CASE NO.:
Arbitration Petition 9 of 1999

PETITIONER:
WELLINGTON ASSOCIATES LTD. ....

Vs.

RESPONDENT:
MR. KIRIT MEHTA

DATE OF JUDGMENT: 04/04/2000

BENCH:
M.J.Rao

JUDGMENT:

M. JAGANNADHA RAO, J.

L.....I.....T.....T.....T.....T.....T.....T..J

This is an application filed under sub-clauses (2), (6), (10) and (12) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called the Act). The application is made to the Chief Justice of India and after due nomination, has been placed before me.

The brief facts as set out in the petition, to the extent necessary for the purpose of this application, are as follows. The petitioner is a company with its registered office at Les Cascades, Port Luis Republic of Mauritius. The respondent is the promoter and Managing Director of M/s C.M.M. Ltd., Mumbai. The petitioner entered into two agreements both dated 15.8.1995 with the respondent under which it was stated that the petitioner had agreed to subscribe to a private placement of two lots of 85,000 equity shares (each

agreement comprising one lot of 85,000 equity shares, thereby aggregating to 1,70,000 shares) of C.M.M. Ltd.

The shares were having face value of Rs.10/- per share.

They were agreed to be acquired by the petitioners at a premium of Rs.20/- per share. The cumulative value amounted to Rs.51 lakhs (1.70 lakhs x Rs.30 per share).

The shares were to be held by the petitioners for a period of one year from the date of subscription. It was stated that the respondent agreed and undertook to compulsorily purchase back from the petitioners the said shares after the expiry of the said period in the following manner.(i) under the Ist agreement, 85,000 with an assured return at the rate of 35% p.a. and (ii) under the 2nd agreement, 85,000 with an assured return at the rate of 29% p.a. It was stated that the respondent agreed that upon default by the respondent, the respondent would be liable to pay penal interest at 3% p.a. from the date of subscription till actual date of payment. Pursuant to the above agreements, a "subscription agreement" was later entered into on 25.9.95 between the petitioner (the subscriber), the respondent-promoter and the C.M.M. company.

On 26.9.95, Sigma Credit and Capital Services Pvt. Ltd., wrote to the petitioner stating that it had taken up the deal of C.M.M. Ltd. and that it would ensure the petitioner that the terms of the agreement between the

prospective investor (petitioner) and C.M.M.Ltd. -for the subscription and assured buy back, especially regarding the assured return and the confirmed buy-back - would be complied with by both the parties. The said company further undertook to buy-back the 85,000 NRI shares of CMM Ltd., at the end of 12 months from the date of investment, at the rate of 25% p.a. in case the respondent failed to meet the commitment of buy-back. The petitioner paid Rs.51 lakhs to the respondent on 9.10.95 pursuant to the above agreements and 1,70,000 shares were allotted to the petitioner. By 8.10.96, the respondent did not buy back the shares. Nor did Sigma buy back the shares.

On 11.7.1997, the petitioner's lawyer issued a registered notice to the respondent complaining that after the lapse of one year from the date of subscription, neither the respondent nor Sigma Credit and Capital Services (P)Ltd. had honoured their commitments as per agreements dated 15.8.95 and letter dated 26.9.95. There was no response to this notice by the respondent or by Sigma. A further notice was issued by the petitioner on 19.4.99 stating that there was no response to the earlier notice, that the two agreements dated 15.8.95 contained an "arbitration clause" and that the petitioner desired that the disputes and differences be referred to arbitration. It was also intimated that the petitioners had appointed Justice M.L. Pendse, Retired Chief Justice, Karnataka High

Court

as their Arbitrator and that the respondent was being called upon to appoint his Arbitrator within 30 days from the date of receipt of the letter or else the respondent should confirm the appointment of Sri Justice M.L. Pendse. In default, the petitioners would proceed under the Arbitration and Conciliation Act, 1996. The respondent sent a reply on 28.5.1999 raising various contentions. One of the contentions was that the arbitration clause, namely, clause 5 in the agreements dated 15.8.95 used the words "may" and that the said clause was not mandatory but was an enabling provision and, therefore, fresh consent of parties for arbitration was necessary. On 16.6.99, the petitioner's lawyers wrote back to the respondent stating that the interpretation put by the respondent on the arbitration clause was not correct. The respondent sent a further reply on 21.6.99. Petitioner's lawyers sent a rejoinder on 2.7.99. Thereafter, the present petition was filed under section 11 of the Act seeking the appointment of arbitrator/arbitrators.

In this petition before me, the respondent filed a reply and the petitioner thereafter filed a rejoinder. Learned counsel for the petitioner Sri U.A. Rana submitted that the word 'may' used in clause 5 of the agreement was to be read, in the context , as 'shall' and that, in any event, in view of section 16 of the Act, the question of the "existence" of the arbitration agreement was a matter to be decided by the arbitral

tribunal and not by me. A point was raised by the petitioner in the rejoinder based on Ador Samia Ltd. Vs. Peekay Holdings Ltd. (19998(8) SCC 572) that the action of the Chief Justice of India or his designate under Section 11(6) was an administrative act and did not amount to the exercise of any judicial function. Nor would the Chief Justice of India or his designate have any trappings of a judicial authority, while acting under section 11. Counsel also submitted that in Bombay, a civil suit would take more than 20 years for adjudication, and therefore such a situation should be avoided and the matter should be referred to arbitration.

On the other hand, learned counsel for the respondent Sri P.H. Parekh submitted that the relevant clause, viz., clause 5 was not mandatory in its language and that in a similar case in P. Gopal Das Vs. Kota Styraw Board (AIR 1971 Raj. 258), it was held by the Rajasthan High Court that the use of the word 'may' indicated that a fresh consent of both parties for arbitration was necessary. Counsel submitted that section 16 of the Act would not apply to the situation on hand and that it was permissible for me to decide whether clause 5 was an arbitration clause or not.

On the above submissions, the following points arise for consideration:

(1) Whether clause 5 amounted to an arbitration clause at all and whether such a question amounted to a dispute

relating to the 'existence' of the arbitration clause? Whether such a question should be decided only by the arbitral tribunal under section 16 and could not be decided by the Chief Justice of India or his designate while dealing with an application under section 11?

(2) If the Chief Justice or his designate could decide the said question, then whether clause 5 of the agreements dated 15.8.95 which used the words "may be referred" required fresh 'consent' of the parties before a reference was made for arbitration?

(3) To what relief.

Point 1:

This point raises a question as to the scope of section 16 on the one hand and section 11 on the other.

Before referring the said section, I shall refer to the relevant clauses 4 and 5 in the two agreements dated 15.8.95. They read as follows:

"Clause 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."

Clause 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, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

The petitioner's counsel submits that the question whether clause 5 extracted above tantamounts to a dispute as to 'existence" of the arbitration agreement -

is a question which can be decided only by the arbitral

tribunal in view of section 16 of the Act and that it

cannot be decided by me. That section reads as follows:

"Section 16: Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub- section (2) or sub-section (3), admit a later plea if its considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

For appreciating the scope of section 16 of the

new Act, it is necessary to go back to section 33 of the

Indian Arbitration Act, 1940. That section vested

jurisdiction in the court to decide whether there was in

'existence' an arbitration clause or not, whenever the

'existence' of the arbitration clause was challenged by any of the parties. That section read as follows:

"Section 33: Arbitration agreement or award to be contested by application -

Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, shall apply to the Court and the Court shall decide the question on affidavits, ..."

In M/s. D. Gobindram Vs. M/s Shamji Kalidas Co. [AIR 1961 SC 1285 (at 1293)(para 25)] it was held that the question as to the existence of arbitration clause was for the Court to decide under section 33 and not for the arbitrators. In Khardah Co.Ltd. Vs. Raymon & Co.(India) Pvt.Ltd. (AIR 1962 SC 1810) and In Waverly Jute Mills Co.Ltd. Vs. Raymon & Co. (India) Pvt. Ltd. (AIR 1963 SC 90, at 96 para 17), it was held that the question as to the validity of the contract was also for the Court to decide under section 33 and not for the arbitrator. If there was no arbitration clause at the time of entry of the arbitrators on their duties, the whole proceedings would be without jurisdiction. In Renusagar Power Co. Ltd. Vs. General Electric Co. (AIR 1985 SC 1156 = 1985(1) SCR 432) (at p.1170) it was stated that ordinarily,. as a rule, an arbitrator had no authority to clothe himself with power to decide the question of his own jurisdiction unless parties expressly conferred such a power on him.

Thus, it is clear from section 33 of the old

Act of 1940 that any question as to the "existence" of the arbitration agreement was to be decided only by application to the Court and not by the arbitrator. This disability on the part of the arbitrator has now been removed by section 16 of the new Act. Now section 16 has conferred power on the arbitral tribunal to decide whether there is in 'existence' an arbitration clause.

But, it must be noted that the language employed by section 16 of the new Act shows that the said provision is only an enabling one which,- unlike section 33 in the old Act of 1940,- now permits the arbitral tribunal to decide a question relating to the 'existence', of the arbitration clause. This section corresponds to Article 16 of the UNCITRAL Model Law and Article 21 of the UNCITRAL Arbitration Rules. While Article 16 of the Model Law says that the arbitral tribunal may rule on its own jurisdiction, Article 21 of the Rules states that the 'arbitral tribunal shall have power to rule' on these questions. Such power given to the arbitral tribunal is also referred to as 'Kompetenz - kompetenz".

The more important question however is whether section 16 excludes the jurisdiction of the Chief Justice of India or his designate in this behalf if a question as to the existence of the arbitration clause is raised by the respondent in his reply to the petition filed under section 11. (I am not concerned with the

question of the validity or effect of the arbitration clause, in the present case). In my view, section 16 does not take away the jurisdiction of the Chief Justice of India or his designate, if need be, to decide the question of the 'existence' of the arbitration agreement. Section 16 does not declare that except the arbitral tribunal, none else can determine such a question. Merely because the new Act permits the Arbitrator to decide this question, it does not necessarily follow that at the stage of section 11 the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause.

The interpretation put on section 16 by the petitioner's counsel that only the arbitral tribunal can decide about the "existence" of the arbitration clause is not acceptable for other reasons also apart from the result flowing from the use of the word 'may' in section 16. The acceptance of the said contention will, as I shall presently show, create serious problems in practice. As Saville L.J. stated in a speech at Middle Temple Hall on July 8, 1996: "Question of the jurisdiction of the tribunal cannot be left (unless the parties agreed) to the tribunal itself, for that would be a classic case of pulling oneself up by one's own bootstraps". (A practical approach to Arbitration Law, Keren Tweeddale & Andrew Tweeddale, (1999) Blackstone Press Ltd.)(P.75). Let us take this very case. If

indeed clause 5 does not amount to an 'arbitration agreement', it will, in my view, be anomalous to ask the arbitrator to decide the question whether clause 5 is at all an arbitration clause. It is well settled and has been repeatedly held that the source of the jurisdiction of the arbitrator is the arbitration clause. [see Waverly Jute Mills case (AIR 1963 SC 90) above referred to) When that is the position, the arbitrator cannot, in all situations, be the sole authority to decide upon the "existence" of the arbitration clause. Supposing again, the contract between the parties which contained the arbitration clause remained at the stage of negotiation and there was no concluded contract at all. Then in such a case also, there is no point in appointing an arbitrator and asking him to decide the question as to the existence of the arbitration clause. But, I may point out that there can be some other situations where the question as to the "existence" of an arbitration clause can be decided by the arbitrator. Take a case where the matter has gone to the arbitrator without the intervention of an application under section 11. Obviously, if the question as to the existence of the arbitration clause is raised before the arbitral tribunal, it has power to decide the question. Again in a case where the initial existence of the arbitration clause is not in issue at the time of section 11 application but a point is raised before

the

arbitral tribunal that the said clause or the contract in which it is contained has ceased to be in force, then in such a case, the arbitrator can decide whether the arbitration clause has ceased to be in force. A question may be raised before the arbitrator that the whole contract including the arbitration clause is void. Now Section 16 of the new Act permits the arbitral tribunal to treat the arbitration clause as an independent clause and section 16 says that the arbitration clause does not perish even if the main contract is declared to be null and void. Keeping these latter and other similar situations apart, I am of the view that in cases where - to start with - there is a dispute raised at the stage of the application under section 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by section 16.

Further, a reading of sub-clauses (4),(5) and (6) of section 11 shows that they enable the Chief Justice or his designate to appoint arbitrator or arbitrators, and likewise section 11(12) enables the Chief Justice

of India or his designate to appoint arbitrator or arbitrators; under Rule 2 of the scheme framed by the Chief Justice of India, a request is to be made to the Chief Justice of India alongwith with a duly certified copy of the 'original arbitration agreement'. Section 2(b) of the Act defines 'arbitration agreement' as an agreement referred to in section 7. section 7 defines 'arbitration agreement' as follows:

"S.7. Arbitration agreement (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in --

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

The words in sub-clause (1) of section 7, "means an agreement by the parties to submit to arbitration", in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. Section 7 does not cover a case where the parties agree that they "may" go to a suit or that they 'may' also go to arbitration.

Thus, unless the document filed by the party before the Chief Justice of India or his designate is an 'arbitration agreement' as defined in section 7 as explained above, requiring a reference in a mandatory sense, no reference, in my view, can be made to the arbitral tribunal. It is, as already stated, indeed implicit - if an objection is raised by the respondent before the Chief Justice of India or his designate that the so called arbitration clause is not an arbitration clause at all falling within section 7 - that such a question will have to be decided in the proceedings under section 11 of the Act. Therefore the contention raised by the learned counsel for the petitioner that the question - whether clause 5 of the agreement amounts to an arbitration clause - is to be decided only by the arbitral tribunal is liable to be rejected.

It is true that in Ador Samia Pvt. Ltd. vs. Peekay Holdings Ltd. & Others [1999 (8) SCC 572], it has been held that the Chief Justice or his designate under section 11(6) acts in an administrative capacity and he does not exercise any judicial function and that he has no trappings of a judicial authority. But this decision, in my view, cannot support the plea raised by the petitioner in his rejoinder. Even if the Chief Justice of India or his designate under section 11(12) is to be treated as an administrative authority, the position is

that when the said authority is approached seeking appointment of an arbitrator/arbitrator tribunal under section 11 and a question is raised that there is, to start with, no arbitration clause at all between the parties, the Chief Justice of India or his designate has to decide the said question.

For the aforesaid reasons, this objection raised by the learned counsel for the petitioner is rejected. Point 1 is decided accordingly.

Point 2:

Does clause 5 amount to an arbitration clause as defined in section 2(b) read with section 7? I may here state that in most arbitration clauses, the words normally used are that "disputes shall be referred to arbitration". But in the case before me, the words used are 'may be referred'.

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 also 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 word ’shall’. The parties, in my view, must be deemed to have used the words ‘may’ and ‘shall’ at different places, after due deliberation.

A somewhat similar situation arose in B.Gopal Das vs. Kota Straw Board [AIR 1971 Raj. 258]. In that case the clause read as follows:

"That in case of any dispute arising between us, the matter may be referred to arbitrator mutually agreed upon and acceptable to you and us."

It was held that fresh consent for arbitration was necessary. No doubt, the above clause was a little clearer there than in the case before me. In the above case too, the clause used the word 'may' as in the present case. The above decision is therefore directly in point.

Before leaving the above case decided by the from Rajasthan High Court, one other aspect has to be referred to. In the above case, the decision of the Calcutta High Court in Jyoti Brothers vs. Shree Durga Mining Co. [AIR 1956 Cal. 280] has also been referred to. In the Calcutta case, the clause used the words "can" be settled by arbitration and it was held that fresh consent of parties was necessary. Here one other class of cases was differentiated by the Calcutta High Court. It was pointed out that in some cases, the word 'may' was used in the context of giving choice to one of the parties to go to arbitration. But, at the same time, the clause would require that once the option was so exercised by the specific party, the matter was to be mandatorily referred to arbitration. Those cases were distinguished in the Calcutta case on the ground that such cases where option was given to one particular party, the mandatory part of the clause stated as to what should be done after one party exercised the option. Reference to arbitration was mandatory, once option was exercised. In England too such a view was

expressed in Pittalis and Sheriffenttin [1986 (1) QB 868]. In the present case, we are not concerned with a clause which used the word 'may' while giving option to one party to go to arbitration. Therefore, I am not concerned with a situation where option is given to one party to seek arbitration. I am, therefore, not to be understood as deciding any principle in regard to such cases.

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 to go to arbitration. Point 2 is decided accordingly against the petitioner.

Point 3:

In the light of the finding on Point 2, it is obvious that I have to dismiss this petition. It may be that if the petitioner files a suit in Bombay, there can be considerable delay. But that is no ground to construe the clause differently. I may state however, that in case a Civil suit is filed, it will be for the petitioner to seek an early disposal of the case and I have no reason to doubt that the civil court will treat the request of the petitioner for early disposal with due consideration.

With the above observations, this petition is dismissed but in the circumstances without costs.