issue fresh notice to the appellants. If they want to contest the appeal, they should put the appearance therein within two months from today, failing which the appellate court shall dispose of the appeal in accordance with law without waiting for appearance of the appellants.

5. No costs.

(2007) 5 Supreme Court Cases 719

(BEFORE R.V. RAVEENDRAN AND H.K. SEMA, JJ.)

JAGDISH CHANDER . . Appellant;

Versus

RAMESH CHANDER AND OTHERS . . Respondents.

Civil Appeal No. 4467 of 2002†, decided on April 26, 2007

A. **Arbitration and Conciliation Act, 1996 — S. 7 — Arbitration agreement/clause — What constitutes — Principles therefor, exhaustively summarised — Presence of concluded consent of the parties to refer disputes to arbitration — Necessity of — Held, 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 — Such an agreement is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future — Hence, in present case clause in question stating that disputes "shall be referred for arbitration if the parties so determine", was not an arbitration clause since the expression "determine" indicated that the parties were required to reach a decision by application of mind — The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration was missing — Lastly, parties could not be referred to arbitration or an arbitrator appointed under S. 11 on the basis of such a clause under S. 89 CPC — Reasons for, explained**

B. **Arbitration and Conciliation Act, 1996 — Ss. 11, 8 and S. 89 CPC — Relative scope of S. 11, Arbitration and Conciliation Act, 1996 and S. 89, CPC, explained — Clarified, that even though S. 89 mandates courts to refer pending suits to any of the several ADR processes, there cannot be a reference to arbitration under S. 89 unless there is mutual consent of all parties to such reference**

C. **Arbitration and Conciliation Act, 1996 — S. 11 — Exercise of power under — Existence of arbitration agreement as defined under S. 7 — Necessity of**

Allowing the appeal, the Supreme Court

Held :

The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/ Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties in the absence of an arbitration agreement or mutual consent. (Para 11)

† From the Final Judgment and Order dated 10-7-2001 of the High Court of Delhi at New Delhi in Arbitration Application No. 284 of 1997

The principles as to what constitutes an arbitration agreement are the following:

(*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 a 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 an 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; and (*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 exclude 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. (Para 8)

Wellington Associates Ltd. v. *Kirit Mehta*, (2000) 4 SCC 272; *K.K. Modi* v. *K.N. Modi*, (1998) 3 SCC 573; *Bharat Bhushan Bansal* v. *U.P. Small Industries Corpn. Ltd.*, (1999) 2 SCC 166; *Bihar State Mineral Development Corpn.* v. *Encon Builders (I)(P) Ltd.*, (2003) 7 SCC 418; *State of Orissa* v. *Damodar Das*, (1996) 2 SCC 216, *relied on*

Jyoti Bros. v. *Shree Durg Mining Co.*, AIR 1956 Cal 280, *referred to*

In the present case clause 16 of the partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, *consensus ad idem* to refer the disputes to arbitration is missing in the said clause 16. Therefore it is not an arbitration agreement, as defined under Section 7 of the Act. (Para 9)

The contention that if under Section 89 CPC, parties can be mandated to have recourse to alternative dispute resolution processes to settle their disputes, there is no reason why the disputes between the parties in this case should not be referred to ADR process including arbitration under clause 16, has no merit. The object and scope of Section 11 of the Act is specific and narrow. Though the power exercised under Section 11 of the Act has been held to be a judicial power the proceedings relate only to appointment of Arbitral Tribunal. The disputes as such are not before the Chief Justice or his designate for adjudication. Therefore, Section 89 CPC has no application. It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties for such reference. (Para 10)

SBP & Co. v. *Patel Engg. Ltd.*, (2005) 8 SCC 618, *referred to*

D-M/36174/C

Advocates who appeared in this case :
Ms Lalita Kohli, Manoj Swarup and Arvind Gaur, Advocates, for the Appellant;
Rohit Minocha, S.P. Sharma and Ashwani Bhardwaj, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2005) 8 SCC 618, *SBP & Co.* v. *Patel Engg. Ltd.* 726*d*
2. (2003) 7 SCC 418, *Bihar State Mineral Development Corpn.* v. *Encon Builders (I)(P) Ltd.* 724*a*
3. (2000) 4 SCC 272, *Wellington Associates Ltd.* v. *Kirit Mehta* 723*c*
4. (1999) 2 SCC 166, *Bharat Bhushan Bansal* v. *U.P. Small Industries Corpn. Ltd.* 724*a*
5. (1998) 3 SCC 573, *K.K. Modi* v. *K.N. Modi* 724*a*
6. (1996) 2 SCC 216, *State of Orissa* v. *Damodar Das* 724*a-b*
7. AIR 1956 Cal 280, *Jyoti Bros.* v. *Shree Durg Mining Co.* 723*e*

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— This appeal by special leave is against the order dated 10-7-2001 passed by the designate of the Chief Justice of the High Court of Delhi, allowing Arbitration Application No. 284 of 1997 filed under Sections 11(5) and (6) of the Arbitration and Conciliation Act, 1996 ("the Act" for short).

2. The appellant and the first respondent entered into a partnership as per deed dated 9-1-1964 to carry on the business under the name and style of "Empire Art Industries". Clause 16 of the said deed relates to settlement of disputes. The said clause is extracted below:

> "(*16*) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or *shall be referred for arbitration if the parties so determine*." (emphasis supplied)

3. The first respondent filed the application for appointment of an arbitrator to decide the disputes in regard to dissolution of the said partnership firm and for rendition of accounts. In the said application, the first respondent arrayed the appellant herein as the first respondent. Respondents 2 to 6 herein were also impleaded as respondents alleging that the two partners entered into an arrangement/agreement with Respondents 2 to 6 in the year 1974 under which Respondents 2 to 6 were to supervise the business of the firm and pay to each of the two partners, a fixed sum, which was increased periodically. According to the first respondent, the arrangement worked satisfactorily for several years, but for some years, the entire amount was being received by the appellant and he was not paying the first respondent's half-share. The appellant resisted the petition, inter alia, on the ground that the partnership had come to an end in the year 1979 and the accounts were all settled. He also contended that the partnership deed did not contain any agreement to refer disputes to arbitration. It was specifically contended that clause 16 of the deed of partnership was not an arbitration agreement.

4. The learned Judge who heard the application under Section 11, allowed it by order dated 10-7-2001. He held that if the intention of the parties was not to refer their disputes to arbitration, there was no need to incorporate clause 16 making a specific mention of arbitration, and that such a provision should be liberally interpreted so as to encourage arbitration. The

learned Judge held that clause 16 of the partnership deed was an arbitration agreement. In regard to the objection of Respondents 2 to 6 that they were not parties to either the partnership deed or agreement, the learned Judge observed that the scope of the proceedings was limited to the extent of examining whether it was a case for appointment of arbitrator or not, and it was for the arbitrator to decide whether Respondents 2 to 6 were liable or not. Justice Santosh Duggal, a retired Judge, was appointed as the sole arbitrator.

5. The appellant has challenged the said order appointing the arbitrator. It is submitted that the power under Section 11 of the Act, to appoint an arbitrator, can be exercised only if there is a valid arbitration agreement between the parties, and that as there is no arbitration agreement between the parties, the arbitrator could not have been appointed. Strong reliance was placed by the appellant on the decision in *Wellington Associates Ltd.* v. *Kirit Mehta*[1] where a designate of the Chief Justice of India held that the following clause was not an "arbitration agreement": (SCC p. 279, para 9)

> "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."
>
> (emphasis in original)

He also held that the use of the word "may" could not be construed as "shall" and that the clause was only an enabling provision and a fresh consent was necessary to go to arbitration. The decision of the Calcutta High Court in *Jyoti Bros.* v. *Shree Durg Mining Co.*[2] was also cited with approval.

6. Therefore, the only question that arises for consideration in this case is whether clause 16 of the deed of partnership dated 9-1-1964 is an "arbitration agreement" within the meaning of Section 7 of the Act.

7. Sub-section (1) of Section 7 of the Act defines "arbitration agreement" as 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. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) requires an arbitration agreement to be in writing. Sub-section (4) provides that an arbitration agreement is in writing, if it is contained in — (*a*) document signed by the parties; or (*b*) in 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.

1 (2000) 4 SCC 272
2 AIR 1956 Cal 280

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*[3], *Bharat Bhushan Bansal* v. *U.P. Small Industries Corpn. Ltd.*[4] and *Bihar State Mineral Development Corpn.* v. *Encon Builders (I)(P) Ltd.*[5] In *State of Orissa* v. *Damodar Das*[6] 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 a 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 exclude any of the attributes of an

3 (1998) 3 SCC 573
4 (1999) 2 SCC 166
5 (2003) 7 SCC 418
6 (1996) 2 SCC 216

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.

9. Para 16 of the partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, *consensus ad idem* to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration

agreement, as defined under Section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an arbitrator does not arise.

10. Learned counsel for the first respondent next contended that clause 16 of the deed of partnership discloses a clear intention on the part of the partners to settle their dispute relating to partnership by an alternative dispute resolution process. He pointed out that clause 16 required the partners to "mutually decide the disputes" or "refer the disputes to arbitration". This, according to him, is in the nature of a *con-arb* agreement, that is, it requires the parties to settle the disputes by negotiations (conciliation and mediation), and failing settlement by such negotiations, refer the disputes to arbitration for settlement. He submitted that the clause provides what Section 89 CPC now statutorily requires. It is contended that if under Section 89 CPC, parties can be mandated to have recourse to alternative dispute resolution processes to settle their disputes, there is no reason why the disputes between the parties in this case should not be referred to ADR process including arbitration under clause 16. This contention, though attractive, has no merit. The object and scope of Section 11 of the Act is specific and narrow. Though the power exercised under Section 11 of the Act has been held to be a judicial power (see *SBP & Co.* v. *Patel Engg. Ltd.*[7]) the proceedings relate only to appointment of Arbitral Tribunal. The disputes as such are not before the Chief Justice or his designate for adjudication. Therefore, Section 89 CPC has no application. It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference. Be that as it may.

11. The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement or mutual consent. The designate of the Chief Justice of Delhi High Court could not have appointed the arbitrator in the absence of an arbitration agreement.

12. The appeal is therefore allowed, the order appointing an arbitrator is set aside and the application by the first respondent under Section 11 of the Act is rejected. Parties to bear their respective costs.

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7 (2005) 8 SCC 618