**(2012) 1 Supreme Court Cases 361**

(BEFORE SWATANTER KUMAR, J.)

POWERTECH WORLD WIDE LIMITED .. Petitioner;

*Versus*

DELVIN INTERNATIONAL GENERAL TRADING LLC .. Respondent.

Arbitration Petition (C) No. 5 of 2010†, decided on November 14, 2011

A. **Arbitration and Conciliation Act, 1996 — Ss. 11(6) and 7 — Appointment of arbitrator — Ambiguity in arbitration clause/agreement — Existence of valid arbitration agreement — Drawing inference as to — Matters/Materials that may be considered — Necessity to establish consensus ad idem as to arbitration agreement to refer disputes to arbitration**

**— Arbitration clause stating "any disputes arising out of this purchase contract shall be settled amicably between both the parties *or* through an arbitrator in India/UAE" — Held, once correspondence between the parties and attendant circumstances are read conjointly with petition for appointment of arbitrator and with particular reference to purchase contract, it becomes evident that parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with provisions of 1996 Act — Parties obviously had committed to settle their disputes by arbitration, which they could not settle on their own, as claims and counterclaims had been raised in correspondence exchanged between them — Thus, even precondition for invocation of an arbitration agreement stands satisfied — Hence, dispute referred to arbitrator — Evidence Act, 1872 — S. 91 — Ambiguity in contract — Matters/Materials that may be relied on — Contract and Specific Relief — Construction/Interpretation of contract — General principles**

**(Paras 26 to 31)**

*Rickmers Verwaltung GMBH* v. *Indian Oil Corpn. Ltd.*, (1999) 1 SCC 1; *UNISSI (India) (P) Ltd.* v. *Post Graduate Institute of Medical Education and Research*, (2009) 1 SCC 107 : (2009) 1 SCC (Civ) 41; *Shakti Bhog Foods Ltd.* v. *Kola Shipping Ltd.*, (2009) 2 SCC 134 : (2009) 1 SCC (Civ) 411; *Visa International Ltd.* v. *Continental Resources (USA) Ltd.*, (2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379, *relied on*

*Powertech World Wide Ltd.* v. *Delvin International General Trading LLC*, Arbitration Petition No. 5 of 2010, order dated 25-7-2011 (SC), *referred to*

*Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719; *Wellington Associates Ltd.* v. *Kirit Mehta*, (2000) 4 SCC 272, *distinguished*

B. **Arbitration and Conciliation Act, 1996 — Ss. 2(1)(b), 7 and 11(6) — Appointment of an arbitrator under S. 11(6) — Requisites — Existence of ingredients of valid and binding arbitration agreement as defined under S. 7, necessary** **(Para 16)**

† Under Seciton 11 of the Arbitration and Conciliation Act, 1996

*Smita Conductors Ltd.* v. *Euro Alloys Ltd.*, (2001) 7 SCC 728; *Bihar State Mineral Development Corpn.* v. *Encon Builders (I) (P) Ltd.*, (2003) 7 SCC 418, *relied on*

*K.K. Modi* v. *K.N. Modi*, (1998) 3 SCC 573, *considered*

B-D/48923/CV

Advocates who appeared in this case :

C.N. Sreekumar, T.G. Narayanan Nair, K.N. Madhusoodhanan and Ms Resmitha R. Chandran, Advocates, for the Petitioner.

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

1. Arbitration Petition No. 5 of 2010, order dated 25-7-2011 (SC), *Powertech World Wide Ltd.* v. *Delvin International General Trading LLC* 364*g*
2. (2009) 2 SCC 134 : (2009) 1 SCC (Civ) 411, *Shakti Bhog Foods Ltd.* v. *Kola Shipping Ltd.* 367*f*
3. (2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379, *Visa International Ltd.* v. *Continental Resources (USA) Ltd.* 367*g*, 368*b*
4. (2009) 1 SCC 107 : (2009) 1 SCC (Civ) 41, *Unissi (India) (P) Ltd.* v. *Post Graduate Institute of Medical Education and Research* 367*e*
5. (2007) 5 SCC 719, *Jagdish Chander* v. *Ramesh Chander* 365*c-d*, 368*d-e*
6. (2003) 7 SCC 418, *Bihar State Mineral Development Corpn.* v. *Encon Builders (I) (P) Ltd.* 367*b*
7. (2001) 7 SCC 728, *Smita Conductors Ltd.* v. *Euro Alloys Ltd.* 366*e-f*, 366*g*
8. (2000) 4 SCC 272 : AIR 2000 SC 1379, *Wellington Associates Ltd.* v. *Kirit Mehta* 365*f*
9. (1999) 1 SCC 1, *Rickmers Verwaltung GMBH* v. *Indian Oil Corpn. Ltd.* 367*c*
10. (1998) 3 SCC 573, *K.K. Modi* v. *K.N. Modi* 366*a-b*

The Order of the Court was delivered by

**SWATANTER KUMAR, J.**— M/s Powertech Worldwide Ltd., the petitioner, is a limited company registered under the Companies Act, 1956, having its registered office at 202, Krishna Chambers, 59, New Marine Lines, Churchgate, Mumbai and has filed the present petition through its authorised representative under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act") praying for appointment of an arbitrator. M/s Delvin International General Trading LLC, the respondent, is also a company, which has been incorporated under the laws of Dubai (UAE) having its registered office in Dubai and is stated to be engaged in the business of importing and selling of various commodities.

**2.** The respondent was desirous of purchasing and the petitioner was willing to sell various articles in the course of their international trade, for which their negotiations in November 2006 finally resulted in a purchase contract dated 1-12-2006 executed between the parties. This contract specifically noticed that after satisfactory discussions between the respondent and the petitioner, the respondent agreed to join hands and work with the petitioner on the terms and conditions provided in the contract. This contract was to be operative and valid for a period of one year subject to the terms and the conditions mentioned therein and became effective w.e.f. 1-12-2006.

**3.** The contract also contained an arbitration clause which reads as under:

> "Any disputes arising out of this purchase contract shall be settled amicably between both the parties or through an arbitrator in India/ UAE."

**4.** In furtherance of this contract, the goods were sold and supplied by the petitioner and are stated to have been duly received by the respondent, without any demur in relation to the quantity and quality of the goods. The bills raised by the petitioner were sent through the petitioner's bankers. The documents were accepted by the negotiating bankers.

**5.** It is the case of the petitioner that initially the respondent was prompt in payments for the consignments sold and supplied to it in conformity with the purchase order i.e. within 60/90 days of the acceptance of the consignments. However, in April 2007, a request was made by the respondent to the petitioner to supply more goods as per its requirements, without insisting for the outstanding payments in respect of some previous consignments received at its end. Considering the good business relationship existing between the parties, the goods were supplied though the payments were not made. The requests made by the petitioner for payments of the outstanding dues were not acceded to by the respondent, despite repeated oral and written requests.

**6.** On 30-3-2008, the respondent through its advocates, sent a notice to the petitioner claiming a sum of AED 4,00,000 and also repelled the threat extended by the petitioner to initiate proceedings before Export Credit Guarantee Corporation of India Ltd. (for short "ECGC") for imposing of sanctions, etc. The notice also contained averments that the threat advanced by the petitioner in relation to obtaining sanctions, or otherwise taking proceedings against the respondent was without any basis. Through this notice, the advocates of the respondent informed the petitioner that they should make the payments within seven days, failing which, a lawsuit would be instituted for recovering the appropriate amount, compensation and costs. The respondent also informed the petitioner that no threat should be extended for taking out the proceedings, etc. which was otherwise undesirable.

**7.** This notice dated 30-3-2008 was responded to by the petitioner through its advocates, vide letter dated 4-4-2008 wherein besides stating the facts aforenoticed, it reiterated that the goods were supplied as per specifications and the allegations in the notice were baseless, while claiming a sum of US $6,386,005.56 as the amount payable by the respondent to the petitioner. It also claimed interest on the said amount till the date of payment and notified the respondent as under:

> "11. In the event Delvin fails to comply with the requisitions contained in Para 10 above and pays the amounts due within a period of seven (7) days from the receipt of this notice, Powertech will be constrained to initiate appropriate legal proceedings entirely at the risk of Delvin, as to costs with consequences."

**8.** Having failed to receive any response to this letter dated 4-4-2008, the petitioner sent another notice dated 30-5-2008 to the respondent through its advocates invoking the arbitration proceedings to adjudicate the disputes

regarding the purchase contract dated 1-12-2006. The relevant part of the said notice reads as under:

> "The contract provides for the resolution of all disputes arising thereunder between the parties by way of arbitration to be held in India. Powertech now desires to exercise its right under the contract to invoke arbitration proceedings to resolve the dispute with Delvin.
>
> Powertech hereby nominates Mr Justice D.R. Dhanuka (Retired Judge, Bombay High Court) as their arbitrator and the venue being Mumbai, India for resolution of the disputes that have arisen under the contract. You are hereby requested to concur to the appointment of Mr Justice D.R. Dhanuka (Retired Judge, Bombay High Court) as the sole arbitrator for resolution of the disputes that have arisen under the contract or nominate an arbitrator within thirty (30) days from receipt of this notice.
>
> Please note that if Delvin fails to concur to the nomination of Mr Justice D.R. Dhanuka (Retired Judge, Bombay High Court) or nominates an arbitrator within thirty (30) days from the receipt of this notice, Powertech shall take out appropriate legal proceedings for appointment of arbitrator for resolution of the disputes that have arisen under the contract."

**9.** This notice invoking the arbitration proceedings was responded to by the respondent through its advocates vide its reply dated 27-6-2008 and it will be useful to reproduce the relevant portion of the said letter:

> "In the meantime, you are requested not to approach or adopt legal proceedings for appointment of arbitrator as telephonically we are instructed to suggest some other name as an arbitrator subject to your consent."

**10.** According to the petitioner, thereafter and till date, the respondent has neither concurred to the appointment of the said arbitrator nor has it settled the disputes. Treating it to be inaction or refusal to act on the part of the respondent, the petitioner filed the present petition under Section 11(6) of the Act on 20-3-2010.

**11.** As the respondent could not be served in the normal course, a Registrar of this Court vide order dated 28-4-2011 permitted the petitioner to serve the respondent by substituted service. The Registrar vide order dated 11-6-2011 noticed that the proof of publication of notice had been produced and the sole respondent stood served by substituted service. As no one appeared on behalf of the respondent despite service, vide order dated 25-7-2011[1], the suit was ordered to be proceeded ex parte and the matter was heard accordingly. When the matter was being heard, a question had been raised as to whether the arbitration agreement as contained in the purchase contract and reproduced supra, was a binding arbitration agreement enforceable in terms of Section 11(6) of the Act?

1 *Powertech World Wide Ltd.* v. *Delvin International General Trading LLC*, Arbitration Petition No. 5 of 2010, order dated 25-7-2011 (SC)

**12.** The learned counsel appearing for the petitioner contended that from the language of the arbitration clause itself, it is unambiguously clear that there is a binding arbitration agreement between the parties. The respondent having failed to act despite notice, the petitioner is entitled to the relief prayed for.

**13.** It is further the contention of the petitioner that the words "shall" and "or" appearing in the arbitration clause have to be given their true meaning. The expression "shall" has to be construed mandatorily while the expression "or" has to be read as disjunctive. Upon taking this as the correct approach, the arbitration agreement would be binding upon the parties as the expression "settled amicably between both the parties" cannot be construed as a condition precedent to the invocation of the arbitration agreement and the reference to arbitration being an alternative and agreed remedy, the petitioner may unequivocally be allowed to invoke the arbitration agreement.

**14.** The aforesaid contentions have been raised by the advocates for the petitioner in view of the judgment of this Court in *Jagdish Chander* v. *Ramesh Chander*[2] wherein this Court had taken the view that such an arbitration clause would not have satisfied the prerequisites of a valid arbitration reference. In that case, this Court was concerned with Clause 16 of the contract between the parties that read as under: (SCC p. 722, para 2)

> "2. … (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 in original)

The Court felt that 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.

**15.** A similar view was expressed by this Court in *Wellington Associates Ltd.* v. *Kirit Mehta*[3] though the arbitration clause in that case was different.

**16.** Now, I may refer to the prerequisites of a valid and binding arbitration agreement leading to an appropriate reference under the Act. Section 2(1)(*b*) defines "arbitration agreement" to be an agreement referred to in Section 7. Section 7 of the Act states that an "arbitration agreement" is 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. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and shall be an agreement in writing. An arbitration

2 (2007) 5 SCC 719
3 (2000) 4 SCC 272 : AIR 2000 SC 1379

agreement is in writing if it is contained in any of the clauses i.e. clauses (*a*) to (*c*) of sub-section (4) of Section 7 of the Act. Once these ingredients are satisfied, there would be a binding arbitration agreement between the parties and the aggrieved party would be in a capacity to invoke the jurisdiction of this Court under Section 11(6) of the Act.

**17.** In *K.K. Modi* v. *K.N. Modi*[4] this Court, while differentiating an "arbitration agreement" from a "reference to an expert" for decision, contained in an MoU recording a family settlement, enumerated the essential attributes of a valid arbitration agreement: (SCC p. 584, para 17)

> "(*1*) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement;
>
> (*2*) that the jurisdiction of the tribunal to decide the rights of the parties must be derived either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;
>
> (*3*) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal;
>
> (*4*) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides;
>
> (*5*) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly;
>
> (*6*) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

**18.** Also in *Smita Conductors Ltd.* v. *Euro Alloys Ltd.*[5] where no contract, letter or telegram confirming the contract containing the arbitration clause as such was there, but certain correspondences which indicated a reference to the contract containing arbitration clause for opening the letter of credit addressed to the bank, were there. There was also no correspondence between the parties disagreeing either with the terms of the contract or the arbitration clause. The two contracts also stood affirmed by reason of their conduct as indicated in the letters exchanged between the parties. This Court construed it to be an arbitration agreement in writing between the parties and referred to Article II Para 2 of the New York Convention, which is in pari materia with Section 7 of the Act and observed as under: (*Smita Conductors Ltd. case*[5], SCC pp. 734-35, para 6)

> "*6.* What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by Para 2 of Article II. If we break down Para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause

4 (1998) 3 SCC 573
5 (2001) 7 SCC 728

(*1*) in a contract containing an arbitration clause signed by the parties, (*2*) an arbitration agreement signed by the parties, (*3*) an arbitral clause in a contract contained in exchange of letters or telegrams, and (*4*) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing."

**19.** This Court, in *Bihar State Mineral Development Corpn.* v. *Encon Builders (I) (P) Ltd.*[6] has also taken the view that the parties must agree in writing to be bound by the decision of such tribunal and they must be ad idem.

**20.** The next question that falls for consideration is what should be the approach of the court while construing a contract between the parties containing an arbitration agreement.

**21.** In *Rickmers Verwaltung GMBH* v. *Indian Oil Corpn. Ltd.*[7] this Court took the view that: (SCC p. 9, para 13)

> "*13.* ... it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them ... Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence."

**22.** Still in *UNISSI (India) (P) Ltd.* v. *Post Graduate Institute of Medical Education and Research*[8], where the appellant had given its tender offer which was accepted by the respondent and the tender contained an arbitration clause, this Court, considering the facts of the case, the provisions of Section 7 of the Act and the principles laid down by it, took the view that though no formal agreement was executed but in view of the tender documents containing the arbitration clause, the reference to arbitration was proper.

**23.** In *Shakti Bhog Foods Ltd.* v. *Kola Shipping Ltd.*[9] this Court held that from the provisions made under Section 7 of the Act, the existence of an arbitration agreement can be inferred from a document signed by the parties or exchange of e-mails, letters, telex, telegram or other means of telecommunication, which provide a record of the agreement.

**24.** In a recent judgment of this Court in *Visa International Ltd.* v. *Continental Resources (USA) Ltd.*[10] this Court was concerned with an arbitration clause contained in the memorandum of understanding that read as under: (SCC p. 61, para 12)

6 (2003) 7 SCC 418
7 (1999) 1 SCC 1
8 (2009) 1 SCC 107 : (2009) 1 SCC (Civ) 41
9 (2009) 2 SCC 134 : (2009) 1 SCC (Civ) 411
10 (2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379

"*12. …* 'Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996.' "

**25.** The disputes having arisen between the parties, the respondent, instead of challenging the existence of a valid arbitration clause, took the stand that the arbitration would not be cost-effective and will be premature. In view of the facts, this Court held that there was an arbitration agreement between the parties and the petitioner was entitled to a reference under Section 11 of the Act and observed: (*Visa International Ltd. case*[10], SCC p. 64, para 25)

"*25. …* No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances."

**26.** It is in light of these provisions, one has to construe whether the clause in the present case, reproduced above, in para 3, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE. There was apparently some ambiguity caused by the language of the arbitration clause. If the clause is read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in *Jagdish Chander*[2]. But once the correspondence between the parties and the attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act.

**27.** Vide their letter dated 30-3-2008, the respondent had raised certain claims upon the petitioner and had also repelled the threat extended by the petitioner to take steps before ECGC. This notice had been responded to by the petitioner vide letter dated 4-4-2008 wherein it had raised its claims demanding payment of money within seven days and also stated that any default thereto would constrain it to take legal action. Finally, vide letter dated 30-5-2008, the petitioner had invoked arbitration clause between the parties and, in fact, had even nominated an arbitrator calling upon the respondent to concur to the said appointment.

**28.** Replying to this letter vide letter dated 27-6-2008, the respondent had neither denied the existence nor the binding nature of the arbitration clause. On the contrary, it had requested the petitioner not to take any legal action for appointment of an arbitrator, as they wanted to suggest some other name as an arbitrator, that too, *subject to the consent of the petitioner*. This letter conclusively proves that the respondent had admitted the existence of an arbitration agreement between the parties and consented to the idea of appointing a common/sole arbitrator to determine the disputes between the

parties. However, thereafter there had been complete silence from its side, necessitating the filing of the present petition under Section 11(6) of the Act by the petitioner.

**29.** Thus, any ambiguity in the arbitration clause contained in the purchase contract stood extinct by the correspondence between the parties and the consensus ad idem in relation to the existence of an arbitration agreement and settlement of disputes through arbitration became crystal clear. The parties obviously had committed to settle their disputes by arbitration, which they could not settle, as claims and counterclaims had been raised in the correspondence exchanged between them. In view of the above, even the precondition for invocation of an arbitration agreement stands satisfied.

**30.** The arbitration agreement does not provide for any specific mode/methodology to be adopted while appointing an arbitrator. The learned counsel appearing for the petitioner contended that keeping in view the extent of claims, it will be highly expensive if an Arbitral Tribunal consisting of two arbitrators and a presiding arbitrator is constituted. He further contented that the parties in their correspondence have already agreed to the appointment of a sole arbitrator. He prayed for appointment of a sole arbitrator as both the parties in their respective letters had agreed to appoint an arbitrator with common concurrence.

**31.** Thus, in the aforementioned circumstances, this petition is allowed and Mr Justice D.R. Dhanuka (Retired Judge, Bombay High Court), is appointed as sole arbitrator to adjudicate upon the disputes. The parties are at liberty to file claims/counterclaims before the appointed arbitrator, which shall be decided in accordance with law.

**32.** No orders as to costs.

---

## (2012) 1 Supreme Court Cases 369

(BEFORE R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.)

T. VARGHESE GEORGE .. Appellant;

*Versus*

KORA K. GEORGE AND OTHERS .. Respondents.

Civil Appeal No. 6786 of 2003† with SLPs (C) Nos. 22590-91 of 2007 and Contempt Petition (C) No. 435 of 2004 in CA No. 6786 of 2003, decided on October 13, 2011

A. **Civil Procedure Code, 1908 — S. 92 — Jurisdiction — Educational trust whether a secular public trust or minority institution — Determination of — Cardinality of founder's intention — High Court, held, justified in framing scheme for administration of trust concerned by treating it as secular public trust**

† From the Judgment and Order dated 5-12-2002 of the High Court of Judicature of Madras in OSA No. 49 of 1995