adjudication upon the dispute between the parties and also keeping in view the amount of the claim award, I appoint Brig. M.M.S. Parihar as arbitrator to adjudicate the dispute

in respect of claim of the petitioner against contract agreement No. CENWZ/AMB-24 of 69-70"

(64) The Union of India did not assail the said order before any higher Court in appeal or revision and the said order attained finality between the parties. Another fact which needs to be clarified at this stage is that the Union of India claims to have appointed Brig. M.M.S. Parihar as sole arbitrator,—*vide* its letter dated 25th May, 1989. However, this letter was neither referred to in the application filed by Union of India on 30th May, 1989 before the learned trial Court nor the copy of the said letter ever saw the light of the day till the present revision was being heard by this Court.

Second application :

(65) On 17th October, 1989 the company filed still another application under Section 8 of the Arbitration Act. It was stated in the application that Brig. M.M.S. Parihar was appointed as arbitrator to adjudicate the claims pending arbitration,—*vide* order dated 30th May, 1989 by the Court, but said Brig. Parihar had neglected to act, enter upon and proceed with the reference in accordance with the order of the Court. Other averments were also made in the application with regard to bias of the said arbitrator being in employment of the Union of India and thus, prayer was made before the Court that appointment of Brig. Parihar be revoked and an independent arbitrator be appointed.

(66) Union of India filed a reply to this application blaming the petitioner for not submitting the succession certificate before Brig. Parihar and pleaded that the delay was caused by the petitioner himself. It was stated that proceedings were obstructed by the petitioner himself and he could not take advantage of his own wrongs.

(67) This reply was filed on 12th June, 1990 and the application was finally disposed of by the Court,—*vide* its order dated 16th February, 1991. The Court recorded its finding on the issues framed and ultimately found that the claims of the company were not being adjudicated for the last 19-20 years and also referred to inaction on the part of Brig. Parihar, However, also keeping in view the fact that Brig. Parihar had resigned on 15th December, 1990 the Court held as under :—

"The earlier application filed by the petitioner for removal of the arbitrator was dismissed but now since arbitrator has, admittedly, resigned on 15th December, 1990 and therefore has become incapable to adjudicate upon the claims of the petitioner, and a period of more than four months has expired

and the arbitrator has not announced the award and therefore, also I have no option but to allow the application of the petitioner for appointment of new arbitrator in his place."

"Due to foregoing reasons, petition is accepted with costs and I appoint Sh. B.K. Wadhwa, Chief Engineer, Buildings, Public Works Department, Haryana, as arbitrator to adjudicate upon the claims of the petitioner, if any, and to announce the award within the period of four months from the date he enters upon the reference."

(68) The order of the learned trial Court dated 16th February, 1991 was challenged in civil revision No. 1245 of 1991. This revision filed by the Union of India was dismissed by the High Court,—*vide* its order dated 9th July, 1993. In fact the revision was dismissed in terms of order passed by the Court in another matter between the same parties involving the same question but relating to a different contract with identical clauses. The same was registered as Civil Revision No. 1221 of 1991 and the application for extension of time filed by the company in the present revision as well as the main petition against the order under Section 8 were dismissed in terms of the order passed in Civil Misc. No. 3558/C-II of 1993 and Civil Revision No. 1220 of 1991. The High Court only upheld the order of the trial Court.

(69) The order of the trial Court was up-held by the High Court in terms of the orders passed by the High Court in Civil Revision No. 1220 of 1991,—*vide* its order dated 9th July, 1993. The order in Civil Revision No. 1220 of 1991 was challenged before the Supreme Court and the Special Leave to Appeal No. 1139 of 1994 was dismissed by the Hon'ble Supreme Court on 14th July, 1994.

Whether High Court retained or ought to retain unto itself control over the arbitration proceedings?

(70) It is contended on behalf of the Company that the High Court had passed various orders and more particularly the order dated 9th July, 1993 passed by another learned Single Judge and retained the control unto itself over the arbitration proceedings. The claimant company has also filed an application in Civil Revision No. 1685 of 1994 praying that the High Court, for the reasons stated in the application, should retain control over the arbitration proceedings. On the other hand, according to the counsel appearing for Union of India, the High Court never retained and should not retain control over the arbitration proceedings keeping in view the facts and circumstances of the present case.

(71) In order to appreciate the rival contentions of the parties in this regard, we have to examine the entire controversy under two different sub-heads :—

(a) Whether the order passed by the Hon'ble Mr. Justice V.K. Bali dated 9th July, 1993 tantamounts to retaining control of this court over the arbitration proceedings or not?

(b) Whether, for the reasons stated in the application this Court ought or ought not to maintain control over the arbitration proceedings after filing of Civil Revision No. 1685 of 1994?

(72) It is argued that while passing the order of granting extension of time and directing the sole arbitrator to enter upon the reference again, the High Court,—*vide* its order dated 9th July, 1993 intended to retain control over the arbitration proceedings.

(73) The undisputed facts are that on 16th February, 1991 Shri B.K. Wadhwa was appointed as arbitrator by the Court and he entered upon the reference on 18th March, 1991. The order of the Court dated 16th February, 1991 was challenged by the Union of India in a civil revision being Civil Revision No. 1245 of 1991 filed on 11th April, 1991. The High Court,—*vide* its order dated 12th April, 1991 had passed the following order :—

"Notice of motion for 23rd April, 1991. At this stage Mr. Salil Sagar, Advocate accepts notice on behalf of the respondent. To come up on the aforesaid date for arguments.

In the meantime, the proceedings before the Arbitrator are stayed but the claimants may, however, put his claim. To be heard with C.R. 1221/91."

(74) During the pendency of this petition, Civil Misc. No. 3559 of 1993 was also filed by the claimant company praying for granting extension of time for the arbitrator to pronounce his award. *Vide* order dated 9th July, 1993 Civil Revision No. 1245 of 1991 filed by Union of India was dismissed in terms of the orders passed in Civil Revision No. 1220 of 1991, while the miscellaneous application filed by the claimant company for extension of time was allowed. The High Court while allowing the said application directed—

"IN view of the uncontroverted facts as detailed above, this miscellaneous application is allowed and the civil revision No. 1220 of 1991 is dismissed. The time for giving award by

the arbitrator appointed by the Court below *is extended by four months* from the date he *enters upon the reference again.*"

(emphasis supplied by us)

(75) In the light of the above facts, we have to consider whether the above order was a mere consequential order or was an order expressing the specific intention of the Court to exercise effective control over the arbitration proceedings between the parties. To us, it appears that the order of the Court is suggestive only of an order which is in the nature of a consequential order passed on the conclusion of the proceedings. While issuing notice of the civil revision to the respondent, the Court had granted stay of further proceedings before the arbitrator. Before the dismissal of the revision petition, the prescribed period of four months had already expired. While dismissing the petition the Court had to give a ditrection while vacating the stay in regard to further continuation of the arbitration proceedings. The expression "enter upon the reference again" has a direct relation to the order of the Court dated 12th April, 1991. The Court passed no effective directions in relation to the continuation and the manner in which the arbitration proceedings ought to continue suggestive of the control of the High Court.

(76) Intention to retain control can only be inferred by the language of the order. The intention of the Court to this effect must be apparent on the face of the record. Such intendment on the part of the Court has to be manifested without ambiguity in its orders.

(77) Another way to trace such intention is to see how the parties to the arbitration proceedings understood the order of the Court and acted there-upon. As far as Union of India is concerned, it is their specific case that the High Court never retained or intended to retain control over the arbitration proceedings. As far as claimant company is concerned, it also filed subsequent applications for appointment of arbitrator or supplying vacancy and for other directions before the trial Court and not before the High Court. The parties participated in the arbitration proceedings in furtherance to the directions passed by the trial Court and they approached learned trial Court on various occasions. The claimant company for the first time filed an application with a specific prayer for retention of control over the arbitration proceedings by the High Court in the present proceedings (Civil Revision No. 1685 of 1994). This itself shows that the order dated 9th July, 1993 was never understood or acted upon by the parties on the premise that the High Court had intended or had actually retained control over the arbitration proceedings.

(78) We cannot ignore a pertinent fact that the High Court itself,—*vide* its order dated 15th December, 1995 passed in Civil Revision No. 1685 of 1994 had directed the learned trial Court to dispose of the said matter as also the question of jurisdiction to entertain the application by 31st January, 1996 filed by the Union of India. The learned trial Court,—*vide* its order dated 8th January, 1996 decided this question and held that it had the jurisdiction to entertain the application. The order dated 8th January, 1996 was challenged by the claimants company in Civil Revision No. 1076 of 1996. This also shows that the High Court never intended to exercise effective control over the arbitration proceedings; and, in our opinion, rightly granted liberty to the learned trial Court where various applications were filed to decide the question of jurisdiction. The intent of the Court must be to exercise complete control over the arbitration proceedings.

(79) In view of the above and the circumstances of this case, we have no hesitation in coming to the conclusion that the order dated 9th July, 1993 passed by the High Court in granting extension of time while affirming the order of the learned trial Court appointing Shri Wadhwa as arbitrator was a mere consequential order and was not an order amounting to retention of control over the arbitration proceedings by the High Court.

(80) In this regard reference to the well settled principles of law, also governing the subject would be beneficial.

(81) In the case of *The State of Madhya Pradesh* versus *M/s Saith and Skelton (P) Ltd. and others* (16) while rejecting the contention of the counsel for the appellant that the award ought to be filed in the Court of competent jurisdiction i.e. Additional District Judge, Mandsaur and that the Supreme Court had no jurisdiction to decide objections in the first instance, the Court held as under :—

> "According to Mr. Shroff the award should have been filed not in this Court, but in the Court of the Addl. District Judge, Mandsaur, as that is the Court which will have jurisdiction to entertain the suit regarding the subject matter of the reference. We are not inclined to accept this contention of Mr. Shroff. It should be noted that the opening words of S. 2 are "In this Act, unless there is anything repugnant in the subject or context". Therefore, the expression "Court" will have to be understood as defined in S.2(c) of the Act, only if there is nothing repugnant in the subject or context. It is in that light that the expression "Court" occurring in S.14(2) of

(16) A.I.R. 1972 S.C. 1507-(1972) 3 Supreme Court Reports 233.

the Act will have to be understood and interpreted. It was this Court that appointed Shri V.S. Desai on 29th January, 1971, by consent of parties as an arbitrator and to make his award. It will be seen that no further directions were given in the said order which will indicate that this Court had not divested itself of its jurisdiction to deal with the Award or matters arising out of the Award. In fact the indications are to the contrary. The direction in the order dated 29th January, 1971 is that the arbitrator is "to make his Award". Surely the law contemplates further steps to be taken after the Award has been made, and quite naturally the forum for taking the further action is only this Court. There was also direction to the effect that the parties are at liberty to apply for extension of time for making the Award. In the absence of any other court having been invested with such jurisdiction by the order, the only conclusion that is possible is that such a request must be made only to the court which passed that order, namely, this Court.

"That this Court retained complete control over the arbitration proceedings is made clear by its orders dated 1st February, 1971 and 30th April, 1971. On the former date, after hearing counsel for both the parties, this Court gave direction that the record of the arbitration proceedings be called for and delivered to the Sole Arbitrator Mr. V.S. Desai. On the latter date, again, after hearing the counsel, this Court extended the time for making the Award by four months and further permitted the arbitrator to hold the arbitration proceedings at Bombay. The nature of the order passed on 29th January 1971 and the subsequent proceedings, referred to above, clearly show that this Court retained full control over the arbitration proceedings."

(82) Reliance has been placed on various judgments of the Supreme Court in support of the application. The first judgment relied upon by the claimant company is in the case of *M/s Guru Nanak Foundation* versus *M/s Rattan Singh & Sons (17)* where the Supreme Court held that the Supreme Court itself was the Court having exclusive jurisdiction for the purposes of filing an award under Section 14 of the Act and while even making reference to the delay in arbitration proceedings observed as under :—

"Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum,

(17) A.I.R. 1981 S.C. 2075

less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 (Act for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity. This case amply demonstrates the same.

"Section 31 of the Act provides the forum in which an award may be filed. Sub-section (1) of section 31 provides that an award may be filed in any court having jurisdiction in the matter to which the reference relates. Incorporating the definition of the expression 'court' as set out in section 2 (c) in sub-section (1) of section 31 would mean that the award will have to be filed in that court in which the suit in respect of the dispute involved in the award would have been required to be filed. This is quite consistent with the provision contained in sub-section (2) of section 14. So far there is no difficulty. The scheme disclosed in sub-sections (2), (3) and (4) of section 31 clearly indicates that to the exclusing of all other courts only one court will have jurisdiction to deal with the proceedings incidental to the reference and the arbitration. Sub-section (3) clearly points in this direction when it provides that all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the court where the award has been or may be filed and to no other court. Then comes sub-section (4). It opens with a non-obstante clause and is comprehensive in character. The non-obstante clause excludes anything anywhere contained in the whole Act or in any other law for the time being in force if it is contrary to or inconsistent with the substantive provision contained in sub-section (4). To that extent it carves out an exception to the general question of jurisdiction of the court in which award may be filed elsewhere provided in the Act in respect of the proceedings referred to in sub section (4). The provision contained in sub-section (4) will have an over-riding effect in relation to the filing of the award if the conditions therein prescribed are satisfied. If those conditions are

satisfied the court other than the one envisaged in section 14 (2) or section 31 (1) will be the court in which award will have to be filed. That is the effect of the non-obstante clause in sub-section (4) of section 31. Sub-section (4) thus invests exclusive jurisdiction in the court, to which an application has been made in any reference and which that court is competent to entertain as the court having jurisdiction over the arbitration proceedings and all subsequent applications arising out of reference and the arbitration proceedings shall have to be made in that court and in no other court. Thus sub-section (4) not only confers exclusive jurisdiction on the court to which an application is made in any reference but simultaneously ousts the jurisdiction of any other court which may as well have jurisdiction in this behalf. To illustrate the point, if an award was required to be filed under section 14 (2) read with section 31 (1) in any particular court as being the court in which a suit touching the subject-matter of award would have been required to be filed, but if any application in the reference under the Act has been filed in some other court which was competent to entertain that application, then to the exclusion of the first mentioned court the latter court alone, in view of the overriding effect of the provision contained in section 31 (4), will have jurisdiction to entertain the award and the award will have to be filed in that court alone and no other court will have jurisdiction to entertain the same."

"Curiously, an officer of this Court took it into his head to advise the arbitrator to file the Award in Delhi High Court without obtaining any direction of the Court. We must record our displeasure about this usurpation of jurisdiction of the Court by an officer of this Court. We say no more. In view of the fact that a reference was made by this Court to the 3rd respondent and that this court gave further direction about the manner and method of conducting the arbitration proceedings and fixed the time for completion of arbitration proceedings, this Court alone would have jurisdiction to entertain the award."

"Mr. Narula lastly urged that if this Court were to arrogate jurisdiction to itself by putting on sub-section (4) of section 31 a construction as canvassed for on behalf of the 1st respondent it would deprive the appellant of its valuable right to prefer an appeal under the Letters Patent and approach this Court under Article 136 of the Constitution. If this Court has jurisdiction to entertain the award and this Court in view of section 31 (4) alone has jurisdiction for entertaining the award

meaning that the award has to be filed in this Court alone and no other, the same cannot be defeated by a specious plea that the right of appeal would be denied. In an identical situation in M/s. Saith Skelton (P) Ltd. case, this Court held that the award has to be filed in this Court alone which would certainly negative an opportunity to appeal because this is the final court. Conceding as held by this Court in *Garikapattl Veeraya* v. *N. Subbiah Choudhury*, that the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis-commences, by the view we are taking such a right is not denied or defeated because the highest court to which one can come by way of appeal will entertain all contentions that may have to be canvassed on behalf of the appellant. The door of this Court is not being closed to the appellant. In fact the door is being held wide ajar for him to raise all contentions which one can raise in a proceeding in an originating summons. Therefore, we see no merit in this contention and it must be rejected."

(83) The above principle was followed by the Hon'ble Supreme Court of India in the cases titled as *P.M. Paul* versus *Union of India (18) Trustees of the Port of Madras* versus *Engineering Constructions Corporation Limited (19); Thakur Das and others* versus *Smt. Vidyawati and others (20), Punjab State Electricity Board and others* versus *Ludhiana Steels Private Ltd. (21)* and *Vaidya Harishankar Laxmiram Rajyaguru of Rajkot* versus *Pratapray Harishankar Rajyaguru of Rajkot, (22).*

(84) The bare reading of the relevant extracts of the aforesaid judgments clearly show that the principles enunciated in the cases of M/s Saith & Skelton (P) Ltd. and M/s Guru Nanak Foundation were followed by the Supreme Court in all the subsequent cases. Another common feature is that in most of these cases, the Hon'ble Apex Court itself had appointed an arbitrator either with the consent of the parties or upon removal of the arbitrator appointed by their Lordships. Specific directions were given by the Supreme Court in regard to conduct of the arbitration proceedings and even filing of the award. Certainly delay was considered to be relevant consideration but delay by itself

(18) 1989 Supp(1) SCC 368
(19) 1995 (5) SCC 531
(20) 1987 (Supp.) SCC 154
(21) 1993 (1) SCC 205
(22) 1988 (3) SCC 21

cannot be a sufficient ground as indicated by their Lordships in the above judgments to justify retention or assumption of an effective control over the arbitration proceedings by Higher Court from the lower Court where the matter was pending for a considerable period. The general principle that emerges is that the higher Courts in the hierarchy prescribed in the normal course of law must spell out its intention to exercise specific control over the arbitration proceedings by its proper manifestation in its orders. Otherwise, control over the proceedings should normally be left to the Court of competent jurisdiction where the proceedings in their normal course should and ought to be instituted in the Court of lowest grade competent to adjudicate upon the dispute.

(85) Now we would proceed to discuss the alternative prayer made on behalf of the claimants company (Civil Misc. No. 6362 of 1995 in Civil Revision No. 1685 of 1994) requesting that the time be extended by four months for making the award and that this Court should exercise effective control over the arbitration proceedings. According to the petitioner inordinate delay in conclusion of the proceedings, the humiliation faced by him resulting in such inordinate delay and the attitude adopted by the respondents in obstructing smooth and expeditious conclusion of the arbitration proceedings would justify passing of such an order. On the other hand, the learned counsel appearing for Union of India contends that the Court normally would not retain control over the arbitration proceedings unless it appoints an arbitrator itself and in addition thereto certain compelling circumstances are placed on record to justify effective and complete control to be exercised by the High Court.

(86) From the facts of the case it is clear that at no point of time the High Court in exercise of its revisional powers had ever appointed any arbitrator or had given effective direction of material consequence in relation to the progress in furtherance of the arbitration proceedings. On the contrary, the High Court from time to time had only affirmed the order passed by the learned trial Court and the record clearly shows that the trial Court had exercised effective and complete control over the proceedings.

(87) As already noticed, all the three applications filed by the claimant company as well as by the Union of India had been filed before the trial Court and were decided by that Court. The parties acted upon such orders and the revisions filed before this Court were dismissed (Civil Revisions No. 1220 of 1991, 1221 of 1991 and 1245 of 1991) and those orders had even attained finality.

(88) Twin conditions which may persuade the higher Court to exercise effective and complete control over the arbitration proceedings in a suitable case would normally be :-

(a) The arbitrator is appointed by the higher Court on consent of the parties or otherwise.

(b) There are peculiar and compelling circumstances before the Court exercising its appellate or revisional jurisdiction, in that event the intention of the Court must manifest itself in the orders of the Court by passing effective directions, justifying exercise of complete and effective control by that Court over the arbitration proceedings.

(89) All the afore-noticed judgments of the Hon'ble Supreme Court of India relied upon by the claimants company including the cases of M/s Guru Nanak Foundation, M/s Saith & Skelton (P) Ltd. and Punjab State Electricity Board are the cases where the Hon'ble Apex Court had itself appointed arbitrators (retired Judges of the Hon'ble Supreme Court of India) and had passed effective directions for the progress and control of the arbitration proceedings and had even directed the award to be filed before the Apex Court. For this purpose we may also notice that Hon'ble Supreme Court of India alone has the over-riding power to make such orders as may be necessary for doing "complete justice" in any cause or matter pending before it under Article 142 of the Constitution of India.

(90) In the afore-noticed cases the Hon'ble Supreme Court of India specifically noticed that the Court had overriding control over the arbitration proceedings, which certainly, is not the case here. We have already discussed that no order of the High Court has been brought to our notice in the previous proceedings which could even remotely suggest that the High Court intended to keep control over the arbitration proceedings. On the other hand, the High Court and even their Lordships of the Supreme Court have clearly indicated despite the facts of the case, that the case should follow its normal legal course. We see no exceptional circumstances in this case to carve out any exception to the contrary.

(91) No doubt, there is delay in progress and conclusion of the arbitration proceedings, but each party blames the other for it. However, now the award has been made on 27th August, 1996 and even objections to the award have been filed by the Union of India which would be considered on receipt by the competent Court and in accordance with law. We have no doubt in our mind that the trial

Court being the Court of competent jurisdiction had appointed arbitrators. Further more, no prejudice would be caused to either of the parties to these proceedings if the learned trial Court is allowed to continue to exercise the control and deal with the matters in accordance with law being the Court of original jurisdiction, which admittedly, is a much wider jurisdiction.

(92) Under the provisions of Section 39 of the Arbitration Act, an order setting aside or refusal to set aside an award is appealable. For this Court to assume effective and complete control over the arbitration proceedings in exercise of its revisional jurisdiction,would deprive the parties of the right of appeal which is specifically granted to them under the provisions of the Act. We see no reason why we should deprive the parties of this statutory right available to them under the provisions of the Act, which can hardly be justified in the facts and circumstances of the present case.

(93) In the cases afore-noticed the Hon'ble Supreme Court of India exercised its jurisdiction with the aid of wide powers vested in it under Article 142 of the Constitution of India with the intention to do complete justice in the facts of those cases and had itself appointed arbitrator to adjudicate the dispute between the parties. No other court is vested with such powers. The basic distinction is between the ordinary civil appellate power exercised by said Courts in contradistinction to the special appellate powers of the Hon'ble Supreme Court of India under Article 136 read with Article 142 of the Constitution. In exercise of ordinary appellate or revisional jurisdiction the Court has to pass orders within the well accepted norms controlling exercise of such power.

Civil Revision No. 1076 of 1996 :—

(94) While hearing the arguments at length on various controversies involved in the above revision (No. 1685 of 1994) it was brought to our notice that this civil revision has to be heard in order to finally determine the controversy in issue. In this revision the petitioner H.S. Tuli (M/s.) and sons Builders Private Limited have challenged two orders, dated 8th January, 1996, and 27th January, 1996 respectively passed by the learned trial Court. *vide* order dated 8th January, 1996 the learned trial Court in furtherance to the observations of the High Court in furtherance to the observations of the High Court decided the question that it had the jurisdiction to entertain and decide a petition filed by the Union of India under Sections 5 and 11 of the Act, while,—*vide* order, dated 27th January, 1996, the learned trial Court vacated the order of stay granted by it earlier in relation to the

arbitration proceedings pending before the arbitrator. The trial Court had on 29th November, 1995 granted *ex parte* stay of the proceedings before the arbitrator. In this order it was also observed by the learned trial Court that an application under Section 28 of the Arbitration Act for extension of time for publishing the award was pending before the High Court and considered it appropriate that the High Court should deal with that aspect of the matter.

(95) At the very out-set we must notice that when the learned trial Court passed the above orders, final order in Civil Revision No. 1685 as well as for granting extension of time for making of the award by the arbitrator had been decided by the High Court,—*vide* its orders, dated 4th July, 1995 and 7th September, 1995. As already noticed the Special Leave Petitions were preferred by the Union of India against these orders of the High Court which have been ordered to be heard by the Division Bench, by the Hon'ble Apex Court,—*vide* its order, dated 12th August, 1997. The preliminary question raised in this revision is whether the learned trial Court was justified in passing the order, dated 8th January, 1996, holding that it had jurisdiction to entertain and decide the petition filed by Union of India under Sections 5 and 11 of the Act. This petition is still pending before the learned trial Court. However, in the meanwhile, as stay against progress of the arbitration proceedings before the arbitrator had been vacated, the arbitrator had already pronouced the award. The learned trial Court while holding that it had jurisdiction to entertain and decide the petition mainly placed reliance upon the provisions of Section 31(4) of the Act. The relevant part of the impugned judgment reads as under :-

> "Where can the first application be said to have been filed Indisputably the Original Court, no application is filed in the Higher Court. The Higher Court is in seisin of the matter in appeal or revision and not by way of an original proceedings. It has been further laid down therin that jurisdiction contemplated in sub-section 4 of Section 31 of the Arbitration Act is the jurisdiction of the Trial Court. In the later case law, it has been laid down that when some proceedings on an application under Arbitration Act pertaining to a reference have been taken in a particular Court, then that Court alone should have the jurisdiction to entertain the subsequent applications arising out of that reference under Section 31(4) of the Arbitration Act. Moreover, it is also to note that the application under Section 28 of the Arbitration Act for the extension of time has been moved in the Hon'ble High Court on 4th December, 1995 and whereas the instant application

under Section 5 of the Arbitration Act has been filed on 27th November, 1995 and hence it is prior to the above said application under Section 28 of the Arbitration Act."

(96) Mr. Tuli has contended that keeping in view the orders of Hon'ble Supreme Court this Court is the only Court of competent jurisdiction empowered to decide this application.

(97) We have already, at great length, discussed the various arguments raised by the parties to this petition as to which is the Court of competent jurisdiction, having answered the question on the interpretation of Section 31(4) read with Section 2(c) of the Act and Section 15 of the Code of Civil Procedure, the learned trial Court being the Court of lowest grade, is the competent Court to entertain and decide the petition. We see no reason to interfere in the impugned order, dated 8th January, 1996. The order, dated 27th January, 1996, in any case, does not call for any interference because the order vacating stay in relation to the proceedings before the arbitrator had exhausted itself and the arbitrator had filed the award in Court. Therefore, we have no hesitation in dismissing this revision petition. However, we shall be passing separate directions in relation to the main proceedings which are still pending (under Sections 5 and 11 of the Act), out of which the present revision arises, in the interest of justice.

CONCLUSION :—

(98) Argo, it is imperative for us to issue certain directions in regard to continuation and conclusion of the proceedings pending in this Court. Civil Revision No. 1685 of 1994 preferred by the Union of India, along with Review Application No. 34 of 1995 are dismissed. We are of the considered view and hold that the learned trial Court was competent to entertain the application prefered by the claimant company for appointment of arbitrator. Further, We see no error of jurisdiction in the impugned order appointing Shri O.P. Gupta as arbitraror.

(99) We have already held that the Court of competent jurisdiction in the facts and circumstances of the present case is the Subordinate Court. Thus, as a necessary corollary thereto, Civil Revision No. 1076 of 1996, challenging the order of the Court dated 8th January, 1996, is also dismissed. A petition under Sections 5 and 11 of the Act filed by the Union of India is still pending before the learned trial Court, though the arbitration proceedings before the sole arbitrator Shri O.P. Gupta, have already concluded and the award stands filed in the Court. The learned trial Court being the Court of competent jurisdiction, we hold that the award ought to have been filed before the learned trial Court,

which had initially appointed Mr. Gupta as the arbitrator. We would therefore, direct that the award filed in the Registry of this Court, along with the trial Court records, if any, would be transmitted to the Court of competent jurisdiction, i.e. Civil Judge (Junior Division), Chandigarh, forthwith. The petition filed by the Union of India for removal of arbitrator would be heard by the same Court, which would also dispose of the objections filed by Union of India to the award. In other word, the petition of Union of India under Section 5 and 11 of the Act and its objections filed to the making of the award rule of the Court, shall be heard and decided together by the learned trial Court. Parties are directed to appear before the learned trial Court on 7th February, 2000.

(100) As a result of the above orders and directions, we have to pass a consequential order on Civil Misc. No. 13460 of 1995 and Civil Misc. No. 7375 of 1996 both under Section 28 of the Act, praying for extension of time. Viewing it in retrospect, the time had been extended by the High Court,—*vide* its orders dated 9th July, 1993 (C.R. NO. 1245/91), 14th March, 1996 and 16th July, 1996 permitting the arbitrator to make and publish the award. Resultant thereto, the award already stands filed in the Court. We see no valid reason for declining extension of time prayed for by the applicant or in recalling the orders dated 9th July, 1993, 14th March, 1996 and 16th July, 1996. We are of the considered view that it would not be in the interest of justice to wipe out the arbitration proceedings which have taken place in the last six years on this basis.

(101) However, we make it clear that we are affirming the order of the trial Court limited to the appointment of Shri Gupta as an arbitrator. The objections of Union of India to the award as well as to the bias, conduct or otherwise of Mr. Gupta would be heard and decided in the pending petitions by the Court of competent jurisdiction.

(102) Keeping in view the extraodinary delay which has resulted from the cantankerous attitude adopted by either party to the proceedings, we would request the learned trial Court to dispose of the remaining petitions within a period of six months from the date a copy of this judgment is placed on the record of the trial Court. We do express the pious hope that both the parties would co-operate before the trial Court and that they would adopt an attitude of final determination of their real controversies rather than raising frivolous objections on each step of the proceedings. We are certain that the learned trial Court would be able to finally dispose of the matter within the afore-indicated time and in accordance with law. No party would

be entitled to any adjournment except for very exceptional circumstances.

(103) Both the revision petitions are accordingly disposed of. However, in the peculiar facts and circumstances of the case, we leave the parties to bear their own costs.

R.N.R.

Before Iqbal Singh, J.

KARNAL IMPROVEMENT TRUST,—*Defendant/Petitioner*

versus

ISHWAR CHANDER,—*Plaintiff/Respondent*

C.R. No. 5185 of 1998

8th October, 1999

Code of Civil Procedure, 1908—0.39 Rl. 4—Modifying order of status quo—*Trial Court ordered status quo regarding possession—During pendency of suit defendant demolished boundary wall—Plaintiff filed application u/o 39 Rl. 4 to modify* status quo *order and to seek permission to reconstruct wall—Application dismissed by the trial Court and subsequently allowed by the appellate Court to reconstruct boundary wall—Impugned order virtually granted relief of mandatory injunction sought in suit—Not sustainable—Order set aside.*

Held, that under Order 39 Rule 4 of the Code, a party may seek discharge, variation or setting aside of an order of injunction if it is so necessitated by a change in the circumstances or if such order of injunction has caused undue hardship to it. By the order under revision, the appellate court has in a way granted the relief, at least the relief of mandatory injunction, as claimed in the suit by granting the permission to the plaintiff to reconstruct the boundary wall and this would amount to decreeing the suit, without affording to the parties opportunities to lead evidence. The lower appellate court should go slow in upsetting/ varying the finding of the trial court on an application u/o. 39 Rls. 1 and 2 of the Code and should not substitute its opinion for the opinion of the trial court.

(Para 7)

C.B. Goel, Advocate, *for the petitioner.*

K.C. Bhatia, Advocate, *for the respondent.*