JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.168 of 2024
Civil Aviation Authority of Pakistan
Versus
LTH JV

Date of Hearing:	05.07.2024
Petitioner by:	Barrister Yousaf Khosa, Barrister M. Zubair Khan Nasar, Barrister Khushbakht and Malik Omair Saleem, Advocate along with Mr. Sagheer Ahmad Bhatti, Legal Officer, CAA.
Respondent by:	Mr. Muhammad Masood Khan and Syed Faisal Hussain Shah, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition the petitioner, Civil Aviation Authority of Pakistan (**"CAA"**), impugns order dated 26.04.2024 passed by the Court of the learned Civil Judge, Islamabad, allowing the application filed by the respondent, Joint Venture of (i) Lagan Construction Limited, (ii) Technical Associates Pakistan (Pvt.) Limited, and (ii) Habib Construction Services (Pvt.) Limited (**"LTH-JV"**), under Section 8 of the Arbitration Act, 1940 (**"the 1940 Act"**), praying for a retired Judge of the Hon'ble Supreme Court to be appointed as an umpire to supply the vacancy that became available due to the recusal by the Hon'ble Mr. Justice (Retired) Tassaduq Hussain Jillani (**"Justice Jillani"**), former Chief Justice of Pakistan, who had earlier been appointed as the umpire. Furthermore, the Hon'ble Mr. Justice (Retired) Abdul Shakoor Paracha (**"Justice Paracha"**) was appointed as the umpire by the learned Civil Court

2. The facts essential for the disposal of the instant petition are that on 24.07.2008, CAA and LTH-JV entered into a contract for the construction of the new Islamabad International Airport (Package-I Airside Infrastructure Civil Works) (**"the Contract"**). The Contract contained a clause providing for disputes between the parties to be settled through arbitration in accordance with the provisions of the 1940 Act. Clause 67.5 provided *inter alia* that the reference of

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disputes shall be to two arbitrators, one appointed by each party, and that before entering on the reference, *"the arbitrators shall appoint an umpire."*

3. It is not disputed that after disputes and differences arose between the parties to the Contract, a two-member arbitral tribunal comprising of the Hon'ble Mr. Justice (Retired) Muhammad Sair Ali (**"Justice Ali"**) and the Hon'ble Mr. Justice (Retired) Muhammad Ather Saeed (**"Justice Saeed"**) was constituted. On 27.09.2016, Justice Jillani was appointed as the umpire by the arbitrators.

4. It appears that there were a series of arbitration proceedings between the parties to the Contract. Justice Jillani, in his capacity as an umpire, had earlier decided disputes between CAA and LTH-JV after the two arbitrators had rendered divergent awards.

5. Subsequently, when more disputes were referred to the arbitral tribunal, CAA submitted an application before the arbitrators taking the position that the claim that had been submitted by the LTH-JV in the second arbitration reference had already been decided by the umpire in the earlier arbitration, and therefore such claims were liable to be dismissed. This application was contested by LTH-JV. One of the arbitrators, Justice Saeed, passed an order dismissing the said application, whereas Justice Ali disagreed and took the view that the application was to be decided in the award on the claims filed by LTH-JV. On 18.02.2023, the arbitrators issued a notice of disagreement to the umpire stating that the arbitrators had not been able to agree with each other on CAA's application for the dismissal of the reference and claims made by LTH-JV. In the said notice, it was also mentioned that the arbitrators were also unable to agree on the ultimate award. Due to this disagreement, the arbitrators referred the matter to the umpire with the request to enter on the reference in terms of Rule 4 of the First Schedule to the 1940 Act.

6. It was after the said notice of disagreement was issued by the arbitrators that LTH-JV, on 01.03.2023, submitted an application to the umpire praying for his recusal. The primary ground taken in the said application was that earlier Justice Jillani had, while deciding

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disputes referred to him by the arbitrators, expressed his mind, and that such expression had resulted in an apprehension of his bias against LTH-JV. CAA contested the said application. Vide order dated 27.04.2023, Justice Jillani recused himself from sitting as an umpire in the reference made by the arbitrators through the notice of disagreement dated 18.02.2023. In the said order, Justice Jillani also directed the parties to approach the Court of competent jurisdiction for the appointment of a new umpire in terms of Section 8(b) of the 1940 Act.

7. On 16.05.2023, LTH-JV sent a notice to CAA under Section 8 of the 1940 Act proposing that the parties either agree to write to the International Chamber of Commerce, Paris, France to nominate a person from its panel of arbitrators to act as the umpire or to agree to the appointment of Mr. Justice (Retired) Syed Hamid Ali Shah as the umpire. LTH-JV cautioned CAA that in case of its failure to give concurrence within a period of fifteen days, an application would be filed before the competent forum for the appointment of the umpire. On 25.05.2023, CAA wrote to LTH-JV insisting that Justice Jillani be recognized as the umpire.

8. This caused LTH-JV to file an application on 02.09.2023 before the learned Civil Court under Section 8 of the 1940 Act praying for the appointment of any retired Judge of the Hon'ble Supreme Court of Pakistan as the umpire against the vacancy created due to Justice Jillani's recusal. CAA contested the said application by filing a written reply. In the said reply, it prayed for a direction to Justice Jillani to assume jurisdiction as the umpire and render an award. Vide order dated 26.04.2024, the learned Civil Court allowed LTH-JV's application under Section 8 of the 1940 Act and appointed Justice Paracha as the umpire. The said order has been assailed by CAA in the instant civil revision petition. Vide ad interim order dated 10.05.2024, this Court suspended the operation of the said order dated 26.04.2024.

9. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that since Justice Jillani had been appointed as the umpire on 27.09.2016, it

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was not reasonable for LTH-JV to seek his recusal more than six years after his appointment; that the mere fact that the umpire, in an earlier reference between the same parties, had rendered an award not to LTH-JV's liking is not a valid ground for seeking his recusal from adjudicating on disputes in a subsequent reference; that since Justice Jillani had been paid a substantial fee, it would be appropriate for the matter to be referred back to him after setting aside the order dated 27.04.2023 whereby he recused himself from sitting as the umpire; and that since clause 67.5 of the Contract provided that the umpire is to be appointed by the arbitrators, the learned Civil Court could have requested to concur in the appointment of the umpire instead of appointing the umpire itself. Learned counsel for the petitioner prayed for the instant civil revision petition to be allowed and for the impugned order 26.04.2024 to be set aside. In making his submissions, learned counsel for the petitioner placed reliance on the judgments reported as Excel Techno Solutions FZE, UAE Vs. Messrs Oil and Gas Development Company Limited (2019 CLC 416), Better Engineered Solutions (Pvt.) Ltd. Vs. Balochistan Development Authority, Quetta (PLD 2023 Islamabad 105), Messrs Alpha Insurance Co. Limited Vs. Messrs Ch. Nizam Din & Sons (2001 CLC 289), Project Director University of Loralai Vs. Zarif Khan Hussainzai and Brothers (2023 YLR 527), Karachi Dock Labour Board Vs. Messrs Quality Builders Ltd. (PLD 2016 S.C. 121), Mengal Brothers Transporters (Pvt.) Ltd. Vs. Federation of Pakistan (2023 MLD 195), and Syed Munir Syed Vs. Sardar Muhammad Kamal Khan (2019 YLR 209).

10. On the other hand, learned counsel for LTH-JV submitted that the impugned order dated 26.04.2024 passed by the learned Civil Court does not suffer from any jurisdictional irregularity so as to warrant interference in the revisional jurisdiction of this Court; that all the essential pre-requisites for filing an application under Section 8 of the 1940 Act had been fulfilled in the statutory notice dated 16.05.2023 which was issued by LTH-JV to CAA requiring concurrence in the appointment of the umpire; that within fifteen clear days of the said notice, the CAA did not concur in the

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appointment of an umpire; that the learned Civil Court, by appointing Justice Paracha as the umpire, acted strictly in conformity with the requirements of Section 8(2) of the 1940 Act; that once the two-member arbitral tribunal appointed Justice Jillani as the umpire, they had no authority under the terms of the Contract or the law to appoint his replacement; and that Section 8(1)(c) of the 1940 Act is applicable only to the first appointment of the umpire that is made by the arbitrators. Learned counsel for LTH-JV prayed for the revision petition to be dismissed. In making his submissions, learned counsel for LTH-JV placed reliance on the law laid down in the judgments reported as Gul Rehman Vs. Gul Nawaz Khan (2009 SCMR 589), Muhammad Kamal-ud-Din Vs. Munir Syed (2022 SCMR 806), Province of Punjab Vs. Rana & Sons (1996 CLC 69), Project Director, University of Loralai Vs. Zarif Khan Hussainzai and Brothers (2023 YLR 527) and Keshavsinh Dwarkadas Kapadia Vs. Indian Engineering Company (AIR 1972 SC 1538).

11. I have heard learned counsel for the parties at considerable length and given my anxious consideration to the arguments advanced by them. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 8 above and need not be recapitulated.

12. The need to delve into the question as to whether CAA has come up with ample justification to object to Justice Paracha's appointment as the umpire by the learned Civil Court through the impugned order dated 26.04.2024 would arise only if this Court were to hold that, given the facts and circumstances of the case, the conditions for filing an application under Section 8 of the 1940 Act were satisfied. The said section reads thus:-

> ***"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, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be*

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*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 the 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."
(Emphasis added)

13. The requirement for the appointment of an umpire is intended to meet the contingency of the arbitrators being of divided opinion. Where the arbitrators are not at variance there is no occasion to refer a matter to the umpire. An umpire can only be appointed if there are even number of arbitrators.

14. Section 8(1)(b) of the 1940 Act envisages a situation where the umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the arbitrators do not supply the vacancy. Section 8(1)(c) of the 1940 Act also envisages a situation where the arbitrators are required to appoint an umpire and do not appoint him. It is only in these circumstances that a party can serve the arbitrators with a written notice to concur in supplying the vacancy created by the umpire's refusal to act. In other words, where the arbitrators do not supply the vacancy created by the umpire's refusal to act etc., they may be required by the parties through a notice in writing to supply the vacancy. And if they do not supply the vacancy within fifteen days of the service of such notice, a party may apply to the Court to appoint the umpire.

15. As mentioned above, the two-member arbitral tribunal constituted pursuant to clause 67.5 of the Contract had, on 27.09.2016, appointed Justice Jillani as the umpire. Whether or not LTH-JV had come up with sufficient grounds to seek Justice Jillani's

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recusal, the fact remains that he, vide order dated 27.04.2023, recused himself from sitting as the umpire in the arbitration with respect to which the notice of disagreement had been sent to him. By recusing himself from sitting as the umpire, Justice Jillani must be deemed to have "refused to act," necessitating the appointment of his substitute. For such appointment, resort is to be made to the provisions of the Contract.

16. Clause 67.5 of the Contract provides *inter alia* that before entering on the reference *"the arbitrators shall appoint an umpire."* It may also be mentioned that Section 3 of the 1940 Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provision set out in the First Schedule insofar as they are applicable to the reference. Paragraph 2 of the First Schedule provides that if the reference is to an even number of arbitrators, *"the arbitrators shall appoint an umpire"* not later than one month from the latest date of their respective appointments. The umpire has to be appointed by the persons designated in the Contract, i.e. the two arbitrators. The power to appoint the umpire has been placed by the parties in the hands of the arbitrators. This is the agreed contractual mechanism for the appointment of the umpire. The Court will lean in favour of exercising its power to effectuate the agreement of the parties embodied in the arbitration clause.

17. By virtue of clause 67.5 of the Contract as well as paragraph 2 in the First Schedule to the 1940 Act, it is the arbitrators who are to appoint the umpire. Where the arbitration agreement between the parties provides a mechanism for the appointment of an arbitrator or an umpire, the Court must hold the parties to their bargain. The Court ought to give deference to the agreement between the parties including the mechanism agreed for appointing an umpire. Reference in this regard may be made to the following case law:-

(i) In the case of Union of India Vs. Prafulla Kumar (AIR 1979 SC 1457), the question that came up for consideration before the Supreme Court of India was whether a Court while deciding an application under Section 20 of the 1940 Act could appoint

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an arbitrator when the arbitration clause in the agreement between the parties provided for a mechanism for the appointment of arbitrators. In the said case, the arbitration clause provided that an arbitrator has to be appointed by the President of India. It was held that an arbitrator can be appointed only in accordance with the terms of the agreement. Accordingly, the application under Section 20 of the 1940 Act was disposed of by the Court by requiring the President to appoint an arbitrator in terms of the arbitration clause in the agreement.

(ii) In the case of D. Gobindram Vs. Messrs Shamji K. & Co. (AIR 1961 SC 1285), the arbitration clause in the agreement between the parties had placed the power of selecting an arbitrator in the hands of the Chairman of the Board of Directors of the East India Cotton Association Ltd. It was held that once the agreement is filed in the Court, the Court could certainly perform the ministerial act of sending the agreement to the Chairman for the appointment of an arbitrator.

(iii) In the case of Vedprakash Vs. Union of India (AIR 1984 Delhi 325), a clause in the arbitration agreement between the contractor and the government provided that in case of disputes, the arbitrator would be appointed by the Chief Engineer. It was held that the Court would order the agreement to be filed and make an order of reference by asking the Engineer to appoint the arbitrator in terms of the arbitration clause in the agreement. Furthermore, in paragraph 39 of the said report, it was held as follows:-

> ***"39. To sum up. The clause provides for an agreed method. The method is appointment of the arbitrator by a named appointor. 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***

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> ***by the arbitration. If the arbitrator is not appointed by the agreed appointor such a case is contemplated by the authors os 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 appointor. 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."***
> **(Emphasis added)**

(iv) **In the case of Food Corpn. of India Vs. A. Muhammad Yunus (AIR 1987 Kerala 231), the agreement between A and B provided that the matters in dispute shall be referred to the sole arbitrator appointed by A and also that no person other than the person appointed by A should act as an arbitrator, and if for any reason that is not possible, the matter is not to be referred to arbitration at all. In the said case, the arbitrator appointed by the Court under Section 8 of the 1940 Act on the application by B was held to be without jurisdiction.**

18. The arbitrators did, on 27.09.2016, appoint Justice Jillani as the umpire, but now that he has recused himself the question that needs to be answered is that by what mechanism is his substitute to be appointed. The Contract does not provide for a mechanism for the appointment of an umpire in place of the umpire who refuses to act. However, the provisions of the Contract do not show that it was intended that a vacancy should not be supplied. 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. In the case of Union of India Vs. Raghunath Singh & Co. (AIR 1980 SC 103), it was held that a Court had no power to supply the vacancy under Section 8(1)(b) of the 1940 Act only if the arbitration agreement did not show that the parties did not intend to supply the vacancy. Additionally, in the case of Parbhat General Agencies Vs. Union of India (AIR 1971 SC 2298), it was explained that the language of Section 8(1)(b) is not 'that the parties intended to supply the vacancy' but on the other hand it is that 'the parties did not intend to

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supply the vacancy'. Furthermore in the said judgment, it was held that if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. Since the terms of the Contract before me do not in the least show that the parties intended not to supply the vacancy, it would be presumed that the parties intended to supply the vacancy.

19. Strong reliance was placed by the learned counsel for LTH-JV on the judgment in the case of Keshavsinh Vs. Indian Engineering Co. (AIR 1972 SC 1538) in support of his submission that once an umpire is appointed by the arbitrators and the umpire accepts the appointment, the power to make the appointment is exhausted, and if a vacancy occurs, a fresh appointment can be made only by the Court. Paragraph 17 of the said report runs as follows:-

> ***"Under section 8 of the Arbitration Act, 1940 if any umpire refuses to act 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, any party may take recourse to the provisions of the statute for appointment of umpire. The construction which the Judicial Committee put upon the words 'refuses to act' in Mirza Sadik Husain's case (1911) 38 Ind. App. 181 (P.C.) (supra) applies to the provisions contained in the Arbitration Act, 1940. Where the arbitrators appoint an umpire upon the condition of the umpire's acceptance of office, the arbitrators will have power to reappoint an umpire if the post is refused. Where, again, the arbitrators appoint an umpire without any such condition of acceptance of office and the appointee declines the office, the arbitrators in accordance with their powers under the arbitration agreement can appoint an umpire again. The court has also power to appoint in lieu of an appointed umpire who refuses to act, as stated in section 8 of the Arbitration Act, 1940. In all these cases the appointment of an umpire becomes effective by acceptance of the office. Thereupon the power of appointment is exhausted. If the appointed person after acceptance of office refuses to act or will not act the parties have to take recourse to the court."***
>
> **(Emphasis added)**

20. In the said case, the arbitration agreement between the parties provided for arbitration by a two-member arbitral tribunal. The agreement also included a clause providing that the arbitrators shall before proceeding with the arbitration appoint an umpire and in the event of any difference arising between them, they shall refer the matter to the umpire for his decision and award. After the time fixed in the arbitration agreement for rendering the award had expired, one of the parties expressed its apprehension of bias with

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respect to one of the arbitrators and made a request for the matter to be referred to the umpire. After the umpire entered on reference and issued certain directions, he was asked by one of the parties to adjourn the matter since that party wanted to file a petition under Section 33 of the 1940 Act to challenge his appointment. One of the grounds taken in the said challenge was that since consent of the umpire was not obtained prior to his appointment, there was no valid appointment of the umpire. The said case in no manner concerned the question of filling of a vacancy created due to the umpire's refusal to act. The observation in the said case to the effect that the arbitrators cannot supply the vacancy created by the umpire's refusal to act is at best *obiter dicta* not binding on this Court.

21. Even otherwise, I do not find the abovementioned observation in the judgment to be in accord with Section 8(1)(b) and (c) of the 1940 Act. Section 8(1)(b) in explicit terms provides for the vacancy created due to an umpire's refusal to act to be supplied by *"the parties or the arbitrators, as the case may be."* Since Section 8(1) provides for a mechanism for *inter alia* supplying a vacancy created due to the umpire's refusal to act, which includes the power of the arbitrators to supply the vacancy, it cannot be held that after the arbitrators appoint an umpire in the first instance, they cannot supply the vacancy created by the refusal of such umpire to act. Section 8(1)(c) envisages an agreement *"where the parties or the arbitrators are required to appoint an umpire and do not appoint him."* Resort is to be made to the arbitration agreement in order to determine whether the umpire is required to be appointed by the parties or the arbitrators. Clause 67.5 of the Contract between CAA and LTH-JV provides for the arbitrators (and not the parties) to appoint the umpire. This method of appointing an umpire fits in the scheme and structure of Section 8 of the 1940 Act.

22. It is an admitted position that after Justice Jillani recused himself from sitting as an umpire, neither party issued a notice to the two-member arbitral tribunal requesting them to appoint an umpire in place of Justice Jillani. This omission is of significance since it is

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only where the arbitrators do not supply the vacancy created by the umpire's refusal to act that a party can serve "the arbitrators" with a written notice to concur in supplying the vacancy. Furthermore, the Court will have jurisdiction to appoint an umpire under Section 8(2) only if the arbitrators do not appoint the umpire within fifteen clear days after the service of notice by any of the parties seeking for the vacancy to be supplied. The notice dated 16.05.2023 sent by the LTH-JV to CAA requiring the latter to concur in supplying the vacancy created due to Justice Jillani's recusal cannot be treated as a substitute to a notice that is required to be sent to the arbitrators.

23. The authority of the arbitrators under clause 67.5 of the Contract as well as paragraph 2 in the First Schedule to the 1940 Act is not restricted to the appointment of the umpire in the first instance but also to the appointment for supplying the vacancy created by the umpire's refusal to act. I say this because otherwise, there would have been no reason for the legislature to employ the words: "*the parties or the arbitrators, as the case may be, do not supply the vacancy"* in Section 8(1)(b) of the 1940 Act. Arbitrators would be re-exercising their power to appoint an umpire to supply the vacancy created due to the umpire's refusal to act. How else are the arbitrators expected to supply a vacancy in terms of Section 8(1) if after the refusal to act by the umpire appointed by them in the first instance, their power to appoint his replacement stands exhausted? Therefore, with all due respect, I cannot bring myself to subscribe to the law laid down in the case of Keshavsinh Vs. Indian Engineering Co. (*supra*).

24. In the case at hand, although the umpire had refused to act and the Contract has no provision that the vacancy created by the umpire's refusal to act should not be supplied, but at no material stage did any of the parties serve the arbitrators with a written notice to concur in supplying the vacancy. Had such a notice been issued by LTH-JV and had the arbitrators not appointed an umpire in place of Justice Jillani within a period of fifteen clear days after the service of such notice, LTH-JV would have been well within its right to have filed an application under Section 8 of the 1940 Act before the Court

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praying for an umpire to be appointed in place of Justice Jillani. In holding so, reliance is placed on the following case law:-

(i) In the case of Misti Enterprises Vs. Britannia Engineering Products & Services Ltd. (AIR 1993 Calcutta 272), the arbitration clause in the contract between the parties provided for disputes to be referred to an arbitrator to be appointed by the Chairman and Managing Director of the contractor. As several letters to the Chairman and Managing Director for the appointment of an arbitrator did not elicit any response, an application was filed before the Court seeking the appointment of an arbitrator. The said application was resisted by the other party to the contract on the ground that the Court has no power to appoint a person to act as an arbitrator as the said prerogative rests only with the Chairman and Managing Director under the terms of the arbitration clause in the contract. It was held that the Chairman and Managing Director was on several occasions called upon to appoint an arbitrator but since no step was taken by the Chairman and Managing Director there was failure or neglect on the part of the appointing authority and as such the Court was competent to appoint an arbitrator. Furthermore, it was held that if the appointing authority fails to appoint an arbitrator in spite of the fact that the parties have called upon to appoint or nominate such arbitrator, the Court has the power to fill up the vacancy.

(ii) In the case of Union of India Vs. D.P. Singh (AIR 1961 Patna 228), the arbitration clause in the agreement provided *inter alia* that any dispute or difference of opinion between the Railway Administration and the contractor as to the respective rights and obligations of the parties under the agreement shall be referred to the sole arbitrator who shall be nominated for the purpose by the General Manager, Northern Railway and his decision shall be final, conclusive and binding on the parties. After the General Manager failed to appoint an arbitrator despite having been asked by the contractor a number of times to appoint an arbitrator, the contractor filed an application

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before the Court under Section 8 of the 1940 Act for the appointment of an arbitrator. This application was resisted on the ground that since the arbitration clause gave sole power to the General Manager to appoint an arbitrator, the Court should have asked the General Manager to appoint the arbitrator and only on his failure could the Court proceed to make the appointment. This objection was spurned by the Patna High Court, which held that the application under Section 8 made long after the expiry of fifteen days of the notice to the General Manager to appoint an arbitrator, was maintainable and allowed for good reason by the Court below.

25. Unlike the cases of Misti Enterprises Vs. Britannia Engineering Products & Services Ltd. (*supra*) and Union of India Vs. D.P. Singh (*supra*), in the case at hand LTH-JV at no material stage called upon the arbitrators to appoint an umpire in place of Justice Jillani. Had LTH-JV fulfilled the prerequisites of issuing a notice to the arbitrators requiring them to appoint an umpire after Justice Jillani recused himself, and had there been a failure on the part of the arbitrators to appoint an umpire for fifteen clear days after receipt of such notice, LTH-JV would have been justified to have filed an application before the Court under Section 8 of the 1940 Act seeking the appointment of an umpire to fill the vacancy created due to Justice Jillani's recusal. In the case of Union of India Vs. Dev & Co. (AIR 1978 Gauhati 91), it was held *inter alia* that Section 8(2) is consequential to the operation of Section 8(1), and that the power of the Court under Section 8(2) cannot be invoked if Section 8(1) itself is not applicable. Additionally, in the case of Bharat Construction Co. Ltd. Vs. Union of India (AIR 1954 Calcutta 606), it was held *inter alia* that a Court has no inherent or absolute power to appoint arbitrators; its powers are only those which are expressly specified in the 1940 Act such as, for example, those contained in Section 8(1) and (b), and unless it is shown that a particular arbitration agreement falls in any of the contingencies contained in clauses (a) to (c) of Section 8(1), Section 8 is not applicable, although the arbitration agreement may not exclude the intention to fill up a vacancy, if one should arise.

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26. Since clause 67.5 of the Contract required the arbitrators and not the parties to appoint the umpire, and since LTH-JV had not addressed notice dated 16.05.2023 for the appointment of a substitute umpire to the arbitrators but to CAA, such notice did conform to the requirements of Section 8(1)(b) of the 1940 Act. LTH-JV could not solicit concurrence in the appointment of the umpire from CAA but from the arbitrators for that is what Clause 67.5 provides for. Without a notice by LTH-JV to the arbitrators to appoint the umpire in place of Justice Jillani, the application under Section 8 of the 1940 Act could not be entertained by the learned Civil Court, which ought to have pointed LTH-JV to the arbitrators who were to concur in the appointment of Justice Jillani's substitute.

27. As arbitrators have not been required by LTH-JV to supply the vacancy created by Justice Jillani's recusal to sit as the umpire, I am of the view that the requirements of Section 8(1)(b) had not been fulfilled and therefore the Court did not have the jurisdiction to appoint an umpire under Section 8(2) of the 1940 Act. Consequently, the instant petition is <u>allowed</u>; and the impugned order dated 26.04.2024 is <u>set aside</u>. No costs.

28. LTH-JV is at liberty to request the arbitrators to supply the vacancy created due to Justice Jillani's recusal, and if they don't, a notice in writing can be sent to them under Section 8(1) requiring them to supply the vacancy within fifteen days of such notice. And if they still don't, LTH-JV can then apply to the Court under Section 8(2) to supply the vacancy.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON <u>22/07/2024</u>.

(JUDGE)

<u>Qamar Khan</u> ***<u>APPROVED FOR REPORTING</u>***

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