

DELHI HIGH COURT

Ved Prakash

Vs.

Union of India, (Delhi)

Suit No. 625-A of 1982

(Avadh Behari Rohatgi, Sultan Singh and G. C. Jain, JJ.)

28.5.1984

JUDGEMENT

Avadh Behari Rohatgi, J.

1.The plaintiff Ved Prakash Mithal entered into an agreement for the construction of Government Higher Secondary School (Scheme II-A) at Tulsi Nagar, Phase II. The agreement contained the following arbitration clause:-

"Clause 25:-

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions, hereinbefore mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Central Public Works Department, in charge of the work at the time of dispute or if there be no Chief Engineer, the administrative head of the said Central Public Works Department at the time of such appointment. It will be no objection to any such appointment that arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he had expressed views on all or any of the matters in disputes or differences. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Chief Engineer or

administrative head as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the C. P. W. D. as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000/- (Rs. fifty thousand) and above, the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.

It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Government that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

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

2. Disputes arose between the parties. The plaintiff issued a notice under Section 4 read with Section 8 (1) of the Arbitration Act, 1940 (the Act) invoking the arbitration clause and requiring the Chief Engineer to appoint an arbitrator in accordance with the clause. The Chief Engineer did not appoint the arbitrator. The contractor thereupon made an application under Sections 8 and 20 of the Act on 3rd May, 1982 against the Union of India and the Chief Engineer. He prayed that the agreement may be filed and the disputes may be referred to the arbitration of a person to be appointed in terms of Clause 25 of the agreement failing which an arbitrator may be appointed by the Court.

3. This application was contested by the Union of India and the Chief Engineer on a variety of grounds. Before the learned single Judge (B.N.Kirpal, J.) a ruling of the Division Bench in *Kishan Chand v. Union of India*, ¹ (S.N.Andley, C.J. and T.P.S.Chawla, J.) was cited in support of the submission that where the Chief Engineer refused to appoint an arbitrator, as in this case, the Court has no jurisdiction to deal with the matter and the application should be thrown out. Four other decisions of the learned single Judge of this Court were cited before Kirpal, J. They are *Basakha Singh and Sons v. Indian Drugs and Pharmaceutical Ltd.*, ² (Sultan Singh, J.); *Rajindra Electric Works v. Delhi State Industrial Development Corporation Ltd.*, ³ (J. D. Jain, J.); *M/s. Alkarama v. Delhi Development Authority*, ⁴ (Avadh Behari Rohatgi, J.) and *G.D.Tiwari v. Union of India*, unreported decision in ⁵ dated 9th January, 1982 decided by G.R.Luthra, J. On the decisions cited before him the learned single Judge found a conflict of opinion. He, therefore, referred this case to a larger bench. This is how this suit has come to us for decision.

4. The real question for decision is whether the Court has the power to appoint an arbitrator under Section 20 of the Act where the Chief Engineer on a request made to him has, for one reason or the other, declined to make the appointment. The learned Judges in *Kishan Chand* took the view that the arbitration clause, as it is worded, negates the power of the Court to appoint an arbitrator under the Act. The arbitration clause was exactly the same before the Division Bench as before us. On the clause they said this:

"It will be recalled that the arbitration clause categorically states :-

'It is also a term of this contract that no person her than a person appointed by such Chief Engineer or administration head of the C. P. W. D., as a aforesaid, should act as arbitrator, and if, for any reason, that is not possible, the matter is not to be referred to arbitration at all.'

Obviously, the purpose of this stipulation was to negate the power of the Court to appoint an arbitrator under the Arbitration Act. Conceivably, no other authority or person could have or obtain the power to appoint an arbitrator to determine disputes arising out of the agreement. So absolute is the stipulation made that if, for any reason, it is not possible that an arbitrator be appointed by the Chief Engineer or the administrative head of the C. P. W. D., the arbitration agreement itself is destroyed" (pages 648 and 649).

5. To the clause in question the learned Judges held that neither Section 8 (1) (a) nor Section 8 (1) (b) nor Section 20 (4) would be applicable. So their conclusion was that under Section 20 (4) the Court will be unable to deal with a situation in which the person designated, Chief Engineer as in this case, failed or refused to appoint. They said:

"It may well be that the Court is powerless in the situation contemplated the Arbitration Act is not all comprehending and does not provide for every imaginable case." (page 647)

6. The short question is whether Kishan Chand's case was rightly decided.

7. We have no doubt that Section 8 does not apply to this case. In our respectful opinion the learned Judges were absolutely right that neither Section 8 (1) (a) nor Section 8 (1) (b) applied to the clause such as we have in this case. On this point we are perfectly in agreement with them. Whether it is under Clause (a) or Clause (b) Sec. 8 requires the party to serve on the other party a written notice to concur in the appointment of the arbitrator or in supplying the vacancy where the appointed arbitrator neglects or refuses to act etc. The contractual mechanism of Clause 25 of the arbitration clause with which we are concerned is entirely different. To a case where the authority to nominate the arbitrator is vested in the Chief Engineer, as is the case with Clause 25, Section 8 on its own term shall have no application. The clause provides for an appointment by a named person - Chief Engineer - in this case. He is *persona designata*. This method must be invoked. Thus method does not fit in the scheme and structure of Section 8.

8. Where we differ from the learned Judges of the Division Bench in Kishan Chand's case is on the power of the Court to appoint the arbitrator under Section 20 (4) of the Act. In our opinion the Court clearly has power to appoint the arbitrator if the Chief Engineer refuses to appoint one on a request made to him. Section 20 provides that where any persons have entered into an arbitration agreement and where a difference has arisen to which the agreement applies, they or any of them may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. Such an application is registered as a suit. The claimant is called a plaintiff and the opposite party is called the defendant. Notice is then issued on this application of the plaintiff to the opposite parties.

"requiring them to show cause within the time specified in the notice why the agreement should not be filed" (S.20 (3)).

9. Then comes Section 20 (4) which says:

"(4) Where no sufficient cause is shown the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or, where the parties cannot agree upon an arbitrator to an arbitrator appointed by the Court."

10. In Kishan Chand's case (ILR (1974) 2 Delhi 637) the learned Judges held that under Section 20 (4) the Court would be unable to deal with a situation in which the person designated failed or refused to appoint. With great respect we are unable to agree with this conclusion.

11. Clause 25 vests the power to nominate the arbitrator in the Chief Engineer. Section 4 provides for the mode of appointment of the arbitrator by a person designated by the parties. Section 4 says:

"The parties to an arbitration agreement may agree that any reference there under shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment."

12. So the contractor and the Union of India who are the parties to the arbitration agreement have agreed that the reference of their disputes shall be to be arbitrator who shall be appointed by the Chief Engineer. The Chief Engineer is not designated by name but as the holder of the office for the time being.

13. Now Section 20 (3) provides that notice shall issue to the opposite party, viz., the defendant, the Union of India in this case, to show cause why the agreement should not be filed. If the Union of India shows good cause for not filing the agreement the Court shall refuse to file the agreement and dismiss the petition. But if no sufficient cause is shown by the defendant the Court shall order the agreement to be filed and shall make an order of reference by asking the Chief Engineer to appoint the arbitrator in terms of Clause 25. Because that is the mode of appointment of the arbitrator which has been agreed upon by the parties in the agreement. We have no doubt in our minds that when the Court directs the Chief Engineer to appoint the arbitrator, after dismissing the objections of the Union of India, the Chief Engineer shall comply with the order

of the Court and, if in spite of directions given to him he refuses to make 'the appointment, the Court is not powerless, as was the view of the learned Judges in Kishan Chand's case, to make the appointment itself. Under Section 20 (4) the Court shall appoint the arbitrator because then it will be a case "where the parties cannot agree upon an arbitrator."

14. The view that we are taking here is supported by the decision of the Supreme Court in *Union of India v. Prafulla Kumar Sanyal*, AIR ⁶ In that case the clause required that the arbitrator shall be appointed by the President. The President did not appoint the arbitrator. The Court, therefore, made this order : "In the instant case, as air arbitrator has not been appointed by the parties and as the parties are not agreed upon an arbitrator the Court may proceed to appoint an arbitrator, but in so doing it is desirable that the Court should consider the feasibility of appointing an arbitrator according to the terms of the contract. In this case the respondent in his petition has prayed for an appointment of an arbitrator under the terms of the agreement. Before us both the parties expressed a desire that the President should be asked to appoint an arbitrator according to Clause 29 of the agreement. We feel that there could be no objection to this suggestion and we accordingly ask the President to appoint an arbitrator as contemplated under Clause 29 within two months from today. The arbitrator so appointed will immediately enter on his duties and dispose of the reference as expeditiously as possible. The appeal is accordingly allowed. The President will appoint the arbitrator within two months from today, failing which Mr. Tapash Banerjee who was appointed as an arbitrator by the single Judge of the Calcutta. High Court will enter upon his duties." (pages 1458 to 1459).

15. This, in our opinion, is a model order which should be followed in all cases under Section 20 (4) where the circumstances are similar as in the present case. We too are disposed to make an order in terms similar to that of Supreme Court.

16. But counsel for the Union of India say that Prafulla Kumar's case has no application to the present Clause 25. He submits that the difference in the Supreme Court case and the present one is this. Here the arbitration clause states that no person other than a person appointed by the Chief Engineer or administrative head of the C. P. W. D. shall act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all.

17. Counsel laid a great deal of stress on these words and submitted that if the

Chief Engineer does not appoint the arbitrator for one reason or the other then the Court is powerless and the party remediless. At least under the Act, the only course open to the party may be to file a civil suit, he submitted. The Arbitration Act has no remedy for such an eventuality. He maintained that the view of the learned Judges of the Division Bench in Kishan Chand's case (ILR (1974) 2 Delhi 637) on this aspect was right and we should not differ from them. We regret we cannot concur in the reasoning of the division bench when they say that the Court is powerless to appoint the arbitrator under Section 20 (4) and the clause is destroyed.

18. The Chief Engineer is not the Arbitrator. He is the chosen appointer of the parties. It is true that he is an employee of one of the parties to the dispute. But that does not mean that he can take sides. He has to do his duty under the clause. The parties have reposed confidence in him and his integrity. To the Government he will show no favour. He can be neither loyal nor disloyal to the master. He can be neither friend nor enemy of the parties.

19. If the Chief Engineer does not appoint the arbitrator he must justify his refusal and support it with reasons. If the refusal is arbitrary the Court will correct the Chief Engineer and tell him where his duty lay. He is given the duty to appoint the arbitrator and not to destroy the clause. It is a misreading of the clause to say that if the Chief Engineer refuses to appoint the arbitrator the Court is powerless. Such a view as the Judges of the Division Bench took belittles the effectiveness of the provisions of Section 20 (4) on the ground that it does not provide for a case as had arisen before the Division Bench and before us in this Full Bench. The legislature foresaw that such a case can arise and, therefore, Section 20 provides that the Court shall follow this course. In the first place, the Court shall ask the person designated to appoint the arbitrator. Secondly, if he does not appoint the Court shall appoint the arbitrator. Where the parties cannot agree upon an arbitrator the Court at once comes in and appoints the arbitrator. This is the course the Supreme Court followed in Prafulla Kumar's case AIR 1979 Supreme Court 1457. And this is the course we are inclined to follow in this case.

20. As we have said above the Chief Engineer will certainly appoint an arbitrator when the Court directs him to do so, after listening to the objections of the Union of India, who resist the appointment on one ground or the other. The Chief Engineer must mention a reason for his refusal. If the Chief Engineer'

gives reasons that are quite satisfactory the Court may agree with him and refuse to appoint the arbitrator and in that case refuse to file the arbitration agreement. But reason he must give. There must be a good reason to act. And there must be a good reason not to act. The Chief Engineer must take a sane and a sound view. The party has the right to know the reason why he is not appointing the arbitrator. The Court will then rule upon his reason. If the reason is bad the Court will direct him to appoint the arbitrator. This is as simple as that. We have no doubt that he will obey the Court and discharge his duty under the clause.

21. The clause which the Division Bench thought was an "absolute" stipulation uses two critical words: "reason" and "possible". These are strong words. The Chief Engineer's action must be dictated by reason. Reason is used in contradistinction to caprice. The word "possible" means that it is within the realm of the practical. If it is within the range of possibility the Chief Engineer must do his duty. It may be impossible to appoint an arbitrator where the office of the Chief Engineer is abolished, and there is no administrative head of the department either. In that case, it may well be argued that the matter is not to be referred to arbitration at all. We can conceive of those cases where the nominator of the arbitrator is not in existence. But so long as the office of the Chief Engineer exists we cannot conceive that there can be an "insuperable obstacle" to the appointment of the arbitrator by the Court as the Division Bench thought in *Kishan Chand's case* (ILR (1974) 2 Delhi 637). Section 20 (4) shows that the refusal by the Chief Engineer is capable of being surmounted. There is nothing new or novel in the clause which says that no person other than a person appointed by the Chief Engineer shall act as the arbitrator and if for any reason, that is not possible the matter is not to be referred to arbitration at all.

22. The clause shows that the Chief Engineer is accountable to the Court. He cannot say that he is not answerable to any one, as was argued before us on behalf of the Union of India. He is amenable to our jurisdiction under Section 20 (4). He is not above the law. Nor is he a law unto himself. The contract which contains the arbitration clause is a business document. We must give it business efficacy so as to effectuate the intention of the parties. We will be doing great injustice to the contractor if we tell him that the Chief Engineer has destroyed the clause and we are powerless to redress his grievance.

23. One of us (Avadh Behari, J.) protested against the reasoning of the Division Bench sitting singly in *Alkarma v. Delhi Development Authority*,⁷ In the Full Bench we should now overrule Kishan Chand. It was a suicidal argument which the Division Bench accepted. It had disastrous consequence for the contractor. It meant the death of the clause and the abrogation of judicial power. The appointer became the destroyer of the clause. The Judges in the Division Bench made him the master of the show, leaving the contractor at his mercy. They denuded the Court of its jurisdiction. This was against all canons of construction. Such was the unfortunate effect of their decision.

24. That power resides in the Court to make the appointment is the very abstract and essence of Section 20 (4). It is a ministerial job which the Chief Engineer performs under the clause. The judicial function is with the Court under Section 20 (4). By giving the ministerial function a hegemony which it does not possess the learned Judges belittled the importance of the judicial power. They negated the power of the Court under Section 20 (4). We cannot assent to this negative approach. In our opinion, the Court has affirmative power to appoint the arbitrator, where the Chief Engineer refuses to do his positive duty. Where the chosen appointer does not appoint, the result will be a deadlock. It will be a case "where the parties cannot agree upon an arbitrator", to use the words of Section 20 (4). Whatever may be reason of the disagreement the end result is that the parties cannot agree upon the arbitrator.

25. Where the parties agree, the matter is referred to an arbitrator agreed upon by both. In case of disagreement the Court is given the power to appoint. This is how the deadlock is resolved. The phrase "where the parties cannot agree" suggests that there can be either agreement or disagreement on the arbitrator. In case of agreement there is no difficulty. In case of disagreement the Court has the power to appoint. This is the theory of Section 20. It is a fallacy to think that the clause can be destroyed by the Chief Engineer. It is a fallacy to think that the Arbitration Act has no solution for a problem such as the one with which the Division Bench had to wrestle. No modern developed State can afford such a detached attitude. Arbitration is an important part of commercial life, and every legal system must in some degree be concerned with it.

26. The formulation of the rights, duties and powers of the arbitrator and the mutual obligations of the parties in relation to the conduct of the reference are created and regulated by the private bargain between the parties. The arbitration

law of India, as in England, is dominated by the law of contract, it is true. But the State has the right and duty to ensure, through the medium of the Courts, that the reference is conducted in accordance with procedural norms which the State itself lays down. "Recognizing the value of the institution, the State will lend its own coercive power to reinforce the process at points of weakness." (Law and Practice of Commercial Arbitration in England by Mustill and Boyd, 1982 Ed. pp. 5-6). In our opinion Section 20 (4) is the embodiment of judicial powers which are essentially the property of the State.

27. The arbitration agreement provides that the arbitrator is to be nominated by a third party, the Chief Engineer. If the person who is to make the appointment refuses or neglects to do so at the request of the party, the Court may, on the application of the party, under Section 20 (4) appoint an arbitrator with the same powers as if he had been appointed in accordance with the terms of the agreement.

28. Two things are necessary for the exercise of power by the Court. First, the claimant must invite the nominating party to make the nomination. Secondly, the person who is to make the appointment must either have refused to do so or have failed or neglected to do so within a reasonable time.

29. It will appear from this discussion that the Chief Engineer, "the chosen appointer", to use a phrase of Russell is a third party. (Russell- Arbitration, 18th Edition, page 108, Mustill and Boyd, p. (sic). The parties to the dispute are the contractor on the one hand, and the Union of India on the other. The arbitrator has to be nominated by a person designated in the agreement. This is the contractual mechanism for appointment of the arbitrator. Two important consequences follow from it. First, the function of this third party is ministerial and not judicial. As the Privy Council has said:

"It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointment should be made with integrity and impartiality, but it is new to their Lordships to hear them called judicial acts."

(*Palgrave Gold Mining Co. v. Mc Millan*, ⁸ per Lord Hobhouse). The Supreme Court has said

"The powers and duties of the Court under Section 20 (4) are of two distinct

kinds. The first is the judicial function to consider whether the arbitration agreement should be filed or not. This may involve dealing with objections to the existence and validity of the agreement itself. Once that is done and the Court has decided that the agreement must be filed the first part of its powers and duties is over. Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties."

(Per Hidayatullah, J. in *Re: M/s. D. Gobindram v. M/s. Shamji Kalidas and Co.*),⁹

30. The second consequence is that a ministerial functionary cannot destroy the arbitration agreement. He cannot defeat the agreement. The law gives him no such power nor the arbitration agreement. The Supreme Court calls the matter of appointment by the Court or third party a "ministerial" act. The power to appoint is placed by the parties in the hands of the Chief Engineer. But the power to destroy the clause is not placed in his hands.

31. That the Chief Engineer is a third party is borne out by the fact that he nowhere appears as central figure in the arena. He is not the real contestant. He is the appointer. The Union of India is the real defendant. It can oppose the filing of the arbitration agreement on all the grounds open to it. Once the objections have been dealt with by the Court the judicial battle is over. Only the ministerial function remains to be discharged by the third party. Viewed in this light the legal puzzle, as the Division Bench described it, becomes easy to answer.

32. Suppose the Chief Engineer refuse or neglects to appoint the arbitrator, where do we go from here? Can the Judge fold his hands and say: "I have no power?" In that case the arbitration agreement is itself destroyed. But it is dangerous so to hold. In our opinion, Section 20 (4) certainly comprehends a case covered by Section 4 of the Act. Section 4 enacts that the person designated shall appoint the arbitrator. But the residual jurisdiction is vested in the Court under Section 20 (4). The Court will lean in favor of exercising its power to effectuate the arbitration agreement. We ought not to give judicial encouragement to the hands-off theory propounded by the Division Bench in *Kishan Chand* (ILR (1974) 2 Delhi 637). They ousted the jurisdiction of the Court to appoint an arbitrator under Section 20 (4). Thus, the power of the Court was nullified. The result was that the clause was destroyed and the power of the

Court was destroyed. We cannot agree with such a conclusion on the meaning of the clause.

33. The dominant theme of the Division Bench in *Kishan Chand* is that power to appoint the arbitrator is in the Chief Engineer. There was no power in the Court, they thought. On their reasoning it is the Chief Engineer's prerogative to appoint or refuse and no one could question his decision. The moment the Chief Engineer refuses the clause goes. They hold that if the appointer refused to appoint it was impossible to arbitrate. Such is the line of their reasoning. This is a fallacious reasoning, in our respectful opinion. Such absolute power as they give to the Chief Engineer is unknown to law whatever be the field - contract or administrative law. The Chief Engineer has a ministerial act to perform. He is a third party. It is a confusion of thought to identify him with the party to the litigation. It is another thing that the disputes relate to his department and he is the Government's own man. But his role is secondary. He cannot be given a place of primacy. He cannot be allowed to destroy the clause. It is for the Union of India to raise objection to the filing of the agreement and to give reasons for not going to arbitration. That reason is subject to the scrutiny of the Court. The Chief Engineer's role is passive. The Union of India plays the active role in the legal battle.

34. The truth is that the Division Bench did not differentiate between a judicial act and a ministerial act. As opposed to a judicial act a ministerial act is an act or duty which involves the exercise of administrative powers. If the Chief Engineer refuses to appoint he refuses to do his duty. This is administrative nihilism, if we may call it. He stultifies himself. But the clause he cannot destroy.

35. He does not exercise any individual Judgment or discretion in the role assigned to him. In the mode of exercise of his power he has no discretion. To hold that he can destroy the clause is to give him a power which he does not possess.

36. J.D.Jain, J. found the reasoning of the Division Bench unacceptable. He said : "the words 'that is not possible, appearing in the arbitration clause evidently postulate some kind of hurdle or impediment' in the way of the appointing authority. The appointing authority, he said, "must assign some reason as to why it is not possible to appoint an arbitrator in the case. There

must be some valid ground or compelling reason not to appoint", he added. (Rajindra Electric Works V. D. S.I. D. C., AIR 1981 Delhi 225 at p. 228).

37. Kirpal, J. in the referring order in this case expressed dissatisfaction with the reasoning of Kishan Chand. If left free to follow a decision, he said, he would prefer Alkarama to Kishan Chand. But he found himself shackled by the doctrine of precedent; so he referred the matter to a larger Bench.

38. In *Basakha Singh and Sons v. Indian Drugs and Pharmaceutical Ltd.*,¹⁰ Sultan Singh, J. followed Kishan Chand. Similarly Luthra, J. in *G.D.Tiwari . v. Union of India*¹¹ followed Kishan Chand. In our opinion Kishan Chand has been completely undermined by the Supreme Court decision in *Union of India v. Prafulla Kumar*,¹² Now it seems to us impossible, without disregarding the decision of the Supreme Court in Prafulla kumar, to say that the stipulation here is absolute and negates the power of the Court to appoint the arbitrator. In our opinion, the arbitration agreement does not oust the jurisdiction of the Court.

39. To sum up. The clause provides for an agreed method. The method is appointment of the arbitrator by a named appointer. This agreed method or machinery must be invoked. But if the arbitration machinery fails because the Chief Engineer does not appoint the Court has the power to fill in the gap. The Court steps in Chief Engineer's stead. Section 20 (4) confers upon the Court a general residual power to appoint an arbitrator when the parties do not agree upon the arbitrator. The purpose of the section is to effectuate the intention of the parties in certain events in which one would expect them to intend that the provision for arbitration should stand but which are not covered in terms by the arbitration provision. If the arbitrator is not appointed by the agreed appointer such a case is contemplated by the authors of Section 20 (4). They were the authors of Section 4 also where the power of appointment can be committed to some other party.

40. The Arbitration Act applies to the proceedings. The clause says so expressly. Where the machinery of appointment breaks down one can legitimately say that the parties do not agree upon the appointment of the arbitrator. But this cannot be said without approaching the appointer. On his refusal or neglect clause (4) of Section 20 will spring into action. Failure of the arbitration machinery is essential for the invocation of the Court's power.

41. The intention of Section 20 (4) is to confer power on the Court to make an

appointment where the machinery of appointment has broken down. This is a sensible meaning to give to the clause and the statute. To this aspect the learned Judges did not address their minds. The result is that their pronouncement is leading to most unhappy results.

42. On the view that we take and in view of the specific pronouncement of the Supreme Court we must hold that Kishan Chand was wrongly decided. It is time that we overrule it here and now.

43. So much for Kishan Chand. We now turn to the facts of this case. The first question is: Why should the agreement be not filed? The petitioner by his letter dated 29th June, 1981 asked the respondents to appoint an arbitrator. The Chief Engineer refused to make the appointment. The reason he gave was that the petitioner had made the request for appointment of the arbitrator after the expiry of 90 days and it is a term of the clause that such a request should be made within 90 days otherwise the Government shall be discharged and released of all liabilities and all claims will be deemed to have been waived.

44. Is this a good reason? Now a Division Bench of this Court in *Jai Chand Bhasin v. Union of India*,¹³ (Sachar and Khanna, JJ.) has held that this question falls within the province of the Arbitrator to whom the dispute shall be referred. Whether the demand for arbitration has been made within the stated time and whether the claim should be deemed to have been waived in terms of the clause is essentially a question for the arbitrator to decide. The Court is not concerned with it at this stage. The Court has only to see that there are disputes and those disputes are to be referred to arbitration as per agreement between the parties and the arbitrator can decide those questions.

45. Applying Jai Chand's case we find that there are disputes between the parties which ought to be referred to arbitration.

46. Following Prafulla Kumar's case AIR 1979 Supreme Court 1457 we order the Chief Engineer to appoint an arbitrator in accordance with clause 25 of the agreement within two months from today failing which Sri M.L. Jain, Advocate (retired Registrar of this Court), shall be the arbitrator. In the case there will be no order as to costs.

Order accordingly.

Cases Referred.

1. ILR (1974) 2 Delhi 637
2. AIR 1979 Delhi 220
3. AIR 1981 Delhi 225
4. AIR 1981 Delhi 230
5. Suit No. 1287-A of 1982,
- 6.1979 Supreme Court 1457.
7. AIR 1981 Delhi 230.
8. 1892 AC 460 (470)
9. AIR 1961 Supreme Court 1285 (1294)
10. AIR 1977 Delhi 220 (222),
11. (Suit No. 1287-A of 1982, D/-9-1-1982 (Delhi) (supra)
12. AIR 1979 Supreme Court 1457.
13. AIR 1983 Delhi 508