

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4708 OF 2007

State of Rajasthan and others ..Appellant

versus

M/s M.C. Modi & Co. ..Respondent

O R D E R

1. The High Court through the impugned order, dated 19.05.2006, arrived at the conclusion, that clause 39 of the contractual agreement between the parties was indeed an agreement to refer disputes between the parties to an arbitrator, and it is therefore, that the High Court referred the dispute raised by the respondent - M/s M.C. Modi & Co., to Hon'ble Justice (Retired) Ranveer Sahay Verma, as arbitrator to settle the dispute between the parties. Clause 39 of the contractual agreement, which was sought to be relied upon, is extracted hereunder:

"39. That all disputes arising out of this agreement and all questions relating to the interpretation of this agreement shall be decided by the Government and the decision of the Government shall be final."

2. The issue, whether the parties had agreed to refer their dispute to an arbitrator, has been examined on a number of occasions by this Court, and in this context, learned counsel for the rival parties have relied upon different judgments of this Court. During the course of hearing, learned counsel invited our

pointed attention to Jagdish Chander vs. Ramesh Chander (2007) 5 SCC 719, wherein the issue came to be extensively dealt with, after making a reference to number of decisions referred to in paragraph 8, which is extracted hereunder:

"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K K Modi v. K N Modi* [1998 (3) SCC 573], *Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd.* [1999 (2) SCC 166] and *Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd.* [2003 (7) SCC 418]. In *State of Orissa v. Damodar Das* [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The

agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to

arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

(emphasis is ours)

It is therefore apparent, that to determine whether or not the parties had agreed to resort to arbitration, it would be necessary to ascertain whether or not the necessary ingredients of an arbitration clause, were available in the contractual agreement.

3. The conclusions drawn by this Court, as have been extracted above, necessarily inter alia lead to an inference, that the decision to refer for the purposes of arbitration must be to a private tribunal, and that, the private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties, to put forth their case. Having examined clause 39, in terms of the parameters laid down by this Court, we are of the view, that neither of the aforesaid ingredients, referred to by us hereinabove, are satisfied. We say so, because the arbitral reference has to be to a private tribunal, which is not the case herein. Furthermore, the arbitral clause - clause 39, does not contemplate a process of adjudication. Clause 39 of the contractual agreement, relied upon as the arbitration clause, could not have been treated as an arbitration clause, and

as such, the reference by the High Court for adjudication of the dispute under clause 39 to an arbitrator, was wholly uncalled for.

4. For the reasons recorded hereinabove, we set aside the impugned order passed by the High Court, appointing Hon'ble Justice (Retired) Ranveer Sahar Verma as arbitrator, to settle the dispute between the parties.

5. In the above view of the matter, the rival parties shall pursue their respective claims, if any, in consonance with law.

6. The appeal is allowed in the aforesaid terms.

.....CJI
[JAGDISH SINGH KHEHAR]

.....J.
[Dr. D.Y. CHANDRACHUD]

NEW DELHI;
APRIL 11, 2017.

.....J.
[SANJAY KISHAN KAUL]

ITEM NO.103

COURT NO.1

SECTION XV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 4708/2007

STATE OF RAJASTHAN & ORS.

Appellant(s)

VERSUS

M/S. M.C. MODI & CO.
(with office report)

Respondent(s)

Date : 11/04/2017 This appeal was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Appellant(s) Mr. Amit Sharma, Adv. (arguing counsel)
Mr. S.S. Shamsbery, AAG
for Mr. Milind Kumar, AOR

For Respondent(s) Mr. Abhay Kumar, Adv. (arguing counsel)
Mr. Subramonium Prasad, Sr. Adv.
Mr. Vineet Kumar Singh, Adv.
Mr. Himanshu Pal, Adv.
Mr. Utkarsh Srivastava, Adv.
Mr. Himanshu, Adv.
Mr. Saurabh Mishra, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeal is allowed, in terms of the signed order.

(Renuka Sadana)
Assistant Registrar

(Parveen Kumar)
AR-cum-PS

[signed order is placed on the file]