

(1989) 04 OHC CK 0023

In the Orissa High Court

Case No : Civil Revision No. 491 of 1984

Food Corporation of India and Another

APPELLANT

Vs

Ramchandra Agrawala and Another

RESPONDENT

Date of Decision : 20-04-1989

Acts Referred:

Arbitration Act, 1940 — Section 8(1)
Evidence Act, 1872 — Section 115

Citation : AIR 1990 Ori 116

Hon'ble Judges : J. Das, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : Y.S.N. Murty, for the Appellant; R. Mohanty, for R.K. Kar, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—Two important questions of law arise in this revision for our consideration, namely:--

(i) An interpretation of Section 8(1)(b) of the Arbitration Act as to what is the true meaning of the expression "...the arbitration agreement does not show that it was intended that the vacancy should not be supplied"; and

(ii) Whether even though such an intention was there in the original agreement, by subsequent conduct and consent of parties, the said intention can be said to have been varied and the parties agreed to supply the vacancy in the event of the contingencies arising u/s 8(1)(b). The matter has been referred to a Division Bench in view of the divergence of views expressed by the learned Single Judges of this Court.

2. The brief facts of the case are that opposite party No. 1 entered into an agreement with the Food Corporation of India, petitioner No. 1, and the agreement contained an arbitration clause. The said arbitration Clause 15 of the agreement so far as relevant is extracted hereunder in extenso :--

"15. Arbitration :

All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the agreement) shall be referred to the sole arbitration of the Collector. It is also a term of this agreement that no person other than the Collector should act as Arbitrator and, if for any reason that is not possible, the matter is not to be referred to arbitration at all.

Provided"

Disputes having arisen between the parties, the same were referred to the Collector for arbitration and the matter was registered as Arbitration Case No. 6 of 1973. As there was negligence and inaction on the part of the arbitrator in disposing of the matter, opposite party No. 1 filed an application before the Subordinate Judge for removal of the arbitrator and for appointment of fresh arbitrator, invoking the jurisdiction of the Subordinate Judge, Bolangir u/s 8 of the Arbitration Act. That application had been registered as Title Suit No. 5 of 1975 in the Court of the Subordinate Judge, Bolangir and later on was transferred to the Subordinate Judge, Titilagarh, a new Subordinate Judge's Court having been created at Titilagarh and was registered as Title Suit No. 16 of 1976. By order dated 15-12-1978, the Subordinate Judge removed the named arbitrator and thereafter by order dated 25-2-1978 appointed Shri Khageswar Mohanty, a retired District Judge, as arbitrator. The said Shri Mohanty did not give his consent for appointment and, therefore, opposite party No. 1 made a fresh application before the Subordinate Judge for appointment of another arbitrator on 21-9-1982. By order dated 5-10-1982, the Subordinate Judge allowed the application of opposite party No. 1 and recalled the appointment of Shri Khageswar Mohanty and appointed Shri J.N. Das as arbitrator. Thereafter the petitioner Food Corporation of India filed an application on 7-12-1982 to recall the order appointing Shri J. N. Das as arbitrator and while considering that application of the petitioner, on a prayer of the petitioner and on consent of both parties, by order dated 25-2-1983, Justice B. K. Ray, a retired Judge of this Court was appointed as arbitrator. It is undisputed that it is the petitioner-Corporation which suggested the name of Justice B. K. Ray and that was accepted by opposite party No. 1. The said Justice B. K. Ray entered upon the reference and parties submitted to his jurisdiction. Opposite party No. 1 filed the Claims Statement and petitioner also paid the necessary fees towards remuneration of the arbitrator and took time for filing an objection to the Claims Statement. Thereupon on 7-10-1983, the petitioner filed an application purporting to be the u/s 161 of the CPC praying to recall the order dated 25-2-1983 and contending therein that in view of the arbitration clause in the agreement, the Court had no jurisdiction to appoint an arbitrator u/s 8(1)(b) of the Arbitration Act, inasmuch as the clear intention of the parties was that the vacancy should not be supplied at all. That application was registered as M.J.C. No. 49 of 1983 and the Subordinate Judge having rejected that application by order dated 8-8-1984, the

petitioners have filed the present Civil Revision.

3. From the narration of facts made earlier, it is crystal clear that the petitioners did not assail the order of the Subordinate Judge dated 15-12-1978 removing the named arbitrator as well as the order the Subordinate Judge dated 25-2-1978 appointing Shri Khageswar Mohanty as Arbitrator. Further while assailing the order of the Subordinate Judge dated 5-10-1982 appointing Shri J. N. Das as arbitrator, it was the petitioners who prayed that Justice B. K. Ray be appointed as arbitrator and the prayer was acceded to by opposite party No. 1 and said Justice B. K. Ray was appointed as arbitrator by order dated 25-2-1983.

4. Mr. Murty, the learned counsel for the petitioners, contends that in view of the arbitration clause in the agreement, the Court had no jurisdiction u/s 8(1)(b) of the Arbitration Act to fill up the vacancy in question and, therefore, the appointment of all arbitrators made by the Court pursuant to the powers u/s 8(1)(b) must be held to be without jurisdiction. The learned counsel further urges that the question being one of jurisdiction and the Court being without jurisdiction, no amount of consent can confer jurisdiction on the Court and, therefore, the order of appointment of Justice B. K. Ray as arbitrator, even if it is one with the consent of the petitioners, cannot be sustained.

Mr. Mohanty, the learned counsel for opposite party No. 1, on the other hand, though initially urged that the arbitration clause in the present case did not indicate the negative intention of not supplying the vacancy in the event the appointed arbitrator neglects or refuses to act or is incapable of acting or dies and, therefore, Section 8(1)(b) would apply, but in course of arguments fairly states that the agreement, more particularly Clause 15, would indicate that the parties intended that the vacancy should not be supplied and, therefore, Section 8(1)(b) may not be attracted. The learned counsel, however, urges that this question is academic in the present case since the petitioners by their own conduct is not challenging the earlier orders of the Subordinate Judge in cancelling the appointment of the named arbitrator and appointing fresh arbitrators as well as in making the prayer that Justice B. K. Ray be appointed as the arbitrator which prayer has been accepted by opposite party No. 1 and the Court has merely formalised the agreement between the parties by passing an order on 25-2-1983 waived the restriction contained in Clause 15. According to Mr. Mohanty, therefore, the initial intention of the parties in the arbitration agreement that the vacancy should not be supplied must be held to have been varied and substituted to the extent of supplying the vacancy by making a fresh appointment and, therefore, there is no lack of jurisdiction in the Court to pass a formal order in accordance with the substituted intention of the parties. The rival contentions require careful examination of the law on the subject.

5. Let us now examine the first contention of Mr. Murty, the learned counsel for the petitioners, which centres round an interpretation of Section 8(1) of the Arbitration Act and whether the arbitration clause in the agreement ousts jurisdiction under Clause (b) of Sub-section (1) of Section 8 to fill up the vacancy

even if the contingencies mentioned in the said subsection have arisen. In order to appreciate the point in issue, Section 8(1) is extracted hereunder in extenso:--

3. Power of Court to appoint arbitrator or umpire.--

(1) In any of the following cases--

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to set, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; 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."

A plain reading of the aforesaid provision indicates that the Court can have the jurisdiction to pass appropriate orders under the aforesaid sub-section on the following conditions being satisfied--

(a) there is an agreement between the parties to refer the dispute to arbitration;

(b) the parties must have appointed an arbitrator or arbitrators or umpire to resolve their disputes;

(c) any one of them must have neglected or refused to act or is incapable of acting or has died;

(d) the arbitration agreement must not show that it was intended that the vacancy should not be filled; and

(e) the parties or the arbitrators, as the case may be, had not supplied the vacancy.

Undisputedly, the conditions enumerated in items (a), (b), (c) and (e) have been fulfilled in the present case, but the only dispute is whether condition No. (d) has been fulfilled or not, that is to say, whether the arbitration agreement indicates the intention of the parties that the vacancy should not be filled. This provision has been construed by several Courts to which we will refer later, but a conspectus of all the decisions would indicate that if the agreement in question does not show the contrary intention stated in Clause (b) with regard to the filling up of the vacancy, then the Court would have the power to make an appointment under Clause (b) of Sub-section (1) of Section 8 of the Arbitration Act. If, however, it appears from the agreement that the intention of the parties was that the vacancy should not be filled up, then the Court would have no authority to pass an order invoking its jurisdiction u/s 8(1)(b). Further a mere

silence in the agreement about the filling up of the vacancy will not indicate the intention that the vacancy will not be filled up, but on the other hand, the negative intention must be expressly stated in the agreement or can be ascertained with reasonable certainty. The language used in the said sub-section is not that "the parties intended to supply the vacancy" but that the "parties did not intend to supply the vacancy". Therefore, to take the case out of the purview of the provisions of Section 8(1)(b) what is required to be found out is the intention of the parties not to supply the vacancy. An intention not to supply the vacancy cannot be inferred by the mere fact that the arbitrator was designated as the holder of an office, when it appears that he was not appointed for any specialised knowledge and what he could have done could be done by any independent or impartial person possessing adequate knowledge of law. We shall now examine certain authorities cited at the Bar.

6. In the case of *Tata Iron and Steel Co. Ltd. Vs. Rajrishi Mineral Industries*, , Hon"ble R.N. Misra, J. (as he then was) considered the provisions of Section 8(1) (b) of the Arbitration Act and followed the judgment of S. R. Das, J., as the learned Judge then was, in the case of *Governor-General in Council Vs. Associated Live-stock Farm (India) Ltd.*, , wherein his Lordship had observed (at p. 92 of AIR):

".....I am inclined to agree with Mr. Chaudhury. I do not find anything in the arbitration clause suggesting that the parties agreed that any vacancy in the office of arbitrator should not be filled up, In the absence of any such agreement the vacancy can be easily supplied and there is no reason think that the arbitration will be infructuous at all. If the particular officer sanctioning the contracts refuses to act or is incapable of doing so by reason of his absence or otherwise there are provisions in the Indian Arbitration Act for the appointment of another arbitrator in his place and the arbitrator so appointed will be quite competent to proceed with the arbitration....."

It was noticed by Hon"ble R.M. Misra, J., that the dictum of the Calcutta case was specifically approved by the Supreme Court in the case of *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.*, , wherein the Supreme Court pointed out (at pp. 2300-2301 of AIR):--

".....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 noted 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 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....."

It was held by Hon"ble R.N. Misra, J., in the aforesaid case that unless a negative

intention was indicated, Section 8(1)(b) of the Arbitration Act would be applicable and the Court would have the jurisdiction to fill up the vacancy by appointing an arbitrator. But the learned Judge, however, came to the conclusion that the appellant's counsel in that case was not able to show that negative intention in the arbitration clause.

In the case of *Union of India v. Lingaraj Dash* (1981) 52 CLT 146 : AIR 1981 NOC 227), the same learned Judge "Hon"ble R. N. Misra, C.J., (as he then was) considered the same problem. The arbitration clause in that case has been quoted in paragraph 2 of the judgment. A portion of the said arbitration clause which is relevant for our purpose is extracted hereunder:--

".....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 P. & T. 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 view of the aforesaid term and condition of the arbitration clause, the learned Judge" relied upon the decision of the Delhi High Court in the case of *Kishan Chand v. Union of India* ILR (1974) 2 Del 637, and came to the conclusion that the Court had no jurisdiction u/s 8 to fill up the vacancy by appointing an arbitrator and the Subordinate Judge went wrong in holding that he had jurisdiction to appoint an arbitrator in face of the provision contained in the arbitration clause.

A learned Single Judge of the Delhi High Court in the case of *Rai Bahadur Basakha Singh & Sons (Contractors) Pvt. Ltd. v. Indian Drugs & Pharmaceutical Ltd.* AIR 1970 Del 220, interpreting the arbitration clause in the agreement came to hold (at p. 222 of AIR):--

".....Exclusive discretion is given to the Managing Director of the respondent to appoint an arbitrator, and if he refuses to appoint, there cannot be any arbitrator. Thus, under Clause 25 if it is not possible to appoint an arbitrator, the matter is not to be referred at all to arbitration, i.e., the Court cannot impose its own arbitrator upon the parties....."

While coming to the aforesaid conclusion, the learned Judge relied upon the earlier decision of the said High Court in *Kishan Chand's* case ILR (1974) 2 Del 627.

The Supreme Court also considered the provisions of Section 8(1)(b) in the case of *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.,* . The relevant clause with regard to arbitration has been quoted in paragraph 1 of the judgment itself. Their Lordships of the Supreme Court analysing Section 8(1)(b) held :--

".....The substantive rights of the parties are found in Section 8(1)(b). Before Section 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) that they

must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) any one 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."

Their Lordships also have indicated that 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. But construing the arbitration clause in the agreement, their Lordships came to the conclusion that the terms of the agreement did not in the least show that the parties intended not to supply the vacancy.

Thus in our considered opinion, the real test to be applied to a particular arbitration clause in the agreement is to find out whether the parties to the agreement intended not to supply the vacancy and if such an intention is there then Section 8(1)(b) will have no application and the Court will have no jurisdiction to appoint an arbitrator under the said section.

7. In the case of *Rishi Dev Batra v. Secretary Ministry of Works* (1988) 2 Ori LR 246, the point for decision was whether under Clause 25 of the Agreement, if it was not possible to appoint an arbitrator for any reason, the matter was not to be referred to arbitration at all or not. The Subordinate Judge had come to the conclusion that there was no scope for appointment of an arbitrator by the Court under Clause 25. That was rejected by the learned Single Judge of this Court on a finding that rejection of the application filed by the petitioner in terms of Clause 25 of the agreement even when there was no material before the Court to hold that arbitration was impossible, was unsustainable. The relevant arbitration clause has not been quoted in the aforesaid judgment. The Court has not applied its mind to the specific point in issue as to whether the negative intention as required u/s 8(1)(b) was there in the arbitration clause or not. Thus, the specific point which has arisen before us in the present case was not there before the learned single Judge.

The next decision in a decision of this Court in Civil Revn. No. 373 of 1980 (*Union of India v. M. Siva Rao*) disposed of on 1st May, 1984, where an identical clause like the present clause, which was Clause 25 of the agreement, came up for consideration. Hon"ble R.C. Patnaik, J., negatived a similar contention as the one urged by Mr. Murty, the learned counsel for the petitioners in the present case and held:--

".....The clause says that if it is not "possible" to appoint any arbitrator, the matter is not to be referred to arbitration at all, that is to say, to my mind, it does not appear to be of sound approach to hold that a refusal or inaction of the designated person to appoint attracts the clause. His refusal or inaction does not render the appointment of an arbitrator impossible....."

The aforesaid view is contrary to the decision of this Court in *Union of India v. Lingaraj Dash* (1981) 52 CLT 146: AIR 1981 NOC 227), as well as the law laid down by the Supreme Court in *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.,* , and the learned Judge has unfortunately not referred to both the aforesaid decisions. In our view, the aforesaid case has not been correctly decided and we accordingly overrule the said decision.

In the case of *Indian Tourism Development Corporation Ltd. v. Dass & Co. Engineers and Contractors* (1989) 31 OJD 98 (Civil), our learned brother L. Rath, J., has construed the arbitration clause which was clause 48 and has been quoted in paragraph 2 of the judgment and the said clause is in *pari materia* with, the arbitration clause in the present case and after referring to several decisions and construing the clause held that the intention of the parties must be taken to have been that the agreement regarding arbitration would stand frustrated if such appointment was not possible. In other words, the learned Judge found the negative intention to take the case out of the purview of Section 8(1)(b). The said decision is in consonance with the view we have already taken with regard to the arbitration clause in the present case.

The only other case which need be noticed is the Full Bench decision of the Delhi High Court in the case of *Ved Prakash Mithal v. Union of India* AIR 1984 Del 325 (FB). In the said case, the learned Judges of the Delhi High Court came to hold that *Kishan Chand's* case ILR (1974) 2 Del 637 (referred to *supra*) had not been correctly decided and further held that even though Section 8 might not be applicable, but the Court had power u/s 20(4) of the Arbitration Act. In interpreting the arbitration clause in the said case which is almost in *pari materia* with the arbitration clause of the present case with which we are concerned, their Lordships also agreed with the views expressed in *Kishan Chand's* case to the effect that Section 8(1)(a) or Section 8(1)(b) did not apply to the clause in question. In fact, in the present case, we are only concerned with the applicability of Section 8(1)(b) since on an application u/s 8, the Court has invoked its jurisdiction and has appointed a fresh arbitrator after cancelling the earlier named arbitrator. Therefore, so far as the point in issue in the present case is concerned, namely whether Section 8(1)(b) applies to an agreement or not, the Full Bench agree with the views expressed by the Division Bench *Kishan Chand's* case and consequently the present decision has not decided anything against the view we have already taken with regard to the application of Section 8(1)(b). But the learned Judges in the aforesaid Full Bench case came to the conclusion that the Court had power u/s 20(4) of the Arbitration Act. While coming to the aforesaid conclusion, the learned Judges lost sight of the decision of the Supreme Court in *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.,* , wherein their Lordships of the Supreme Court analysing Section 8(1) and Section 20(4) observed that Section 20 was merely a machinery provision and that the substantive rights of the parties were found in Section 8(1)(b). However, it is not necessary for us to go into that question in the present case, since the present case is to be governed by applicability or non-

applicability of Section 8(1)(b) only.

In view of the aforesaid discussion on the question of law and applying our mind to Clause 15 of the present agreement, we have no doubt in our mind that in the present case the parties did not intend to supply the vacancy and, therefore, the Court had no jurisdiction u/s 8(1)(b) to fill up the vacancy. The first contention of Mr. Murty, the learned counsel for the petitioners, is accordingly sustained.

8. The next question which then arises for consideration is whether in view of the conduct of the parties and more particularly that of the petitioners by not challenging the order of the Subordinate Judge removing the named arbitrator and appointing a fresh arbitrator and filling up the vacancy, as well as all subsequent orders including the order dated 25-2-1983 which order the learned Subordinate Judge passed on the request of the petitioners and Justice B. K. Ray was appointed as arbitrator as prayed for by the petitioners, can it be said that the parties intended to supply the vacancy arising out of cancellation of appointment of the named arbitrator and, therefore, the Court was clothed with jurisdiction to make the appointment. Mr. Murty, the learned counsel for the petitioners, in this connection contends that consent cannot confer jurisdiction if there was originally none and this case being one of lack of inherent jurisdiction cannot be cured. In support of the aforesaid contention reliance has been placed on the decision of the Supreme Court in the case of Khardah Company Ltd. v. Raymon & Co. (India) Pvt. Ltd. AIR 1962 SC 1810 as well as the decision of the Supreme Court in the case of Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., .

In Khardah Company Ltd.'s case AIR 1962 SC 1810, the matter arose on an application being filed u/s 33 of the Arbitration Act, the dispute being as to the validity of the agreement and whether the arbitration clause would include within it the dispute of the nature raised, or not. In that connection, the Supreme Court observed that since the arbitration agreement as defined in Section 2(a) conferred jurisdiction on the arbitrator to hear and decide the dispute, where there was no such agreement, there was initial want of jurisdiction and the said want could not be cured by acquiescence.

In the other case Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., , after an award was passed, the validity of the said award was being challenged on the ground of want of initial jurisdiction of the arbitrator. Their Lordships of the Supreme Court hold (at p. 97 of AIR) :

"Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction, and this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction....."

But in the very case, their Lordships further observed (at P. 98 of AIR) :--

".....There is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrators and in that event the proceedings thereafter before them might be upheld as referable to that agreement and the award will not be open to attack as without jurisdiction....."

In our considered opinion, the aforesaid two decisions of the Supreme Court will not apply to the present case where though the intention of the parties in the original agreement was not to supply any vacancy caused on account of any contingencies enumerated in Section 8(1), yet by virtue of their own conduct the parties consented to fill up the said vacancy thereby making Section 8 applicable and permitting the court to fill up the vacancy by appointing an arbitrator. In fact, a learned single Judge of this Court in the case of Food Corporation of India v. Dwarika Prasad Agarwala, (Civil Revn. No. 571 of 1984 decided on 23rd June, 1986), proceeded on the basis of such consent of parties and held that the Court had the jurisdiction to appoint the arbitrator. It would be profitable at this stage to notice two recent decisions of the Supreme Court. In the case of Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, , wherein their Lordships quoted with approval a passage from Russel on Arbitration; (18th Edition, page 105) to the following effect:--

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence."

Their Lordships rejected the submission of Mr. Kacker that the principle of acquiescence will apply only where the challenge is made after the making of the award and not before and held:--

".....The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from contending that the proceedings were without jurisdiction."

In the case of Neelakantan and Bros. Construction Vs. Superintending Engineer, National Highways, Salem and Others, , reiterating the principles of law decided in Prasun Roy's case (supra) and relying upon the decision of the Judicial Committee in Chowdhury Murtaza Hossein v. Mussumat Bibi Bechunnissa (1876) 3 Ind App 209, as well as the decision of the Supreme Court in the case of N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, , it was held that acquiescence defeated the right of the appellant at a later stage. In view of the aforesaid two recent decisions of the Supreme Court and in view of the conduct of the petitioners referred to earlier, and particularly the petitioner's application before the Subordinate Judge to recall the appointment of Shri J. N. Das and then making a prayer to appoint a fresh arbitrator and supplying the

name of Justice B.K. Ray, a retired Judge of this Court, which prayer of the petitioners was accepted, it would not be open for the petitioners to assail the said appointment again on the ground that the Court had no jurisdiction u/s 8(1) (b) in view in the arbitration clause in the agreement. We have already held that by subsequent conduct the parties have agreed to supply the vacancy and thus the original agreement was substituted by a fresh intention of the parties with regard to supply of the vacancy in question and, therefore, even though Mr. Murty's first contention has been upheld by us, this, revision must be dismissed as we sustain the argument of Mr. Mohanty on the question of fresh consent being given by the petitioners for filling up the vacancy caused after the original arbitrator neglected to arbitrate upon the differences.

9. In the net result, therefore, this Civil Revision is dismissed, but in the circumstances, there will be no order as to costs.

Das, J.

10. I agree.