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**(1996) 09 AHC CK 0128**  
**In the Allahabad High Court**  
**Case No : C.M.W.P. No. 6500 of 1994**

State of U.P.

APPELLANT

Vs

Continental Construction Co. Ltd. and Another

RESPONDENT

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**Date of Decision :** 06-09-1996

**Acts Referred:**

Arbitration Act, 1940 — Section 8, 8(1)

**Citation :** (1996) 09 AHC CK 0128

**Hon'ble Judges :** M. Katju, J

**Bench :** Single Bench

**Advocate :** W.H. Khan and S.S. Bhatnagar, for the Appellant; K.N. Tripathi and B. Malik, for the Respondent

**Final Decision :** Dismissed

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## Judgement

M. Katju, J.—This writ petition has been filed for a writ of certiorari against the impugned order dated 8th January, 1994 Annexure 3 to the writ petition and for writ of quo warranto against Respondent No. 2 Justice Mahabir Singh, a retired Judge of this Court who is functioning as Umpire in an arbitration proceedings between the Petitioner and the Respondent No. 1.

2. The facts of the case are that Respondent No. 1 entered into a contract with the Petitioner for construction of Barrage, etc. In connection with the same, certain disputes arose and Respondent No. 1 invoked the arbitration Clause of the contract, true copy of which is Annexure 1 to the writ petition. The Petitioner as well as Respondent No. 1 appointed their Arbitrators, but since these Arbitrators could not give their award within time, the matter was referred to the Umpire Sri. Ansari. However, Sri. Ansari died in June, 1992 and thereafter the two Arbitrators who had been appointed earlier nominated Justice Mahabir Singh as the umpire. It appears from a perusal of paragraph 6(c) to (t) that about seventeen dates were fixed before Justice Mahabir Singh before whom the parties (often with their Counsel also) appeared and it was only on 20.12.1993 that the Petitioner objected to the Jurisdiction of Justice Mahabir Singh on the

ground that only the court could have appointed the Umpire after Sri. Ansari died. This objection of the Petitioner was rejected by Justice Mahabir Singh by his order dated 8.1.1994 Annexure 3 to the writ petition.

3. I have heard Sri. Wajahat Husain Khan learned Counsel for the Petitioner, Sri. K.N. Tripathi, for the Respondent No. 1 and Sri. B. Malik for the Respondent No. 2 and have perused the impugned order.

4. Learned Counsel for the Petitioner has invited my attention to the decision of the Supreme Court in *Keshavsingh Dwarkadas Kapadia, etc. Vs. Indian Engineering Company, ,* and has referred to paragraph 19 of this case. He has particularly emphasized the last sentence in paragraph 19 which states:

If the appointed person after acceptance of office refuses to act or will not act the parties have to take recourse to the Court.

5. Learned Counsel for the Petitioner submitted that the case of death of an Arbitrator stands on the same footing as refusal by the Arbitrator to act as referred to in Section 8(1)(b) of the Arbitration Act. Section 8 of the Arbitration Act states as follows:

8. 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 act, 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.

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

6. A perusal of Section 8(1)(b) with which we are concerned in this case shows that if the arbitrator or umpire dies and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or

arbitrators do not supply the vacancy, then a party may serve a notice on the other party to concur in the appointment in supplying the vacancy and if the appointment is not made within fifteen days, the court may appoint the arbitrator or umpire. In my opinion, the important words in Section 8(1)(b) with which we are concerned in the present case are "do not supply the vacancy".

7. The question for interpretation is whether the vacancy can be supplied by conduct of the parties also or only by written agreement. In my opinion, there is no bar to supply the vacancy by conduct of the parties. If the parties voluntarily appeared before an arbitrator or umpire and perform several acts such as adducing evidence, cross-examination, filing documents, etc., it shall be deemed that they have supplied the vacancy by conduct and have impliedly appointed the said person before whom they are appearing repeatedly as the arbitrator or umpire.

8. Learned Counsel for the Petitioner then relied on the decision of the Supreme Court in *State of West Bengal Vs. M/s. Naional Builders*, and has invited my attention to Paragraph 6 of the aforesaid decision. In my opinion, this decision will not apply to the facts of the present case because in the said decision of the Supreme Court, the facts were not that the parties were voluntarily appearing before an arbitrator or umpire on several occasions and performing acts like adducing evidence, cross-examination, filing of documents, etc. and then much later they turned round to challenge the jurisdiction of the arbitrator or umpire. A case must be understood on its own facts and in my opinion, the aforesaid decision of the Supreme Court will not apply to the facts of the present case as the facts of the present case are totally different from the facts In the Supreme Court decision. If the interpretation of the learned Counsel for the Petitioner is accepted, then the decision of the Supreme Court should be interpreted to mean that the words "do not supply the vacancy" in Section 8(1)(b) should be ignored. In my opinion, the decision of the Supreme Court cannot be interpreted in the manner as canvassed by the Counsel for the Petitioner. No part of the Statute can be ignored.

9. Learned Counsel for the Petitioner then submitted that the question of jurisdiction could be raised at any stage and there can be no conferment of jurisdiction by acquiescence. He relied on the decision of the Supreme Court in *Tarapore and Co. Vs. State of M.P.*, and the decision on *U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others*, . There is no dispute about the proposition that acquiescence cannot confer Jurisdiction. However, the present case is not a case of jurisdiction being conferred by acquiescence, rather this is a case of jurisdiction being conferred by supplying the vacancy by conduct of the parties as is permissible u/s 8(1)(b) of the Arbitration Act.

10. A perusal of Para 6(c) to (1) of the counter-affidavit reveals that the parties appeared before Justice Mahabir Singh on about seventeen dates and the Petitioner never took the plea on those dates that Justice Mahabir Singh has no Jurisdiction. Instead the Petitioner filed applications, led evidence, and did

various acts and it was only on 20.12.1993 that he raised this issue of jurisdiction. In my opinion, by their conduct, the parties supplied the vacancy which occurred on the death of Mr. Ansari by appointing Justice Mahabir Singh by their conduct and hence there is no infirmity in the impugned order.

11. In *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.,* , it was held that if the agreement is silent, then Section 8(1)(b) raises a presumption that the parties intended to supply the vacancy.

12. Learned Counsel for the Petitioner submitted that in this case, the vacancy had been supplied by the two arbitrators who had become functus officio. That may be so, but the fact remains that subsequently the Petitioner appeared before Justice Mahabir Singh on several dates without raising any objection, and hence he will be deemed to have ratified the Act. As held by the Supreme Court in *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, ,* long participation and acquiescence in the proceeding preclude such a party from contending that the proceedings were without Jurisdiction.

13. In the result, this petition is dismissed and the interim order is vacated.