

ITEM NO.203

COURT NO.7

SECTION XII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).32408/2009
(From the judgement and order dated 10/07/2009 in CRP No.2473/2008
of The HIGH COURT OF MADRAS)

M/S.ADDISON & CO. LTD & ORS.

Petitioner(s)

VERSUS

M/S. SANCO TRANS LTD.

Respondent(s)

(With prayer for interim relief and office report)
(FOR FINAL DISPOSAL)

Date: 22/04/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. PATNAIK

HON'BLE MR. JUSTICE A.K SIKRI

For Petitioner(s) Ms. S. Ramamani, Adv.

For Respondent(s) Mr. John Mathew, Adv.

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

Heard learned counsel for the parties.

The facts very briefly are that the petitioner instituted a Suit, O.S. No. 7524 of 2005 against the respondents for a sum of Rs.4,41,739/- equivalent to Euro 7749.80 with interest and costs. The respondents filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') before the Trial Court saying that the agreement between the parties provides for arbitration and therefore, the suit should not proceed. The Trial Court rejected the contention of the respondents and dismissed the application. Aggrieved, the respondents moved the High Court in Revision and by the impugned order, the High Court has set aside the order of the Trial Court and allowed the Revision holding that there is an arbitration agreement between the parties in accordance with which disputes between the parties have to be resolved.

Learned counsel for the petitioners submitted that Clause 25 of the agreement on which the High Court has relied on is not really an arbitration agreement. According to her, it is only an enabling clause and leaves the discretion to the parties to resort to arbitration or not. In support of this argument, the learned counsel relied upon the decision of this Court in Wellington Associates Ltd. Vs. Kirit Mehta, (2000) 4 SCC 272 wherein this Court, having found that besides a clause which provides for arbitration, there was another clause which enables the parties to go before a Civil Court by way of a Suit, held that on a reading of clauses 4 and 5 together, it was not the intention of the parties that arbitration is to be the sole remedy. She referred to Clauses 23 and 25 of the agreement in the present case and endeavoured to argue that these clauses were almost pari materia with clauses 4 and 5 in Wellington Associates Case.

In order to appreciate the aforesaid contentions of the learned Counsel for the petitioner, we would like to discuss, in the first instance, judgment of this Court in Wellington Associates Ltd. Vs. Kirit Mehta. In that case, the question that arose for consideration

was as to whether clause 5 in the contract amounted to arbitration agreement or, having regard to the words used in the said clause "fresh consent" of the parties was required before making a reference for arbitration. While interpreting the said clause, the Court took note of clause 4 of the agreement as well, which conferred exclusive jurisdiction on the Courts in Bombay (now Mumbai). Clauses 4 and 5 of the agreements in the said case were worded in the following manner:

4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.
5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay.

In the light of the provisions of Section 7 of the Act, 1996, this Court took a view that Section 7 postulates an agreement which necessarily or rather mandatorily requires an appointment of arbitrator/ arbitrators and this would not cover those cases where the parties agreed that they "may" go to a suit or that they "may" also go to arbitration. In the process, it was also observed that in most arbitration clauses, the words which are normally used are that "disputes shall be referred to arbitration". However, in clause 5, the words used were "may be referred" and, therefore, it was treated as optional. Argument was advanced that the word "may" should be construed as "shall". However, this contention was rejected keeping in view the provisions of clause 4 where the parties desired that in case of disputes, the Civil Court at Bombay is to be approached by way of a suit. Discussion in this behalf is contained in para 22 of the said judgment which we would like to reproduce here:

- "22. It is contended for the petitioner that the word "may" in clause 5 has to be construed as "shall". According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties. The parties, in my view, used the words "may" not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the Civil Courts at Bombay are to be approached by way of a suit. Then follows clause 5 with the words "it is also agreed" that the dispute "may" be referred to arbitration implying that parties need not necessarily go to the Civil Court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4 which discloses a general intention of the parties to go before a Civil Court by way of suit. Thus, reading clause 4 and clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "also" go to arbitration in case the aggrieved party does not wish to go to a Civil Court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same clause 5, so far as the venue of arbitration is concerned, uses the word "shall". The parties, in my view, must be deemed to have used the words "may" and "shall" at different places, after due deliberation."

It is clear from above that the Court was primarily influenced by fact that the parties have agreed for the remedy of suit as contained in clause 4 of the agreement. Thus, in the event of disputes the parties could approach the Civil Court at Bombay "by way of a suit". It was thus, held that when the primary remedy for filing suit, in case of, was provided, conjoint reading of clauses 4 and 5 would demonstrate that the clause 5 which uses the words "may be referred" was merely an enabling provision and it was not a firm or mandatory arbitration clause. This conclusion is recorded in the judgment in the following manner:

"25. Suffice it to say, that the words "may be referred" used in clause 5, read with clause 4, lead me to the conclusion that clause 5 is not a firm or mandatory arbitration clause and in my view, it postulates a fresh agreement between the parties that they will go to arbitration. Point 2 is decided accordingly against the petitioner."

In the present case, however, we find that clauses 23 and 25 of the agreement entered into between parties are materially different from clauses 4 and 5 in Wellington Associates Ltd. Vs. Kirit Mehta. For the sake of comparison, clauses 23 and 25 of the agreement between the parties are extracted herein below:

23. Jurisdiction:

(1) In Judicial proceedings relating to the contract for Multimodal Transport Document under these conditions, the plaintiff, at his option, may institute an action in a Court which, according to the law of the country where the Court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- (b) the place where the Multimodal Transport Contract was made, provided that the defendant has there a place of business branch of agency at such place; or
- (c) the place of taking charge of the goods for Multimodal Transportation or the place of delivery thereof; or
- (d) any other place specified for that purpose in the Multimodal Transport Contract and evidenced in the Multimodal Transport Document.

25. Arbitration

The contract evidenced hereby or contained herein shall be governed by and construed according to Indian laws. Any difference of opinion or disputes thereunder can be settled by arbitration in India or a place mutually agreed with each party appointing an arbitrator.

A reading of Clause 25 of the agreement which is titled "Arbitration" clearly shows that the parties have intended that any difference of opinion or disputes under the contract were to be settled by means of arbitration in India or any place mutually agreed upon with each party appointing an arbitrator. On reading this clause 25 of the agreement, it becomes clear that not only mode of

arbitration is provided for settlement of disputes, even the procedure for constituting the arbitration is stipulated i.e. each party is to appoint an arbitrator for settlement of dispute by arbitration. In this context, the words "can be settled by arbitration" used in clause 25 are to be understood in the manner that the parties agreed for settling difference of opinion or dispute under the agreement by resorting to arbitration. In the instant case, clause 23 of the agreement is also differently worded. It does not provide for filing of any suit in a particular court, which was the position in Wellington Associates Ltd. Vs. Kirit Mehta. Clause 23 of the agreement quoted above is titled "Jurisdiction" and it only enumerates the places at which the parties may move the Court for appropriate remedy. The main purpose behind clause 23 is to confer jurisdiction on a particular Court in respect of matters arising out of arbitration, which is, otherwise, to be resorted to for settlement of disputes. It is a matter of common knowledge that the Act, 1996 provides for hybrid scheme. No doubt, wherever there is an arbitration agreement between the parties, to resolve the disputes covered by the said agreement, parties are required to invoke the machinery of arbitration to the exclusion of the Courts. However, assistance of Courts is still needed in the aid of arbitration. It is for this purpose clause 23 provides for jurisdiction for availing any such appropriate remedy. We are, therefore, of the opinion that clauses 23 and 25 in the present case, are not akin to Clauses 4 and 5 in the case Wellington Associates Ltd. Vs. Kirit Mehta (supra) cited by the learned counsel for the petitioner in which it has been held that a party had the option of either filing a civil suit or moving the arbitrator for settling the dispute.

We thus, hold that the High Court was right in coming to the conclusion that the disputes between the parties are to be settled by way of arbitration and we are not inclined to interfere with the impugned order passed by the High Court.

The special leave petition is dismissed accordingly.

| (G. SUDHAKARA RAO)
| COURT MASTER

| | (SHARDA KAPOOR)
| | COURT MASTER

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